51 Misc.3d 585
Supreme Court, Kings County.

BOARD OF MANAGERS OF the 125 NORTH 10TH CONDOMINIUM, Plaintiff,
v.
125NORTH10, LLC d/b/a 125 North 10 LLC, 125N 10 d/b/a 125North10 LLC, 125 N 10 d/b/a 125North10 MM, LLC, Savanna Services L.L.C d/b/a Savanna Partners d/b/a Savanna Fund, Christopher Schlank, Nicholas Bienstock a/k/a Nicholas c. Bienstock a/k/a Nicholas Churnham Bienstock, Peter Petron, John Fraser a/k/a John R. Fraser, Investcorp International Holdings Inc. d/b/a Investcorp, Ryder Construction, Inc., Carl Jaccarino, Robert M. Reich, LLC, Robert M. Rich, Anthony Cucich Architects d/b/a A. Cucih Architects, Anthony Cucich a/k/a Anthony A. Cucich, Scarano Architect, PLLC d/b/a Scarano & Associates, Sharon Engineering P.C. d/b/a Sharon Engineering, P.C., Ronan Sharon, Penmark Realty Corporation d/b/a Penmark Realty Corp. d/b/a Penmark, Core Group Marketing LLC d/b/a Core Group Marketing, LLC, S. Schwartz Engineering, PLLC d/b/a S. Schwartz Associates LLC d/b/a Schwartz S d/b/a S. Schwartz Associates Consulting Engineers, Simon Schwartz, Frank Seta & Associates, LLC, Saeid S. Seta a/k/a Frank Seta, "John Doe No.1 Through John Doe # 10, Inclusive, the Last Ten Names Being Fictitious and Unknown to Plaintiff, The Persons or Parties Intended Being the Persons or Corporations or Entities Who Provided Construction Services and/or Design and Fabrication Services at the Premises Described Herein, Defendants.

Jan. 26, 2016.

Synopsis
Background: Board of managers of condominium filed suit against condominium project sponsors that had asserted third-party claims for common-law indemnification and breach of contract against general contractor/construction manager that had also asserted fourth-party claims against subcontractors for contractual and common-law indemnification and declaratory judgment that subcontractors were contractually required to defend and indemnify contractor against all or some of sponsors' claims. Subcontractors cross-claimed for indemnity, contribution, and breach of contract. Subcontractors moved to dismiss for failure to state claim.

Holdings: The Supreme Court, Carolyn E. Demarest, J., held that:

[1] declaratory judgment claim was duplicative;

[2] contractor's purchase order with one subcontractor lacked indemnity provision;

[3] indemnification provision in American Institute of Architects (AIA) standard form of agreement between contractor and subcontractor did not apply to sponsors' claims arising from faulty workmanship;

[4] in matter of first impression, insurance indemnity provision in AIA form agreement does not apply to claims against faulty workmanship in subcontractor's work product;

[5] contractor's contractual indemnification claim based on insurance indemnity provision in AIA form agreement was not actionable;

[6] insurance indemnity provision in AIA form agreement was not invalid;

[7] contractor's common law indemnification claim was sufficiently alleged;

[8] sponsors' common law indemnification claim was sufficiently alleged; and

[9] sponsors' breach of contract claim was sufficiently alleged.

Motions granted in part and denied in part.

West Headnotes (18)

[1] **Declaratory Judgment**
Alternative, substitute or supplemental remedy

General contractor's claim seeking declaratory judgment that subcontractors were contractually obligated by subcontracts to defend and indemnify contractor regarding project

sponsors' damages claims for construction defects in connection with work performed on condominium project was duplicative of contractor's claim against subcontractors for contractual indemnification, since both claims sought contractual indemnification and were based on same contracts and damages claims.

Cases that cite this headnote

[2] **Indemnity**
Contractors, subcontractors, and owners

General contractor's written purchase order with one subcontractor lacked indemnity provision requiring subcontractor to contractually indemnify contractor from project sponsors' damages claims for construction defects in connection with work performed on condominium project.

Cases that cite this headnote

[3] **Indemnity**
Contractors, subcontractors, and owners

Subcontractors were not contractually required to indemnify general contractor for claims by project sponsors challenging defects in design and construction of condominium project, contractor's alleged failure to oversee and develop project, and subcontractors' allegedly faulty workmanship, under indemnity provision of American Institute of Architects (AIA) standard form of agreement between contractor and subcontractor, providing that "Subcontractor shall indemnify" against claims "arising out of or resulting from performance of Subcontractor's Work" if claims were "attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself)."

Cases that cite this headnote

[4] **Contracts**
Nature and Form of Remedy
Indemnity
Nature of obligation

A breach of contract claim does not, like indemnity, involve a complete shifting of responsibility to another by a party which is, itself, without fault.

Cases that cite this headnote

[5] **Indemnity**
Contractors, subcontractors, and owners
Insurance
Contracts and other instruments

Insurance indemnity provision in American Institute of Architects (AIA) standard form of agreement between contractor and subcontractor does not apply to claims that arise from a subcontractor's faulty workmanship in the work product itself.

Cases that cite this headnote

[6] **Indemnity**
Contractors, subcontractors, and owners
Insurance
Contracts and other instruments

Subcontractors were not contractually required to indemnify general contractor for claims by project sponsors challenging defects in design and construction of condominium project, under insurance indemnity provision of American Institute of Architects (AIA) standard form of agreement between contractor and subcontractor, providing that "Subcontractor shall indemnify" against claims "arising out of or in any way connected with the performance or lack of performance of the work under the agreement and any change orders," provided that any such claim "is attributable to bodily injury, sickness, disease or death, or physical injury to tangible property including loss of use

of that property, or loss of use of tangible property that is not physically injured," since provision was not intended to expand indemnity to claims against faulty workmanship in subcontractors' work product itself.

