Supreme Court of the State of New York
County of Kings
Part LL1M

Index Number 500094/2015
Seqs. 026–032

DANIEL MURPHY AND LISA MURPHY OLIVERI,

Plaintiffs,

against

80 PINE, LLC., STRUCTURE TONE INC., ALL AMERICAN CONTRACTING CORP., RUDIN MANAGEMENT CO., INC., HUGH O'KANE ELECTRIC CO., INC., AMERICAN INTERNATIONAL GROUP, INC., BIGMAN BROTHERS, INC., USIS ELECTRIC, INC., AIG TECHNOLOGIES INC., AIG GLOBAL SERVICES, INC., UNITED STATES INFORMATION SYSTEMS INC., AMERICAN HOME ASSURANCE COMPANY AND AMERICAN INTERNATIONAL REALTY CORP.,

Defendants.

80 PINE, LLC., STRUCTURE TONE INC., RUDIN MANAGEMENT,

Third-Party Plaintiffs,

against

EMPIRE OFFICE EQUIPMENT, INC.,

Third- Party Defendant.

DECISION/ORDER

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

Papers Numbered	
Notice of Motion and Affidavits Annexed	1–7
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	11–37
Replying Affidavits	38–51
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Upon the foregoing papers, Daniel Murphy and Lisa Murphy Oliveri's motion for summary judgment (Seq. 026), American International Group, Inc., AIG Technologies Inc., and AIG Global Services, Inc.'s (collectively, AIG) motion for indemnification and breach of contract (Seq. 027), Empire Office Equipment, Inc.'s (Empire) motion to dismiss (Seq. 028), USIS Electric, Inc.'s (USIS Electric) motion to dismiss (Seq. 029), 80 Pine, LLC. (80 Pine), Structure Tone Inc. (Structure Tone), and Rudin Management Co., Inc.'s (Rudin) motion for summary judgment against plaintiff and any cross-claims (Seq. 030), 80 Pine, Structure Tone, and Rudin's motion for summary judgment against Bigman Brothers Inc (Bigman) (Seq. 031),

80 Pine and Rudin's motion for summary judgment on its indemnification claim against Empire (Seq. 032) are decided as follows:

Procedural History

On June 12, 2019, this court issued an order resolving several of the parties' motions for summary judgment. Parties appealed and also filed a second round of summary judgment motions addressing different issues. On August 3, 2022, that Appellate Division issued an order modifying this court's prior order. Now, the court is presented with the second set of motions for summary judgment.

Introduction and Factual Background

Daniel Murphy and his wife Lisa Murphy Oliveri commenced this New York Labor Law action for injuries Daniel Murphy (hereinafter "plaintiff") claims he sustained on July 24, 2013, after tripping on a "stub-up", the brass part of an electrical conduit, while performing renovations on the fourth floor of a building located at 80 Pine Street, New York, New York. It is undisputed that plaintiff tripped and fell.

It is also undisputed that 80 Pine owned the building and Rudin managed the building. Plaintiff, a carpenter employed by Empire, was installing office partitions and furniture on the fourth floor of the building on the day of his accident. The AIG entities (AIG) were the commercial tenants on the fourth floor of the building at the time of the accident. The contracts in the record show that AIG hired Structure Tone, USIS Electric, and Empire to perform the office renovations. Structure Tone was the general contractor on the site and superintendent James Joyce was the site coordinator (Joyce EBT at 8–9). James Joyce also conducted a daily walk-thru on the site (*id.* at 110). Structure Tone also had general stop-work authority (Joyce EBT at 117). Structure Tone sub-contracted Bigman to perform electrical work. It is undisputed

that Bigman installed the stub-up. Although Bigman workers usually marked the stub-ups by spray painting them, coning them, or wrapping them in caution tape and tying the caution tape to the ceiling, it is undisputed that this stub-up was unmarked when plaintiff tripped on it.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Liability

Plaintiff moves for summary judgment against AIG, 80 Pine, Rudin, and Structure Tone as to his Labor Law §§ 241 (6) and 200 claims. 80 Pine, Rudin, Structure Tone, and AIG cross-move for summary judgment to dismiss plaintiff's Labor Law claims.

Labor Law § 200

The Appellate Division's January 18, 2022 order granted 80 Pine, Structure Tone, and Rudin's summary judgment motion as to Labor Law §200 (*Murphy v 80 Pine, LLC*, 208 AD3d 492, 496 [2d Dept 2022]). Therefore, both plaintiff's summary judgment motion and 80 Pine, Rudin, and Structure Tone's cross-motion as to Labor Law §200 are denied as moot.

