

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

ROBERT SHOLLENBERGER,

Plaintiff,

- against -

FIFTH AVENUE OF LONG ISLAND REALTY
ASSOCIATES,

Defendants.

TRIAL/IAS PART 20
NASSAU COUNTY

INDEX NO. 13541/04

MOTION SUBMISSION
DATE: 6/17/08

MOTION SEQUENCE
NOS. 6, 7

2

FIFTH AVENUE OF LONG ISLAND REALTY
ASSOCIATES,

Third-Party Plaintiff,

- against -

BURBERRY LIMITED,

Third-Party Defendant.

BURBERRY LIMITED,

Second Third-Party Plaintiff,

- against -

RICHTER & RATNER CONTRACTING CORP.,

Second Third-Party Defendant.

RICHTER & RATNER CONTRACTING CORP.,

Third Third-Party Plaintiff,

- against -

PRECISION AIRE,

Third Third-Party Defendant.

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u>X</u>
Notice of Cross-Motion and Affidavits.....	<u>X</u>
Affirmation in Oppositions.....	<u>X</u>
Reply Affirmations.....	<u>X</u>

The Third-Party Defendant, Precision Aire, (hereinafter referred to as "Precision"), moves for an order pursuant to CPLR §3212 dismissing all claims, cross-claims and counterclaims against Precision. The Second Third-Party Defendant/Third Third-Party Plaintiff, Richter & Ratner Contracting Corp., (hereinafter referred to as "R&R"), submit opposition to the motion submitted by Precision, and cross-move for an order pursuant to CPLR §3212 granting the motion by R&R summary judgment against Precision. The Defendants/Third-Party Plaintiffs, Fifth Avenue of Long Island Realty Associates, and Fifth Third-Party Defendant, RFC Construction Corporation, (hereinafter referred to as "Fifth Avenue" and "RFC"), submit opposition to the Precision motion. Precision submits a reply to R&R's opposition. Precision submits opposition to the R&R cross-motion. R&R submits a reply to Precision's opposition to R&R's cross-motion.

The plaintiff initiated this action as a result of personal injuries sustained on March 2, 2004 at the Burberry store located at the Americana Mall in Manhasset, New York. The plaintiff, employed by Precision, was performing work at the Burberry store, work which involved the start up and installation of roof-top HVAC equipment. The plaintiff claims that he fell off a scaffold approximately eight feet below, whereby the scaffold was set up "on a rubble base, stone, broken concrete, dirt and unlevel ground". The plaintiff claims that he slipped off a rung as he was descending the scaffold. Plaintiff has initiated an action under Labor Law §§ 200, 240, 241. 241(6) and common law negligence. R&R's negligence claims as and against Precision were dismissed. R&R's remaining claim, as and against Precision, is for contractual indemnification.

Precision's Summary Judgment Motion Requesting the
Dismissal of R&R's Claim for Contractual Indemnification

Precision, a subcontractor for the subject Burberry job site, and R&R, the general contractor thereto, entered into a Purchase Order Style Contract, bearing Purchase Order #77197, a four page document. Gerard Schmidt, co-owner of Precision, and a representative from R&R, signed the contract. Upon the record herein, the representative from R&R who signed the contract with Precision has been identified only as "Dan", by Robert Romano, President of Precision. Mr. Romano identified the signed contract at his deposition. Mr. Schmidt signed the contract on October 16, 2003, and a representative of R&R signed the contract on September 30, 2003.

Immediately above the two signatures, the contract provides

"Important: The terms and conditions on the reverse side are part of the contract ." Contained on the reverse side of the contract is paragraph 11 which provides "SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor ... for all claims caused by any negligent act or omission of the Subcontractor ..."

Debra Burns, the office manager for Precision, avers that in her capacity as office manager, she reviews the contracts that are entered into by Precision. Ms. Burns provides that the owners of Precision actually sign the contracts, and that it is her job to review the contracts and make any necessary changes to conform with Precision's policies prior to the owners actually signing the contracts. Ms. Burns avers that she made various changes to the subject contract before she submitted it to Mr. Schmidt for his signature. Ms. Burns avers that she struck paragraph 11 in its entirety and replaced it with the phrase "Refer to Insurance Certificate". However, Precision, in its moving papers, has submitted a copy of the subject contract as Exhibit "C", whereby such copy indicates that paragraph 11 was not stricken at all, and that only the following was added to the end of paragraph 11, "Refer to Insurance Certificate". The copy of the subject contract submitted by R&R indicates the same.