Cases that cite this headnote

[7] **Contracts**
Conflicting clauses in general

Where two seemingly conflicting contract provisions reasonably can be reconciled, a trial court is required to do so and to give both effect.

Cases that cite this headnote

[8] **Contracts**
Subject, object, or purpose as affecting construction
Indemnity
Construction and Operation of Contracts

Words in a contract are to be construed to achieve the apparent purpose of the parties; although the 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, which is particularly true with indemnity contracts.

Cases that cite this headnote

[9] **Indemnity**
Liberal or strict construction

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.

Cases that cite this headnote

[10] **Contracts**
General and specific words and clauses

Trial courts construing contracts must give specific terms and exact terms greater weight than general language. Restatement (Second) of Contracts § 203(c) (1981).

Cases that cite this headnote

[11] **Indemnity**
Contractors, subcontractors, and owners
Insurance
Contracts and other instruments

Insurance indemnity provision of American Institute of Architects (AIA) standard form of agreement between contractor and subcontractor that was executed by general contractor and subcontractors on condominium project was not invalidated by General Obligations Law, providing that agreements exempting owners and contractors from liability for negligence were void and unenforceable; contractor was not indemnified for its own negligence, but rather duty to indemnify was limited to extent of subcontractors' own negligence, under provision stating, "In the event that an Indemnitee is determined to be any percent negligent pursuant to any verdict or judgment," then "Subcontractor's obligation to indemnify the Indemnitee for any amount, payment, judgment, settlement, mediation or arbitration award shall extend only to the percentage of negligence of the Subcontractor and anyone directly or indirectly engaged or retained by it and anyone else for whose acts the Subcontractor is liable." McKinney's General Obligations Law § 5.322–1.

Cases that cite this headnote

[12] **Indemnity**

Right of One Compelled to Pay Against Person Primarily Liable

The principle of common law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party.

Cases that cite this headnote

[13] **Indemnity**
Relative culpability

A party seeking common law indemnification must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought, and must not have committed actual wrongdoing itself.

Cases that cite this headnote

[14] **Indemnity**
Contractors, subcontractors, or owners

General contractor sufficiently alleged that subcontractors assumed full responsibility for construction work that each subcontractor performed on condominium project and materials that subcontractors supplied, as required to state claim against subcontractors for common law indemnification of contractor against claims by sponsors of project.

Cases that cite this headnote

[15] **Indemnity**
Contractors, subcontractors, or owners

In analyzing a claim for common law indemnification, a contract for construction work with a general contractor or construction manager is not, in itself, sufficient to establish that the general contractor or construction manager actually supervised or had direct control over the work which ultimately damaged the plaintiff.

Cases that cite this headnote

[16] **Parties**
Persons who may be brought in, and grounds in general

The liability to be imposed upon a third-party defendant in a third-party action should arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action. McKinney's CPLR 1007.

Cases that cite this headnote

[17] **Indemnity**
Contractors, subcontractors, or owners

Sponsors of condominium construction project sufficiently alleged cause of action against general contractor for common law indemnification against claims by condominium's board of managers; sponsors alleged that exclusive responsibility for design and construction of condominium was delegated to contractor, and that sponsors were not responsible for any wrongdoing.

Cases that cite this headnote

[18] **Contracts**
Acts or Omissions Constituting Breach in General

Sponsors of condominium construction project sufficiently alleged claim against general contractor for breach of contract, by alleging that sponsors entered into construction agreement with contractor, that sponsors paid contractor pursuant to that agreement, that contractor failed to perform under agreement,

and that damages could result from contractor's alleged breach.

Cases that cite this headnote

Attorneys and Law Firms

****828** Jennifer J. Bock, Esq., Law Firm of Elias C. Schwartz, PLLC, Great Neck, Andrea Roschelle, Esq., Sean Pappas, Esq., Starr Associates LLP Attorneys for Sponsor Defendants Third–Party Plaintiff, New York, John Hannum, Esq., Hannum Feretic Prendergast & Merlino, LLC, Attorneys for Defendant/Third–Party Plaintiff, ****829** Ryder Construction, Inc., New York, Jason S. Samuels, Esq., Farrell Fritz, P.C., Attorneys for Third–Party Defendant, KNS Building Restorations, Inc., Uniondale, Daniel P. Mevorach, Esq., Gallo Vitucci Klar LLP, Attorneys for Third–Party Defendant, Hi–Lume Corporation, New York, Leigh H. Sutton, Esq., Morris Duffy Alonso & Faley, Attorneys for Third–Party Defendant, Castle Construction Group, Inc., New York, Sunny M. Sparano, Esq., Marshall, Dennehey, Warner, Coleman & Goggin, Attorneys for Third–Party Defendant, Doortec Architectural Metal & Glass, Roseland, Joseph E. Gulmi, Esq., Bushell, Sovak, Ozer & Gulmi LLP Attorneys for Third–Party Defendant, Maspeth Steel Fabricators. Inc., New York, Richard H. Petersen, Esq., Law Office of James J. Toomey, Attorneys for Third–Party Defendant, M & D Fire Door, New York, Deluca & Forster, Attorneys for Third–Party Defendant, ADS Windows, Inc., Cranford, Gartner & Bloom, P.C., Attorneys for Third–Party Defendant, Stucco Specialists, Inc., New York, Aschettino Struhs LLP, Attorneys for Third–Party Defendant, Williamsburg Parquet Flooring, White Plains, Alan S. Russo, Esq., Russo & Toner, LLP, Attorneys for Third–Party Defendant, H2L Millwork Construction Corp., New York, Gutman Weiss, P.C., Attorneys for Third–Party Defendant, Roz–A–Lite Electrical Contracting, Inc., Brooklyn, Henri A. Demers, Esq., Ahmuty, Demers & McManus, Attorneys for Third–Party Defendant, Dynamic Sheet Metal, LTD., Albertson, Thomas M. Kenny, Esq., Riker, Danzig, Scherer, Hyland & Perretti LLP, Attorneys for Third–Party Defendant, Brook Plumbing & Heating Corp., New York, Wilson Elser, Shorav Kaushik, Wilson Elser Moskowitz, Edelman & Dicker, LLP, Attorneys for Third–Party Defendant, Imperial Painting & Fireproofing Inc. d/b/a The Gold Group, New York, attorney for plaintiffs.

