

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

725

CA 22-01441

PRESENT: SMITH, J.P., CURRAN, BANNISTER, OGDEN, AND NOWAK, JJ.

DONALD HOLLER, PLAINTIFF,

V

MEMORANDUM AND ORDER

DOMINION ENERGY TRANSMISSION, INC., AND
LMC INDUSTRIAL CONTRACTORS, INC.,
DEFENDANTS-RESPONDENTS.

LMC INDUSTRIAL CONTRACTORS, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

O'CONNELL ELECTRIC COMPANY, INC., THIRD-PARTY
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICES OF JOHN WALLACE, BUFFALO, MAURO LILLING NAPARTY LLP,
WOODBURY (SETH M. WEINBERG OF COUNSEL), FOR THIRD-PARTY
DEFENDANT-APPELLANT.

GORDON REES SCULLY MANSUKHANI, LLP, HARRISON (LYNN ABELSON LIEBMAN OF
COUNSEL), FOR DEFENDANT-RESPONDENT DOMINION ENERGY TRANSMISSION, INC.

RUPP PFALZGRAF LLC, ROCHESTER (KEVIN J. FEDERATION OF COUNSEL), FOR
THIRD-PARTY PLAINTIFF-RESPONDENT AND DEFENDANT-RESPONDENT LMC
INDUSTRIAL CONTRACTORS, INC.

Appeal from a judgment (denominated order) of the Supreme Court,
Monroe County (Gail Donofrio, J.), entered August 4, 2022. The
judgment, insofar as appealed from, granted in part the motions of
defendant-third-party plaintiff LMC Industrial Contractors, Inc. and
defendant Dominion Energy Transmission, Inc. for partial summary
judgment.

It is hereby ORDERED that the judgment insofar as appealed from
is unanimously reversed on the law without costs, the motions are
denied, and the declarations in the third through sixth decretal
paragraphs are vacated.

Memorandum: While working on a construction project and walking
between job assignments, plaintiff slipped and fell on ice. Plaintiff
subsequently commenced this action seeking damages for the injuries
that he sustained from the fall. In his complaint, plaintiff asserted

causes of action for common-law negligence, and violations of Labor Law § 200, and Labor Law § 241 (6) against defendant Dominion Energy Transmission, Inc. (Dominion), the property owner, and defendant-third-party plaintiff, LMC Industrial Contractors, Inc. (LMC Industrial), the general contractor (collectively, defendants). LMC Industrial thereafter commenced a third-party action seeking, inter alia, defense and indemnification from third-party defendant, O'Connell Electric Company, Inc. (O'Connell), plaintiff's employer.

Defendants separately moved for partial summary judgment against O'Connell, seeking certain declarations with respect to the issues of defense and indemnification. In appeal No. 1, O'Connell appeals, as limited by its brief, from a judgment insofar as it granted those parts of defendants' motions seeking declarations that O'Connell is required to contractually indemnify defendants on a conditional basis, that O'Connell must reimburse and pay for all of defendants' past and future defense costs and litigation expenses, and that, because defendants are additional insureds and contractual indemnitees of O'Connell, O'Connell must financially protect defendants on a conditional basis against all damages, cross-claims and counterclaims on a primary and non-contributory basis. In appeal No. 2, O'Connell appeals, as limited by its brief, from an order insofar as it denied that part of its motion for leave to renew its opposition to defendants' motions.

Addressing first appeal No. 1, we agree with O'Connell that Supreme Court erred in granting those parts of defendants' motions seeking the declarations at issue on this appeal, i.e., the declarations in the third through sixth decretal paragraphs, and we therefore reverse the judgment insofar as appealed from and vacate those declarations. With respect to whether defendants are entitled to a conditional order of indemnification as contractual indemnitees of O'Connell, the relevant indemnification provision in the subcontract between LMC Industrial and O'Connell requires indemnification for claims "that arise from the performance of [O'Connell's w]ork, but only to the extent caused by the negligent acts or omissions of [O'Connell or its agents]." Defendants failed to establish that they are entitled to a conditional order of indemnification as contractual indemnitees because they failed to eliminate all triable issues of fact whether plaintiff's claims arose from the negligent acts or omissions of O'Connell (see *Ross v Northeast Diversification, Inc.*, 218 AD3d 1244, 1247 [4th Dept 2023]; *Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1327 [4th Dept 2014]). Likewise, because the "duty to defend [a] contractual indemnitee is no broader than [the] duty to indemnify," defendants failed to establish that they are entitled to past and future defense and litigation expenses as contractual indemnitees (*Inner City Redevelopment Corp. v Thyssenkrupp El. Corp.*, 78 AD3d 613, 613 [1st Dept 2010]; see *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 809 [2d Dept 2009]; see generally *County of Monroe v Clough Harbour & Assoc., LLP*, 154 AD3d 1281, 1281-1282 [4th Dept 2017]).

We further agree with O'Connell that the court erred in granting

those parts of defendants' motions concerning their entitlement to defense costs and a conditional order of indemnification based on defendants' status as additional insureds. Defendants failed to establish their entitlement to such relief inasmuch as their rights as additional insureds relate to the obligation of O'Connell's insurance company and are separate and apart from those rights that may be asserted against O'Connell (see *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739-740 [2d Dept 2003]; *Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 401-402 [1st Dept 1996]). The proper remedy is to commence a separate action for a declaratory judgment against O'Connell's insurance company (see *Clyde v Franciscan Sisters of Allegany, N.Y., Inc.*, 217 AD3d 1353, 1356 [4th Dept 2023]; *Hunt v Ciminelli-Cowper Co., Inc.*, 66 AD3d 1506, 1510-1511 [4th Dept 2009]).

Finally, we dismiss appeal No. 2 as moot in light of our determination in appeal No. 1 (see *JPMorgan Chase Bank, N.A. v Kobbie*, 140 AD3d 1622, 1624 [4th Dept 2016]).