Ms. Burns submits that the Insurance Certificate obligated Precision to provide insurance coverage for R&R, that R&R was provided an additional insured, and therefore, it is her understanding that Precision fulfilled its contractual obligations to R&R. Ms. Burns gave the contract to Mr. Schmidt after she made the purported changes, and it was her "understanding that R&R was fully aware of the fact that paragraph 11 of the contract had been stricken and had been replaced with the words 'Refer to Insurance Certificate'." However, Ms. Burns, by way of her affidavit, and Precision in their moving papers, have not indicated how R&R was made aware of the change. In fact, as a representative of R&R apparently signed the contract on September 30, 2003, and Mr. Schmidt signed the contract on October 16, 2003, it appears the purported changes were made after R&R already signed the contract. Therefore, the burden lies with Precision to demonstrate how the changes were communicated to R&R, and if so, how such changes were eventually accepted by R&R. Precision, in their moving papers has failed to meet this burden.

Precision argues, in their moving papers, in their request for an order granting Precision summary judgment in dismissing R&R's claim against Precision for contractual indemnification, that it was Precision's intent to strike the indemnification language from the contract and replace it with an agreement to provide insurance on behalf of R&R. Precision further argues that it was not only the intention of Precision, but also the intention of R&R to modify and replace the indemnification language with insurance procurement language. Therefore, Precision submits R&R's claims for contractual indemnification must be dismissed.

However, Precision has not demonstrated that the proposed change to paragraph 11 was ever communicated to R&R, or that the terms were accepted by R&R through acquiescent conduct. (*Eldor Construction v. County of Nassau*, 272 AD2d 509; *Woodward v. Tan Holding Corp.*, 32 AD3d 467). While an issue of fact may exist as to whether a valid contract was ever formed, the movant, Precision, has not provided any evidence whatsoever to indicate that a potential counter offer was accepted or rejected. Rather, the movant, Precision, argues that Precision believes it was the intent of both parties that the change was accepted. While mere silence, when not misleading, cannot be construed as acceptance, and a counter offer may be accepted by conduct, (*Daiman v. Fridman*, 5 AD3d 426), Precision has not provided evidence of same. Therefore, Precision's motion for summary judgment dismissing R&R's claims for contractual indemnification must be denied.

R&R's Cross-Motion for Summary Judgment as and Against Precision

R&R submits that it is free from any negligence with respect to plaintiff's injuries sustained, and therefore, R&R is entitled to contractual indemnification from Precision. R&R provides that it did not provide the plaintiff with any instruction as to how plaintiff should perform his work, whereby R&R only told the plaintiff where to work. Eric Vasile, the superintendent for R&R testified that the scaffold that plaintiff fell from was erected by Fourth Third-Party Defendant/Fifth Third-Party Plaintiff, York Scaffolding, (hereinafter referred to as "York"), and was erected prior to R&R's arrival at the job site. R&R states that R&R was not privy to the contract entered into by York and RFC, owner of the Americana Mall, with regards to erecting the scaffold, and therefore, cannot be responsible for any defect thereto. Additionally, R&R provides that R&R did not provide any tools or equipment to the plaintiff, and that the means as to how to do the work was left to the subcontractors. Therefore, R&R submits that it is free from any active negligence, and entitled to contractual indemnification.

However, genuine material issues of fact have been raised which warrant the denial of R&R's motion for summary judgment. These issues include that R&R told plaintiff and a co-worker to use the scaffold to gain access to the roofing, that R&R's superintendent testified that if he noticed anything was wrong with the scaffold that he would have immediately remedied the problem. The plaintiff testified that the scaffold was not bolted down, was resting on rubble, was placed in a trench, an opening large enough for a man to fall through, and was placed on unlevel ground.

In light of the foregoing, R&R's motion for summary judgment as and against Precision for contractual indemnification is denied.

ENTER:



J.S.C.

Dated: August 7, 2008

cc: Dell & Little, Esqs.
Law Offices of Michael F.X. Manning
White & McSpedon, P.C.
Tromello, McDonnell & Kehoe, Esqs.
Mulholland, Minion & Roe, Esqs.
The Law Office of John P. Humphreys

ENTERED

AUG 13 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**