Opinion

CAROLYN E. DEMAREST, J.

***588** "Second third-party defendants" Hi–Lume Corporation (Motion Sequence ("MS") 18), Maspeth Steel Fabricators, Inc. (MS19), M & D Fire Doors ("M & D Installers") (MS20), Roz–A–Lite Electrical Contracting, Inc. (MS21), Williamsburg Parquet Flooring Co. (MS22), Dynamic Sheet Metal LTD. (MS23), KNS Building Restorations, Inc. ("KNS Building") (MS24), Capitol Fire Sprinkler CPO, Inc. (MS25), H2L Millwork Construction Corp. ("H2L Millwork") (MS26), Imperial Painting & Fireproofing, Inc., d/b/a The Gold Group (MS27), Stucco Specialists, Inc. (MS28), ADS Windows, Inc. (MS29), Doortec Architectural Metal & Glass (MS30), Brook Plumbing & Heating Corp. (MS31) and Castle Construction Group, Inc. (MS32) move to dismiss the amended third-party complaint ("Sponsors' Complaint") of 125North 10, LLC, Savanna Services LLC, Christopher Schlank, Nicholas Bienstock, Peter Petron, John Fraser, and Investcorp International Holdings Inc. (collectively, "Sponsors") against Ryder,[1] for failure to state a cause of action, and the second third-party complaint against them ("Ryder Complaint")[2] by Ryder Construction Inc. ("Ryder"), for failure to ****830** state a cause of action and the causes of action having no merit (collectively, motion sequences 18–32 are ***589** referred to as the "Motions").[3] Ryder also moves (MS16) for default judgment, pursuant to CPLR 3215, against Mulroy Masonry, Inc. ("Mulroy") and Shabco Construction Services, Inc. ("Shabco").[4]

BACKGROUND

The plaintiff Board of Managers of the 125 North 10th Condominium brought this action, *inter alia*, against the Sponsors which have third party claims against, among other parties, Ryder, which was the construction manager and general contractor on the construction of 125 North 10th Street, Brooklyn, New York, an 86–unit luxury condominium (the "Project").[5] The Ryder Complaint seeks indemnification and the cost of defending the Sponsors' Complaint from numerous subcontractors on the Project. Fifteen subcontractors moved to dismiss the Sponsors' Complaint against Ryder, to dismiss the three causes of action alleged in the Ryder Complaint against them, and any cross-claims that were asserted by any of the other subcontractor defendants.[6] The two causes of action in the Sponsors' Complaint are for common law indemnification and breach of contract. The three causes

of action in the Ryder Complaint are for declaratory judgment that the subcontractor defendants are contractually required to defend and indemnify Ryder against all or some of the claims asserted by the Sponsors, contractual indemnification, and common law indemnification. The numerous cross-claims by the defendants in the Ryder Complaint sound in indemnity, contribution, and breach of contract.

DISCUSSION

As each of the movants has moved to dismiss the cross-claims asserted against it, and there is no opposition to that aspect of ***590** the motions, the motions are granted to the extent that all cross-claims asserted against the movants in the answers to the Ryder Complaint are dismissed.

[1] The first cause of action in the Ryder Complaint seeks a declaratory judgment that, pursuant to the trade contracts between the subcontractors and Ryder, each of the movants is obligated to defend and indemnify Ryder with respect to the Sponsors' claims[7] against Ryder, including ****831** reimbursement for all past, present and future attorney's fees and costs in defending the claims of construction defects, as well as indemnification to Ryder for all damages recovered against Ryder for construction defects in connection with the work performed on the Project. In motion sequences 24 and 26, citing to *BGW Dev. Corp. v. Mount Kisco Lodge No. 1552 of the Benevolent & Protective Order of Elks of the United States,* 247 A.D.2d 565, 568, 669 N.Y.S.2d 56 (2d Dept.1998), KNS Building and H2L Millwork argue that the first cause of action must be dismissed as it is duplicative of Ryder's second cause of action for contractual indemnification. Although Ryder does not address this issue in opposition to MS 24, in opposition to MS 26, Ryder argues that, "the declaratory judgment action is separate and apart from the causes of action for contractual and common law indemnification as it seeks the Court's intervention in determining the rights and other legal relations of the parties to a justiciable controversy. See CPLR § 3001." However, Ryder has not identified what other "rights" and "legal relations" it seeks to have the court determine. As the first cause of action seeks a declaratory judgment for contractual indemnification, and the second cause of action seeks contractual indemnification based upon the same contracts and claims of damages, the first cause of action is duplicative of the second cause of action and is unnecessary (*see BGW,* 247 A.D.2d at 568, 669 N.Y.S.2d 56). Accordingly, the first cause of action in the Ryder Complaint is dismissed as duplicative (*see id.*).

