

**Spero v 3781 Broadway, LLC**

2023 NY Slip Op 34661(U)

January 12, 2023

Supreme Court, Bronx County

Docket Number: Index No. 36235/2017E

Judge: Marissa Soto

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 22

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RALPH SPERO,

Plaintiff,

INDEX NO. 36235/2017E

-against-

3781 BROADWAY, LLC, JD COMMERCIAL BUILDER  
INC., FRIEDLAND PROPERTIES, INC., LARSTRAND  
CORPORATION AND BOSTON MARKET  
CORPORATION,

DECISION AND ORDER

MOT. SEQ. 9

Defendants,

-----X

3781 BROADWAY, LLC, JD COMMERCIAL BUILDER  
INC., FRIEDLAND PROPERTIES, INC., LARSTRAND  
CORPORATION,

Third-Party Plaintiff,

-against-

BOSTON MARKET CORPORATION,

Third-Party Defendants.

-----X

JD COMMERCIAL BUILDER INC..

Second Third Party Plaintiff,

-against-

AMERICAN FLOORING CONCEPTS, INC.,

Second Third Party Defendant.

-----X

3781 BROADWAY, LLC, FRIEDLAND PROPERTIES,  
INC., LARSTRAND CORPORATION and BOSTON  
MARKET CORPORATION.,

Third- Third Party Plaintiff,

-against-

AMERICAN FLOORING CONCEPTS, INC.,

Third - Third Party Defendant.

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Hon. Marissa Soto, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<b>Papers:</b>	<b>NYSCEF Doc. No.#</b>
Notice of Motion, Affirmation/Affidavit in Support and Exhibits thereto:	330-350
Opposition/Cross Motion Filings:	353-355
Reply:	356
Other: Oral Argument May 17, 2022	*1

Defendant/Third Third-Party Defendant AMERICAN FLOORING CONCEPTS, INC., (hereinafter “American”) moves pursuant to CPLR § 3212 for summary judgment against Third Third-Party Plaintiffs, 3781 BROADWAY, LLC, FRIEDLAND PROPERTIES, INC., LARSTRAND CORPORATION and BOSTON MARKET CORPORATION (hereinafter “Owners”), dismissing the action commenced post-Note of Issue seeking a judgment that American is obligated to indemnify and defend Owners in this lawsuit pursuant to the terms of American’s Contractor and Subcontractor Agreement (hereinafter the “Contract”). Owners filed opposition and American filed its reply.

#### Summary Judgment Standard

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986). The burden is upon the moving party to make a *prima facie* showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72 (2003). The failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the court must still assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law. *Winegrad, et al., v. New York University Medical Center*, 64 N.Y.2d 851 (1985); *Liberty Taxi Mgt., Inc. v.*

*Gincherman*, 32 A.D.3d 276 (1st Dept 2006). “In other words, even in the face of a nonmovant’s silence or a poorly drafted response, summary judgment may not be granted unless the movant has met their burden of establishing entitlement to judgment as a matter of law.” *Rivera v. State of New York*, 34 N.Y.3d 383, 401-402 (2019). The function of the court on a motion for summary judgment is issue finding rather than issue determination, and the court must evaluate whether the alleged factual issues presented are genuine or unsubstantive. *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 394 (1957).

### Summary Judgment

The present action is for personal injuries allegedly sustained by the Plaintiff due to the alleged negligence of Third-Party Defendant and general contractor, JD Commercial Builders, Inc. American argues that it has no contractual duty to indemnify Owners under the controlling Agreement. Owners oppose the motion claiming that said contract does require such indemnification.

The paragraph American and Owners focus on in the Agreement is section 4.6, titled “Indemnification”.

Section 4.6.1 of the Agreement provides in relevant part:

. . . Subcontractor [American] shall indemnify and hold harmless the Owner, Contractor . . . from and against claims, damages, losses and expenses, . . . arising out of or resulting from performance of the Subcontractor’s Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the subcontractor, the Subcontractor’s Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or otherwise reduce other rights or obligations [illegible text] would otherwise exist as to a party or person described in this Section 4.6.

Owners argue that the indemnity obligation extends to the negligent acts of “anyone for whose acts [AMERICAN FLOORING] may be liable.” Owners then state that American is liable for JD Commercial’s negligence as well. Owners argue that American’s indemnification obligations are not limited to its own negligence but extends to claims and losses arising out of its work and due to the negligence of another party, including “a party indemnified hereunder”.

#### Contract Construction

The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent. *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). Accordingly, the words used in the contract should be construed to achieve the apparent purpose of the parties. *See Slatt v. Slatt*, 64 N.Y.2d 966, 967 (1985). “A party’s right to indemnification may arise from a contract or may be implied based upon the law’s notion of what is fair and proper as between the parties.” *McCarthy v. Turner Const., Inc.*, 17 NY3d 369, 375 (2011). However, a contract’s words might “seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view.” *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491-492 (1983) (citing *Robertson v. Ongley Elec. Co.*, 146 N.Y. 20, 23 (1895)). This is particularly true with indemnity contracts. *Id.* When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. *Id.* (internal citations omitted). Indemnity obligations should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances. *Id.* (internal citations omitted).

In contracts, intent is evidenced by what they say in the writing as a whole or put another way a contract should be interpreted “as a harmonious and integrated whole.” *Nomura Home*

*Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 581 (2017).

Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Id.* “A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.’” *Torres v. Morse Diesel Intern., Inc.*, 14 A.D.401, 403 (1st Dept 2005) (internal citations omitted).

In this commercial transaction wherein, the Agreement was negotiated and entered into by sophisticated parties, the instrument should be read to mean what it says rather than as containing internally contradictory or unlawful provisions. Section 4.6.1 states unequivocally that American has an obligation to indemnify Owners in connection with any claims arising from American’s work under the Agreement but only to the extent that such claim was caused by the negligent acts or omissions of American or anyone for whom American would otherwise be vicariously liable for whether such party is also indemnified by the Agreement or not. The expansion of American’s indemnification obligation to sub-contractors or any other entity for which American is responsible is a catch all to address any possible independent contractor or other legal relationship that may exist between American and any sub-subcontractors that it might retain. However, to interpret that extension as applying to any claim that arises from or resulting from American’s work, negligent or not, would nullify the purpose of the language “but only to the extent caused by the negligent acts or omissions of the subcontractor, the Subcontractor’s Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable”. The limited nature of the expansion of such indemnification obligation is further reinforced by the clause Owners rely on “regardless of whether or not such claim, damage, loss or expense is cause in part by a party indemnified hereunder”. The language, like the earlier language “but only to the extent caused by”

together the Agreement is including contributory negligence claims in which multiple parties are found to have been the proximate cause. This interpretation is also supported by the common law understanding of contractor and subcontractor liability. Such vicarious liability is premised on control. There is nothing on the record before this Court that would imply such control of JD Commercial Builders by American.

The Court has considered the parties various related arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED AND ADJUDGED that American's motion for summary judgment for dismissing the indemnification action against it is granted as set forth herein; and it is further

ORDERED AND ADJUDGED that a copy of this Decision and Order with Notice of Entry be served by the prevailing party upon all parties to the present action within thirty (30) days of the date of entry.

This constitutes the decision and order of the Court.

Dated: January 12, 2023

  
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HON. MARISSA SOTO, J.S.C.