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Decided on March 31, 2008

Supreme Court, Queens County

Roberto Emeterio Rey and Leonara A. Lagos, Plaintiff

against

**Ridamaset, LLC and Commerce Bancorp,
Inc., Defendant**

12605/06

Allan B. Weiss, J.

This is an action to recover for personal injuries plaintiff allegedly sustained on April 17, 2004 when he fell off the roof of the building under construction where he was working as a bricklayer. The property is owned/leased by defendant, Ridamaset, LLC (Ridamaset) to the defendant/third-party plaintiff Commerce Bank, N.A. i/s/h/a Commerce [*2]Bancorp, Inc. (Commerce) who hired Magnetic Construction Group Corp.(Magnetic) as general contractor to build a bank at the location. The third-party defendant, Highbuilt Contracting, Corp., plaintiff's employer, was hired by Magnetic as a masonry subcontractor on the project. Plaintiff commenced this action to recover for personal injuries against the owner/lessor, Ridamaset, and the lessee, Commerce for alleged violations of Labor Law §§ 240(1), 241(6) and 200 and common-law negligence. The defendant, Commerce commenced a third-party action against Magnetic for common-law and contractual indemnification and contribution and Ridamaset cross-claimed against Magnetic for common-law indemnification and contribution. The defendants, Commerce and Ridamaset now move for summary judgment on their respective claims for contractual and/or common-law indemnification.

It is well settled that a party seeking summary judgment "must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v. Gervasio*, 81 NY2d 1062,1063[1993]; see *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hosp.*, *supra.*; *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Evidence, such as deposition testimony and documentary evidence, in support of such motion may be placed before the court by way of an attorney's affidavit (see *Gaeta v. New York News*, 62 NY2d 340, 350 [1984]; *Ellman v. Village of Rhinebeck*, 41 AD3d 635 , 636 [2007]).

The defendants have failed to establish, prima facie, entitlement to summary judgment on their claims for contractual or common-law indemnification. In support of their motion the defendants submitted the lease between Ridamaset and Commerce, portions of the contract between Commerce and Magnetic and the plaintiff's deposition testimony. The defendants assert Commerce is entitled to contractual indemnification and both Commerce and Ridamaset are entitled to common-law indemnification because Ridamaset did not contract with any contractor to build the building, that neither Ridamaset nor Commerce directed nor controlled the plaintiff's work and, therefore, their liability, if any, is solely vicarious arising out the statutory duty imposed by Labor Law § 240.

One whose liability is solely vicarious arising by operation of law, may seek common-law indemnification from those who are at fault (*Chapel v. Mitchell*, 84 NY2d 345, 347 [1995]; *Singh v. Congregation Bais Avrohom K'Krula*, 300 AD2d 567 [2002]; *Katz v. Wiener*, 302 AD2d 497 [2002]). To obtain common-law indemnification from Magnetic, the defendants had the burden to submit proof of Magnetic's actual negligence that contributed to the accident, or that Magnetic had the authority to direct, supervise, and control the work giving rise to the injury (*McDermott v. City of New York*, 50 NY2d 211 [1980]; *Kader v. City of New York Hous. Preserv. & Dev.*, 16 AD3d 461 [2005]). While Ridamaset established, prima facie, through its extensive lease with Commerce that any liability on its part would be solely [*3]vicarious, it failed to establish, as a matter of law, that Magnetic was actually negligent, or that Magnetic had the authority to direct, supervise, and control the plaintiff's work (see *Singh v. Congregation Bais Avrohom K'Krula*, *supra.*).

Insofar as defendants seek conditional grant of summary judgment on their claim for common-law indemnification it too is denied. Where more than one party might be responsible for an accident, summary judgment granting indemnification against one party is improper (see, *Caruso v. Inhilco, Inc.*, 2 AD3d 662 , 663 [2003]; *Freeman v. Nat'l Audubon Soc.*, 243 AD2d 608; see also, *Edholm v. Smithtown DiCanio Org.*, 217 AD2d 569 [1995].)

In contrast, Commerce, as a party seeking contractual indemnification, only has to establish that it is free from any negligence and that its liability is solely vicarious arising from the non-delegable duty imposed by the labor law(*Brown v. Two Exch. Plaza Partners*, 76 NY2d 172 [1990]; *Correia v. Professional Data Management, Inc.*, 259 AD2d 60, 65 [1999]). In this regard, Commerce failed to establish as a matter of law, that it was not negligent and that its liability, if any, is solely vicarious. The portions of Commerce's contract with Magnetic which

were submitted show that Commerce retained for itself, inter alia, all of the work, including hiring of subcontractors, with regarding to HVAC, that it had final approval rights of all subcontractors on the project (§ 7.3.3) and that it had the authority to suspend the work in accordance with Article 14 (§ 8.2). Article 14, however, and other possibly relevant portions of the contract, were not submitted. In addition, Commerce failed to submit an affidavit from a person with personal knowledge of the extent and degree of Commerce's authority and involvement in the construction project. Counsel's claim that Commerce's deposition was only recently held and that a copy has not yet been produced is insufficient to account for the absence of an affidavit from his own client.

Dated: March 31, 2008

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J.S.C.