[2] The second cause of action in the Ryder Complaint seeks contractual indemnification from each of the subcontractors in the event that the Sponsors recover any judgment against Ryder ***591** and reimbursement for all attorney's fees and costs in this litigation. In MS 20, M & D Installers move for summary judgment dismissing the second cause of action and argue that the only written contract it entered with Ryder is a purchase order which does not contain an indemnification provision. In opposition to M & D Installer's motion, Ryder argues that a Certificate of Liability Insurance, acquired on behalf of M & D Installers, names Ryder as an additional insured party "as required by written contract." Ryder argues that, "it was the intention and understanding of all parties that there was a defense and indemnification requirement as it pertains to the subject construction project" and that it is premature to dismiss the action as discovery is not complete.[8]

In order to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]; CPLR 3212[b]). Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Vermette v.* ****832** *Kenworth Truck Co.,* 68 N.Y.2d 714, 717, 506 N.Y.S.2d 313, 497 N.E.2d 680 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion (*Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co.,* 168 A.D.2d 610, 563 N.Y.S.2d 449 [2d Dept.1990]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793, 520 N.E.2d 512 [1988]). M & D Installers has demonstrated that the purchase order entered between the parties does not contain an indemnity provision. Accordingly, the burden shifts to Ryder to demonstrate the existence of a factual issue (*see Vermette,* 68 N.Y.2d at 717, 506 N.Y.S.2d 313, 497 N.E.2d 680). Ryder has not contested M & D Installer's contention that there are no contracts between the parties with an indemnity provision. Ryder's counsel's contention that "it was the intention and understanding of all parties that there was a defense and indemnification requirement" is insufficient to ***592** raise a triable issue of

fact in light of the written purchase order and Ryder has not offered an evidentiary basis to suggest that discovery may lead to evidence that is exclusively within the control of M & D Installers (*see Gilbert Frank Corp.*, 70 N.Y.2d at 966, 525 N.Y.S.2d 793, 520 N.E.2d 512; *Davila v. New York City Tr. Auth.*, 66 A.D.3d 952, 953, 888 N.Y.S.2d 138 [2d Dept.2009]). Accordingly, the second cause of action in the Ryder Complaint is dismissed as to M & D Installers.

With the exception of M & D Installers, each of the movants entered into an American Institute of Architects ("AIA") "Standard Form of Agreement Between Contractor and Subcontractor"[9] with Ryder. Although the identities of the subcontractors, and the work that was to be performed, was modified for each subcontract, two identical indemnification provisions, § 4.6.1 and a paragraph under § 13.1, are found in each of the subcontracts. Accordingly, for the purposes of this motion, the subcontracts are interchangeable and are referred to as the "Subcontract." Section 4.6.1 ("First Indemnity Provision") states:

> To the fullest extent permitted by law, *the Subcontractor shall indemnify* and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, 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 of indemnity which would otherwise exist as to a party or person described in this Section 4.6. (Emphasis Added)

Article 13 of the Subcontract, captioned "INSURANCE AND BONDS," which requires the subcontractors to purchase and ***593** maintain various forms of insurance, including Commercial General Liability (CGL) insurance, includes the following ****833** provisions under the sub-caption "INDEMNIFICATION AGREEMENT" ("Second Indemnity Provision"):

> To the fullest extent permitted by law, *Subcontractor shall defend, indemnify* and hold harmless Owner, Contractor, Architect, and consultants, agents, and employees of any of them (individually or collectively, "Indemnity") from and against all claims, damages, liabilities, losses, and expenses, including but not limited to attorneys' fees, arising out of or in any way connected with the performance or lack of performance of the work under the agreement and any change orders or additions to the work included in the agreement, provided that any such claim, damage, liability, loss or expense is attributable to bodily injury, sickness, disease or death, *or physical injury to tangible property including loss of use of that property, or loss of use of tangible property that is not physically injured,* and caused in whole or in part by any actual or alleged:
>
> -Act or omission of the Subcontractor or anyone directly or indirectly retained or engaged by it or anyone for whose acts it may be liable; or
>
> -Violation of any statutory duty, regulation, ordinance, rule, or obligation by an indemnitee provided that the violation arises out of or is in any way connected with the Subcontractor's performance or lack of performance of the work under the agreement.
>
> *The Subcontractor's obligations under this Article shall apply regardless of whether or not any such claim, damage, liability, loss or expense is or may be attributable to the fault or negligence of the Contractor.*
>
> *In the event that an Indemnitee is determined to be any percent negligent pursuant to any verdict or judgment, then, in addition to the foregoing, Subcontractor's obligation to indemnify the Indemnitee for any amount, payment, judgment, settlement, mediation or arbitration award shall extend only to the percentage of negligence of the Subcontractor and anyone directly or indirectly engaged or retained by it and anyone else for whose acts the* ***594** *Subcontractor is liable.* (Emphasis Added)

The movants argue that the second cause of action must be dismissed as the indemnity provisions do not require the subcontractors to indemnify Ryder for claims arising out of the contractor or subcontractor's allegedly faulty workmanship. The movants argue that the First Indemnity Provision, which specifically excludes the subcontractor's work with the phrase "(other than the Work itself)", applies to third-party property damage which is not

alleged in the underlying actions against the Sponsors or Ryder. The movants further argue that the Second Indemnity Provision, which does not include the specific exclusion of "(other than the Work itself)", is included in the insurance section of the Subcontract and only relates to claims that would be covered by a CGL policy, which policies do not provide coverage for economic loss due to faulty workmanship. In motion sequence 28, Stucco Specialists also argues that the indemnity provisions are unenforceable as contrary to public policy, pursuant to General Obligations Law 5.322–1, as they contain provisions that would require subcontractor indemnification even if Ryder were found to be negligent. In opposition to the motion, Ryder argues that the indemnity provisions are not limited to third-party property damage or insurance coverage and that the provision is not unenforceable under the General Obligations Law as Ryder has not been found to be negligent.