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

"Where a plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous condition on the premises, a defendant may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition" (*Estrella v ZRHLE Holdings, LLC*, 218 AD3d 640 [2d Dept 2023]). "A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected" (*Valentin v Stathakos*, 2024 NY Slip Op 03512 [2d Dept June 26, 2024]). "A party [with] actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific [recurrence] of that condition" (*Taliana v Hines REIT Three Huntington Quadrangle, LLC*, 197 AD3d 1349, 1352 [2d Dept 2021] [internal citations omitted]).

Moreover, "when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work." (*id.* at [internal citations omitted]). The law requires only that a party have the authority to control the means and methods of the work; that party does not need to have actually exercised that authority (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317–319 [1981]).

In this case, AIG was the tenant on the fourth floor. AIG contracted with Structure Tone as the general contractor. Lou Cirillo, the AIG project manager, was on the site at the time of the accident. Plaintiff references these facts but does not advance any argument as to why AIG should be liable under Labor Law § 200. AIG notes that there is no indication that Mr. Cirillo had stop-work authority or the power to plan and administer site safety, or to otherwise control

plaintiff's work. There is also no evidence in the record that the stub-up condition existed for a sufficient period of time for AIG to have notice and no evidence that AIG created the dangerous condition. Therefore, plaintiff's motion as to AIG is denied and AIG's motion is granted as to plaintiff's Labor Law § 200 claims.

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff's claim under Labor Law § 241 (6) is predicated on the alleged violations of 12 NYCRR 23-1.7 (e) (1) & (e) (2) and 23-1.30 which read:

12 NYCRR 23-1.7 (e) Tripping and other hazards.

> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

12 NYCRR 23-1.30

- Illumination. Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass.

The Appellate Division held that, based on plaintiff's testimony, there "is a question of fact as to whether sub-division (1) or (2) of 12 NYCRR 23-1.7 (e), or neither, applies to these

facts," although the court rejected defendants' arguments that the stub-up was integral to plaintiff's work (*Murphy*, 208 AD3d at 497). This raises triable issues of fact.

Furthermore, with respect to 12 NYCRR 23-1.30, the Appellate Division held that "none of the defendants proffered any evidence regarding the quality of the lighting," and Mr. Murphy testified that it was "a little dark" (*Murphy*, 208 AD3d at 498; Murphy EBT at 74). However, plaintiff did testify that the temporary lighting was sufficient to allow him to perform his work (Murphy EBT at 187–188). Ultimately, there are triable issues of fact as the quantity and quality of the light in the area where plaintiff was working. Therefore, both plaintiff's motion and 80 Pine, Rudin, and Structure Tone's cross-motion are denied as to Labor Law § 241 (6).

Indemnification and Contribution

Contractual Indemnification and Breach of Contract

In evaluating contractual indemnification clauses, courts look to the specific language of the contract (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930, 878 NYS2d 143 [2009]). A promise to indemnify should not be found unless it can be "clearly implied from the language and purpose of the entire agreement and the surrounding circumstance" (*Santos v Power Auth. of State of NY*, 85 AD3d 718, 722 [2d Dept 2011]).

"A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Hirsch v. Blake Hous., LLC*, 65 AD3d 570, 571 [2nd Dept. 2009]). In addition, a party seeking contractual indemnification must not have had the authority to supervise, direct, or control the manner of the work that caused the injury (*Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 331 [2d Dept 2005]). Likewise, claims for common-law indemnification are predicated on the negligence of the party against whom indemnification is being sought

(*Poalacin v Mall Properties, Inc.*, 155 AD3d 900, 909 [2d Dept 2017]). Therefore, as a threshold matter, a party seeking summary judgment on an indemnification claim must prove itself free from negligence.

The AIG Entities

AIG seeks summary judgment on its contractual indemnification claims against Structure Tone and Empire. The contract between AIG and Structure Tone contains an indemnification provision that reads as follows:

> [Structure Tone] will Indemnify, defend and hold harmless [AIG] from loss arising from Injury to persons or property caused by the fault or negligence of [Structure Tone], its affiliates, and their respective employees, subcontractors and agents delegated to perform Structure Tone's obligations hereunder. In addition, [Structure Tone] will Indemnify, defend and hold harmless the [AIG] Indemnitees from Loss arising from employment related claims by [Structure Tone's] employees or agents . . . [.]"

Empire's sub-contract contains a provision with reads:

> [Empire] will indemnify, defend and hold harmless the AIG Indemnitees from Loss arising from injury to persons or property caused by the fault or negligence of [Empire], its affiliates and their respective employees, subcontractors and agents delegated to perform [Empire] obligation hereunder. In addition, [Empire] will indemnify, defend and hold harmless the AIG Indemnitees from Loss arising from employment-related claims by [Empire's] employees or agents.