[3] [4] Giving the Subcontract its plain and ordinary meaning, the First Indemnity Provision is clearly intended to cover situations where the indemnitees are sued ****834** by a third party for physical injury or property damage occurring as a result of the subcontractor's work, but not when the claim challenges the subcontractor's work itself (*see Board of Mgrs. of the Baxter St. Condominium v. Baxter St. Dev. Co. LLC*, 2013 N.Y. Slip Op. 30209(U), 2013 WL 486506 [Sup.Ct., New York County 2013] (holding that an indemnity provision, nearly identical to the First Indemnity Provision, which included the exclusion "(other than the Work itself)", did not apply to claims challenging the work itself); *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 [1990]). Here, Ryder is not being sued by the Sponsors for personal injury or property damage arising out of the construction. The Sponsors' Complaint consists of causes of action for indemnification with respect to defects in the design and construction alleged by the plaintiff and Ryder's alleged failure to oversee and develop the Project. Accordingly, as the claims against Ryder challenge the ***595** movants' work itself, as well as Ryder's failure to perform under its contract, Ryder cannot maintain a cause of action for contractual indemnification based upon the First Indemnification Provision (*see Board of Mgrs. of the Baxter*, 2013 N.Y. Slip Op. 30209(U), 2013 WL 486506; *W.W.W. Assoc.*, 77 N.Y.2d at 162, 565 N.Y.S.2d 440, 566 N.E.2d 639).[10]

The Second Indemnification Provision, however, does not contain an exclusion for "the work itself." The movants argue that since the Second Indemnification Provision falls within Section 13.1 of the Subcontract, which requires the movants to purchase and maintain various forms of insurance, the Second Indemnification Provision only applies to claims that would be covered by a CGL policy. Further, the movants contend that since workmanship is not covered under CGL policies (citing *Savik, Murray & Aurora Constr. Mgt. Co., LLC v. ITT Hartford Ins. Group*, 86 A.D.3d 490, 927 N.Y.S.2d 634 [1st Dept.2011]), the Second Indemnification Provision is inapplicable to the claims asserted against Ryder as they arise out of the allegedly faulty workmanship. The movants also cite to *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365, 548 N.E.2d 903 (1989) to argue that, even if not limited to the insurance section, the First Indemnification Provision must prevail over the Second Indemnification Provision because the Subcontract "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." The movants argue that since the First Indemnification Provision evidences the parties' intent to exclude indemnification with respect to "the work itself," a broader construction of the Second Indemnification Provision would add a duty that the parties did not intend to be assumed. In opposition, Ryder argues that the insurance company's obligations have no bearing on the subcontractor's obligation to defend based upon the contractual language. Further, Ryder argues that pursuant to *Hooper*, there are no ambiguities in the Subcontract and that the parties intended for the Movants to provide for indemnification including the claims against the work itself.

[5] In the 15 separate motions on this issue, neither Ryder, nor the movants, have cited a single judicial decision that addresses whether the Second Indemnity Provision, which appears ***596** to be a standard ****835** provision in a contract used nation-wide, applies to claims that arise from subcontractor's faulty workmanship in the work product itself. This court is also unable to find a decision in which this issue has been addressed. Accordingly, this appears to be a case of first impression as to this provision in AIA document A401–1997.

[6] In order for Ryder to have a viable cause of action for contractual indemnification under the Second Indemnity Provision, the claims against the Sponsors must be attributable to the subcontractors' performance, or lack of performance of the work under the Subcontract, that resulted in: "bodily injury, sickness, disease or death, or physical injury to tangible property including loss of use of that property, or loss of use of tangible property that is not physically injured." As there are no allegations of bodily injury, sickness, disease or death, the claims alleged must be for "physical injury to tangible property including loss of use of that property" or "loss of use of tangible property that is not physically injured" for the

Second Indemnification Provision to apply in this action.

The court agrees with the movants that there is an apparent conflict between the First and Second Indemnity Provisions. The First Indemnity Provision is found within Article 4 of the Subcontract, which describes the subcontractor's role and responsibilities in constructing the Project. Section 4.6, identified solely as "Indemnification", describes the obligation to indemnify with respect to injury to third parties to whom Ryder is held liable. However, the Second Indemnity Provision is found in Article 13 of the Subcontract, which describes the insurance and bonds required to be maintained by the subcontractors on the Project, at the end of a list of the various forms of insurance required to be held, under the title "Indemnification Agreement." While the First Indemnification Agreement clearly excludes indemnification for claims that arise out of faulty workmanship by the subcontractor, the Second Indemnification Agreement does not clearly do so.

[7] [8] [9] "[W]here two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect" (*Moulton Paving, LLC v. Town of Poughkeepsie,* 98 A.D.3d 1009, 1012, 950 N.Y.S.2d 762 [2d Dept.2012]; quoting *LI Equity Network, LLC v. Village in the Woods Owners Corp.*, 79 A.D.3d 26, 35, 910 N.Y.S.2d 97 [2d Dept.2010] [internal quotation marks omitted]; *see Perlbinder v. Board of Mgrs. of 411 E. 53rd St. Condominium,* 65 A.D.3d 985, 987, 886 N.Y.S.2d 378 [1st Dept.2009]; *G & B Photography* ***597** *v. Greenberg,* 209 A.D.2d 579, 581, 619 N.Y.S.2d 294 [2d Dept.1994]). In this case, the First and Second Indemnification provisions can be reconciled and both can be given effect by reading them in context. In *Hooper,* 74 N.Y.2d at 491–492, 549 N.Y.S.2d 365, 548 N.E.2d 903, the Court of Appeals held:

> Words in a contract are to be construed to achieve the apparent purpose of the parties. Although the 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.' This is particularly true with indemnity contracts. 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. The promise 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. Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is ****836** contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise. (Internal citations omitted)

[10] The ambiguous Second Indemnification Provision, which does not mention an exclusion for claims arising out of a subcontractor's faulty work, is listed below the CGL insurance section of the Subcontract and uses language that is nearly identical to the definition of "property damage" found in CGL policies.[11] Moreover, "[c]ourts have held that commercial general liability (CGL) policies do not insure against faulty workmanship in the work product itself" (*I.J. White Corp. v. Columbia Cas. Co.*, 105 A.D.3d 531, 532, 964 N.Y.S.2d 21 [1st Dept.2013], citing *George A. Fuller Co. v. United States Fid. & Guar. Co.*, 200 A.D.2d 255, 259, 613 N.Y.S.2d 152 [1st Dept.1994], lv. denied 84 N.Y.2d 806, 621 N.Y.S.2d 515, 645 N.E.2d 1215 [1994]). Accordingly, excluding the work itself, within the context of the insurance indemnification ***598** provisions, would be superfluous as it would not be covered under a CGL policy. Limiting the Second Indemnification Provision to the terms of mandated insurance policies which precede the Second Indemnification Provision in the Subcontract is thus consistent with the intent evident in the Subcontract and permits reconciliation of the two, apparently conflicted, indemnification provisions (*see Hooper,* 74 N.Y.2d at 491, 549 N.Y.S.2d 365, 548 N.E.2d 903). Construing the Second Indemnification Provision to include damages arising out of claims relating to performance of the "the work itself" would improperly add a duty that is not clearly implied from the language of the entire agreement and which is expressly excluded in the First Indemnification Provision, thereby creating an irreconcilable inconsistency in the Subcontract (*see Hooper,* 74 N.Y.2d at 491–492, 549 N.Y.S.2d 365, 548 N.E.2d 903). Given this inconsistency, and the structure of the Subcontract, if the Second Indemnification Provision had been intended to cover claims arising out of the faulty work itself, it would have included words to

that effect. Further, "[i]t is axiomatic that courts construing contracts must give specific terms and exact terms ... greater weight than general language' " (*County of Suffolk v. Long Island Lighting Co.*, 266 F.3d 131, 139 [2d Cir.2001], quoting *Aramony v. United Way*, 254 F.3d 403, 413 [2d Cir.2001]; *see* Restatement (Second) of Contracts § 203(c) [1981]; *Montgomery–Otsego–Schoharie Solid Waste Mgmt. Auth. v. County of Otsego*, 249 A.D.2d 702, 703, 671 N.Y.S.2d 545 [3d Dept.1998]). As the First Indemnification Provision is more specific than the Second, its intention must be given greater weight.

Accordingly, upon review of the entire Subcontract, the Court finds the Second Indemnity Provision was not intended to expand Ryder's right to indemnification to claims against faulty workmanship in the subcontractor's work product itself. Rather, the Second Indemnity Provision was intended to indemnify Ryder against damage to something other than the work product caused by the subcontractor's failure of performance. As Ryder seeks indemnification for claims of faulty workmanship in the movants' work product itself, the motion to dismiss the second ****837** cause of action for contractual indemnification is granted (*see I.J. White Corp.*, 105 A.D.3d at 532, 964 N.Y.S.2d 21; *Hooper*, 74 N.Y.2d at 491, 549 N.Y.S.2d 365, 548 N.E.2d 903; *Moulton Paving*, 98 A.D.3d at 1012, 950 N.Y.S.2d 762; *County of Suffolk*, 266 F.3d at 139).

[11] It is noted that the Second Indemnification Provision is not, as movants argue, invalidated pursuant to General Obligations Law 5.322–1 as the statute clearly relates to "negligence" ***599** while this action is for economic loss as a result of a breach of contract. Moreover, the Second Indemnification Provision is followed by the following caveat:

> In the event that an Indemnitee is determined to be any percent negligent pursuant to any verdict or judgment, then, in addition to the foregoing, Subcontractor's obligation to indemnify the Indemnitee for any amount, payment, judgment, settlement, mediation or arbitration award shall extend only to the percentage of negligence of the Subcontractor and anyone directly or indirectly engaged or retained by it and anyone else for whose acts the Subcontractor is liable.

As the Second Indemnification Provision does not purport to indemnify Ryder for its own negligence, and the duty to indemnify is limited to the extent of subcontractor's own negligence, it is not invalid pursuant to General Obligations Law 5.322–1 (*see Brooks v. Judlau Contr., Inc.*, 11 N.Y.3d 204, 207, 869 N.Y.S.2d 366, 898 N.E.2d 549 [2008]; *Kinney v. G.W. Lisk Co.*, 76 N.Y.2d 215, 218–219, 557 N.Y.S.2d 283, 556 N.E.2d 1090 [1990]).

The movants argue that the third cause of action for common law indemnification in the Ryder Complaint must be dismissed as Ryder did not delegate exclusive responsibility over the performance of its contract with the Sponsors to the movants. In opposition to the motions, Ryder argues that it delegated exclusive responsibility for the subcontract work to each of the subcontractors and that it is premature to dismiss the cause of action where there are triable issues of fact concerning the degree of fault, if any, attributable to each party.