Both indemnification provisions contain obligations that are triggered by indemnitor's negligence, or the negligence of its employees, subcontractors, and/or agents. Although the provisions also contain language about losses arising out of "employment-related claims," this language does not clearly include personal injury actions, particularly since the sub-heading of the section is divided between "Injury to persons" and "Employment-related claims. "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" (*Tonking v Port Auth. of New York and New Jersey*, 3 NY3d 486, 490 [2004]). Here, there is

ambiguity about the language of the contract. Moreover, there are questions of fact about which parties' negligence or fault caused the accident; it cannot be established as a matter of law that the negligence triggers in the indemnification provisions were activated. Therefore, AIG's motion for summary judgment on its contractual indemnification claims and Empire's motion for summary judgment dismissing AIG's contractual indemnification claim against it are denied.

80 Pine and Rudin

80 Pine and Rudin seek summary judgment on their contractual indemnification claims against Empire and Bigman. Empire argues that these parties' claims for contractual indemnification against Empire must be dismissed because there is a question of fact as to whether any or all of the parties were actively negligent regarding the subject accident. However, the Appellate Division held that 80 Pine and Rudin were not liable under Labor Law § 200 or the principles of common-law negligence (208 AD3d at 496). Therefore, in light of Empire's contractual obligation to indemnify the owners, and since the Appellate Division determined that the owners were not actively negligent, 80 Pine and Rudin's motion for summary judgment on their contractual indemnification claims against Empire is granted.

With respect to Bigman, the Appellate Division affirmed the prior denial of 80 Pine, Rudin, and Structure Tone's motion for summary judgment on its claims against Bigman (*Murphy*, 208 AD3d at 499), and these parties have not demonstrated why they should be entitled to a successive motion for summary judgment, which motions are generally proscribed (*Oppenheim v Village of Great Neck Plaza, Inc.*, 46 AD3d 527 [2007]). Therefore, these parties' motions for summary judgment on their contractual indemnification claims against Bigman (Seq. 031) are denied.

US Systems

The Appellate Division held that US Systems "lacked any role in the work at issue," and dismissed Bigman's cross-claims against it (*Murphy*, 208 AD3d at 499). Based on that determination, US System's motion is granted as to dismissal of all cross-claims against it.

USIS Electric

USIS Electric seeks summary judgment on its contractual indemnification claim against Empire. However, Empire and USIS Electric were not in contractual privity and USIS Electric does not provide a contract to which it would be an appropriate third-party beneficiary of Empire's contractual indemnification obligations (*Murphy*, 208 AD3d at 496). Additionally, the Appellate Division held that there were questions of fact as to USIS Electric's role in the subject accident since its work included threading electrical cables through the stub-up, precluding it from summary judgment on its own cross-claims. Therefore, USIS Electric's motion is denied.

Common Law Indemnification and Contribution

"[T]o establish a claim for common-law indemnification, a party must prove not only that [it was] not negligent, but also that the proposed indemnitor . . . was responsible for negligence that contributed to the accident" (*Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754, 756, [2018] [internal quotation marks omitted]). "[W]here a party is held liable at least partially because of [his] own negligence, contribution against other culpable tort-feasors is the only available remedy" (*Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643 [1988]).

"With respect to contribution, '[t]he critical requirement for apportionment under . . . CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'" (*Santoro v Poughkeepsie*

Crossings, LLC, 180 AD3d 12, 17, 115 N.Y.S.3d 368 [2019], quoting *Nassau Roofing & Sheet Metal Co.* v Facilities Dev. Corp., 71 NY2d 599, 603 [1988]).

As to Empire, the common-law indemnification and contribution claims are barred by Workers Compensation Law § 11 as there is no evidence that plaintiff sustained a grave injury as defined by the statute. Therefore, Empire's motion is granted as to dismissal of all common-law indemnification and contribution claims against it.

As to AIG's motion for summary judgment, in light of the outstanding questions of fact about the various sub-contractors' potential negligence in uncovering the stub-up, common-law indemnification and contribution are not ripe issues for summary judgment. Therefore, AIG's motion is denied as to these claims.

Conclusion

Plaintiffs' motion for summary judgment (Seq. 026) is denied.

AIG's motion for summary judgment (Seq. 027) is granted to the extent provided above, and is otherwise denied.

Empire's motion for summary judgment (Seq. 028) is granted as to the cross-claims for common-law indemnification and contribution against it, and is otherwise denied.

USIS Electric's motion for summary judgment (Seq. 029) is denied.

80 Pine, Structure Tone Inc., and Rudin's motion for summary judgment against plaintiff and on any cross-claims (Seq. 030) is granted to the extent indicated above, and is otherwise denied.

80 Pine, Structure Tone, and Rudin's motion for summary judgment against Bigman (Seq. 031) is denied.

80 Pine and Rudin's motion for summary judgment on their indemnification claims against Empire (Seq. 032) is granted.

This constitutes the decision and order of the court.

October 24, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court