[12] [13] "The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party.' The party seeking indemnification must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought,' and must not have committed actual wrongdoing itself (*Tiffany at Westbury Condominium by Its Bd. of Mgrs. v. Marelli Dev. Corp.*, 40 A.D.3d 1073, 1077, 840 N.Y.S.2d 74 [2d Dept.2007], quoting *17 Vista Fee Assoc. v. Teachers Ins. & Annuity Assn. of Am.*, 259 A.D.2d 75, 80, 693 N.Y.S.2d 554 [1st Dept.1999], remaining internal citations omitted).

Historically, third party actions were narrowly construed as limited to the claim of plaintiff in the action and the obligation of the third party defendant to indemnify another held liable ***600** for the plaintiff's loss (*see generally*, *George Cohen Agency, Inc., v. Donald S. Perlman Agency, Inc.*, 51 N.Y.2d 358, 365, 434 N.Y.S.2d 189, 414 N.E.2d 689 (1980)). That view has been relaxed substantially such that it is now recognized that, to the extent that the plaintiff was damaged as a result of the third-party defendant subcontractor's faulty workmanship, the inclusion of all parties in one action, and before one court, is appropriate as it prevents the judicially inefficient result of multiple actions before multiple courts. "[A]lthough third-party practice has its origins in strict indemnity, it has grown beyond its early limitations and should now be seen primarily as a tool for economical resolution of interrelated ****838** lawsuits" (*id.* at 364–365, 434 N.Y.S.2d 189, 414 N.E.2d 689; *see also Qosina Corp. v. C & N Packaging, Inc.*, 96 A.D.3d 1032,

1035, 948 N.Y.S.2d 308 [2d Dept.2012]; Alexander, Practice Commentaries, McKinney's Cons. Laws of New York, Book 7B, CPLR C1007:3).

[14] [15] The motion to dismiss Ryder's third cause of action for common law indemnification is denied as the Ryder Complaint has sufficiently alleged that the subcontractors assumed full responsibility for the construction work that each subcontractor performed and the materials they supplied and there are issues of fact as to whether Ryder was responsible for any of the allegedly faulty work (*see Tiffany*, 40 A.D.3d at 1077, 840 N.Y.S.2d 74; *17 Vista*, 259 A.D.2d at 80, 693 N.Y.S.2d 554). The movants' contention that Ryder could not have delegated exclusive responsibility to the subcontractors is unavailing as discovery has not been completed and, "[a] contract for construction work with a general contractor or construction manager is not, in itself, sufficient to establish that the general contractor or construction manager actually supervised or had direct control' over the work which ultimately damaged the plaintiff" (*Caldwell v. Two Columbus Ave. Condominium*, 2010 N.Y. Slip Op. 33212(U) [Sup.Ct., New York County 2010]), quoting *McCarthy v. Turner Constr., Inc.*, 24 Misc.3d 1245[A], 2009 WL 2871488 [Sup.Ct., New York County 2009], affd. 72 A.D.3d 539, 898 N.Y.S.2d 836 [1st Dept.2010]; *see Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 A.D.3d 616, 620, 852 N.Y.S.2d 138 [2d Dept.2008]). Further, to the extent that the plaintiff, sponsor, or Ryder were damaged as a result of the subcontractor's faulty workmanship, the inclusion of all parties in one action, appearing before one court, is appropriate as it prevents the judicially inefficient result of multiple actions before multiple courts and the potential for inconsistent results (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of New York, Book 7B, CPLR C1007:3). Accordingly, the motions to ***601** dismiss the third cause of action in the Ryder Complaint for common law indemnification are denied.

Pursuant to CPLR 1008, the movants also move to dismiss the Sponsors' Complaint against Ryder. The first cause of action in the Sponsors' Complaint seeks common law indemnification against Ryder as well as against architects, a structural engineer, a mechanical engineer, and a building envelope consultant. The first cause of action alleges that the Sponsors delegated the "exclusive responsibility" for the design and construction of the Project to the third-party defendants, including Ryder. The Sponsors seek indemnity in the event they are found to be liable to the plaintiff, but any loss alleged by the plaintiff is found not to have been caused by the conduct of the Sponsors. The second cause of action in the Sponsors' Complaint alleges breach of contract against Ryder. The movants argue that the Sponsors' Complaint must be dismissed as to Ryder as the allegations are vague and conclusory. In opposition the motions, the Sponsors argue that they have sufficiently alleged third party causes of action for common law indemnification and breach of contract and the pleadings are to be liberally construed.

[16] In considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell–Harring v. State of New York*, 15 N.Y.3d 8, 20, 904 N.Y.S.2d 296, 930 N.E.2d 217 [2010]; *Leon v. Martinez*, ****839** 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1995]). "The liability to be imposed upon a third-party defendant in a third-party action commenced pursuant to CPLR 1007 should arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action' " (*Lucci v. Lucci*, 150 A.D.2d 649, 650, 541 N.Y.S.2d 992 [2d Dept.1989], quoting *BBIG Realty Corp. v. Ginsberg*, 111 A.D.2d 91, 93, 489 N.Y.S.2d 224 [1st Dept.1985]; *see Qosina*, 96 A.D.3d at 1035, 948 N.Y.S.2d 308).

[17] [18] The motions to dismiss the first cause of action in the Sponsors' Complaint are denied as Sponsors have sufficiently alleged a third party cause of action for common law indemnification, including the delegation of exclusive responsibility for the design and construction of the Project, and the Sponsors have denied any wrongdoing on their part (*see Tiffany*, 40 A.D.3d at 1077, 840 N.Y.S.2d 74; *17 Vista*, 259 A.D.2d at 80, 693 N.Y.S.2d 554). The motions to dismiss the ***602** second cause of action in the Sponsors' Complaint against Ryder are denied as the Sponsors have sufficiently alleged a third party cause of action for breach of contract, including allegations that the Sponsors entered into a construction agreement with Ryder, the Sponsors paid Ryder pursuant to that contract, Ryder failed to perform under the contract, and damages may result from Ryder's breach in the event that plaintiff succeeds in its first-party action against the Sponsors (*see Legum v. Russo*, 133 A.D.3d 638, 639, 20 N.Y.S.3d 124 [2d Dept.2015]; *Lucci*, 150 A.D.2d at 650, 541 N.Y.S.2d 992). Accordingly, the movants' motions to dismiss the Sponsors' Complaint against Ryder are denied.

In Ryder's motion, dated April 7, 2015, it sought a default judgment based upon its third-party complaint dated February 7, 2014. However, that pleading is no longer viable as it was superseded by the amended third-party

complaint dated March 4, 2015 (*see Pourquoi M.P.S. v. Worldstar Int'l,* 64 A.D.3d 551, 551–552, 881 N.Y.S.2d 327 [2d Dept.2009]; *Halmar Distribs. v. Approved Mfg. Corp.*, 49 A.D.2d 841, 373 N.Y.S.2d 599 [1st Dept.1975]). Accordingly, Ryder's motion for default judgment is denied without prejudice.

CONCLUSION

Accordingly, "Second third-party defendants" Hi–Lume Corporation, Maspeth Steel, M & D Installers, Roz–A–Lite, Williamsburg Parquet, Dynamic Street Metal, KNS Building, Capitol Fire, H2L Millwork, Imperial Painting, Stucco Specialists, ADS Windows, Doortec, Brook Plumbing and Castle Construction's motions to dismiss the cross-claims in the answers to the "second third-party complaint" by Ryder, and the first and second causes of action in the "second third-party complaint" by Ryder, are granted and the motions to dismiss the third cause of action in the "second third-party complaint" by Ryder, and to dismiss the Sponsors' third-party complaint against Ryder, are denied. Ryder's motion for default judgment is denied without prejudice.

All Citations

51 Misc.3d 585, 25 N.Y.S.3d 825, 2016 N.Y. Slip Op. 26021

Footnotes

1 Pursuant to CPLR 1008, a third-party defendant has standing to move to dismiss, on behalf of a defendant/third-party plaintiff, against a plaintiff (*see Stamboulis v. Stefatos,* 256 A.D.2d 328, 681 N.Y.S.2d 342 [2d Dept.1998]; *Muniz v. Church of Our Lady of Mt. Carmel,* 238 A.D.2d 101, 655 N.Y.S.2d 38 [1st Dept.1997]; *Cleary v. Starkweather,* 165 A.D.2d 967, 561 N.Y.S.2d 855 [3d Dept 1990]).

2 By order dated February 10, 2015, this court dismissed the plaintiff's complaint against Ryder in its entirety but converted the defendant Sponsors' cross-claims, for contractual and common-law indemnification against Ryder, into third-party claims (*Board of Mgrs. of the 125 N. 10th Condominium v. 125 N. 10, LLC,* 2015 WL 535957 [Sup.Ct., Kings County, February 10, 2015, Demarest, J., index No. 14982/12]). Ryder then filed an "Amended Third Party Complaint" against a number of subcontractors which referred to Ryder as "Second Third–Party Plaintiff" and the subcontractor defendants as "Second Third–Party Defendants". It is noted that this does not appear to be a "second third-party complaint" and should more appropriately be referred to as a fourth-party complaint. However, for the purposes of this decision, this pleading is referred to as the "Ryder Complaint."

3 Each motion seeking to dismiss the Sponsors' Complaint is pursuant to CPLR 3211. Each motion seeking to dismiss the Ryder Complaint is pursuant to both CPLR 3211 and 3212 except for M & D Installers' motion (MS20) which was solely for summary judgment pursuant to CPLR 3212.

4 Ryder's default motions against Williamsburg Parquet Flooring, Inc. and Capitol Fire Sprinkler Co., Inc. were withdrawn.

5 For a more detailed history of this action, see *Board of Mgrs. of the 125 N. 10th Condominium v. 125 N. 10, LLC,* 45 Misc.3d 1215(A), 2014 WL 5836676 [Sup.Ct., Kings County 2014]).

6 There is significant overlap in the motions due to the identical causes of action alleged and the same general contractor/subcontractor relationship between the parties. Most of the motions explicitly rely on MS 18 by Hi–Lume Corporation as it was the first party to move to dismiss the Sponsors' and the Ryder Complaint.

7 Although paragraph 90 of the Ryder Complaint seeks indemnification "with regard to the Board's claims against Ryder", the board's claims against Ryder were previously dismissed (see footnote 2). The remainder of the first cause of action seeks indemnification with respect to the claims asserted by the "Sponsor defendants." Accordingly, it is presumed that Ryder seeks indemnification with respect to the Sponsors' claims against Ryder.

8 It is noted that Ryder argues that all of the present motions to dismiss are premature as discovery is not complete. However, Ryder does not identify what discovery is not in its possession or is in the sole possession of another party.

9 The contract is identified as "Document A401–1997".

10 Ryder would not, however, be precluded from litigating a breach of contract claim against the movants based upon alleged deficiencies in their performance under the subcontracts since a breach of contract claim does not, like indemnity, involve "a complete shifting of responsibility to another" by a party which is, itself, without fault (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of New York, Book 7B, CPLR C1007:3, p. 46).

11 In *I.J. White Corp. v. Columbia Cas. Co.,* 105 A.D.3d 531, 964 N.Y.S.2d 21 [1st Dept.2013], "property damage" was defined in the CGL policy at issue as "[p]hysical injury to tangible property, including all resulting loss of use of that property" and "loss of use of tangible property that is not physically injured." This is almost identical to the language used in the Second Indemnification Provision.

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