

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

-----X
TOMAS BERZOSA,

Plaintiff,

**MICHELE M. WOODARD,
J.S.C.**
TRIAL/IAS Part 18

-against-

Index# 8760/2004

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NORTH HILLS HOLDING COMPANY LLC, NORTH HILLS
BUILDING SYSTEMS LLC, NORTH HILLS REALTY, LLC,
ISLAND NORTH LLC, THE CHATHAM AT NORTH HILLS
HOME OWNERS ASSOCIATION, INC. and THE CHATHAM
AT NORTH HILLS

Defendants.

Motion Seq. Nos. 2 & 3

DECISION & ORDER

-----X
NORTH HILLS HOLDING COMPANY LLC, NORTH HILLS
BUILDING SYSTEMS LLC, NORTH HILLS REALTY, LLC,
ISLAND NORTH LLC,

Third-Party Plaintiffs,

-against-

JAMES D. RUBINO, INC.,

Third-Party Defendant.

-----X
JAMES D. RUBINO, INC.

Fourth-Party Plaintiff

-against-

P&R CARPENTRY CORP.

Fourth Party Defendant

-----X
Papers Read on this Motion

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Third-party defendant James Rubino, Inc. moves for an order pursuant to CPLR §3212 granting it summary judgment dismissing the third-party plaintiffs North Hills Holding Company LLC, North Hills Building Systems LLC, North Hills Realty LLC and Island North LLC's negligence and Labor Law § 200 claims and awarding it summary judgment on its contractual indemnification claim against the fourth-party defendant P&R Carpentry.

North Hills Holding Company LLC ("NHHCo"), North Hills Building Systems LLC ("NHBS"), North Hills Realty LLC and Island North LLC cross move for an order pursuant to CPLR §3212: (1) granting North Hills Realty and Island Realty summary judgment dismissing the complaint in its entirety against them pursuant to Limited Liability Company Law § 609(a); (2) granting NHHCo and NHBS summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims; and, (3) granting NHHCo and NHBS summary judgment on their contractual indemnification claims against third-party defendant James D. Rubino, Inc. and fourth party defendant P&R Carpentry Corp. .

In this action, the plaintiff Berzosa seeks to recover damages for personal injuries he suffered on October 17, 2003 when working for P&R Carpentry at a construction site known as The Chatham at North Hills. While walking along the top of a 3-1/2" wide condominium wall being erected, he fell some 12 to 13' to the ground below. Berzosa has advanced claims pursuant to Labor

Law §§ 200, 240(1) and 241(6) against defendants NHHCo, NHBS, North Hills Realty and Island North. NHHCo owned the construction site. Defendants North Hills Realty and Island North were members of NHHCo. Defendant NHBS was the general contractor.

Defendants NHHCo, NHBS, North Hills Realty and Island North brought the third-party action against James D. Rubino, Inc., with whom NHBS had contracted for the framing of the condominiums. In their third-party action, they allege negligence and violations of Labor Law § 200. They also seek common law and contractual indemnification.

The third-party defendant Rubino brought the fourth-party action against P&R Carpentry Corp. with whom it had subcontracted to perform framing work seeking common law and contractual indemnification. Fourth-party defendant P&R Carpentry advanced counter/cross claims against defendants NHHCo, NHBS, North Hills Realty and Island North. NHHCo, NHBS, North Hills Realty and Island North in turn advanced cross-claims against P&R Carpentry for common law and contractual indemnity.

The following facts pertinent to the determination of this motion are undisputed:

Pursuant to its contract with the general contractor NHBS, Rubino was the carpentry framing subcontractor. Their agreement required Rubino to control, coordinate and supervise the full extent of the work required by the contract. Rubino subcontracted with P&R Carpentry to do framing work at the site. Berzosa was working for P&R Carpentry when his accident occurred. In fact, Berzosa was using only tools supplied by P&R Carpentry and was under its exclusive control and supervision. Rubino played no part in P&R Carpentry or the plaintiff's work. Thus, the "means and methods" being followed by the plaintiff at the time of his accident were entirely those of his employer, P&R Carpentry. While NHBS had an office at the site and assigned supervisors to the

job, they only coordinated the trades. NHBS did not supervise or control the subcontractors, or their work in any fashion, nor did they provide any of the tools or equipment used.

NHBS' contract with Rubino provided that "[t]he Work shall include the coordination and supervision required to complete the Work" and that "[t]he complete coordination and full supervision by the Subcontractor of the Work is of the essence of this Contract." It provided that "the Subcontractor shall be solely responsible for the means, methods, sequences, and techniques of construction and for the safe performance of the Work. . . ." As for safety, the contract specifically provided that "[t]he Subcontractor shall, during the performance of the Work, place proper guards upon about the same for the prevention of accidents" and required Rubino to "cover, protect and exercise due diligence and workmanlike care to secure the Work from injury." The agreement provided that "all damage or injury to the same, not caused by the General Contractor, shall be made good by the Subcontractor." More specifically, it provided that "[t]he Subcontractor shall not hold the General Contractor or Owner responsible for loss or damage or injury caused by any fault or negligence of any other contractor or subcontractor; the Subcontractor will look to the said several contractors or subcontractors for the recovery from them, or either of them, of any damage or injury." The agreement further provided that "[t]he prevention of accidents to workers engaged in the Work is the responsibility of the Subcontractor." Their contract also obligated Rubino to defend, indemnify and hold NHHCo, NHBS, North Hills Realty and Island North harmless. More specifically, their agreement provided "[t]o the Fullest extent permitted by law, the Subcontractor shall defend with counsel acceptable to Owners and General Contractor, indemnify and hold harmless the General Contractor, Owner, Architect and agents, partners, principals, members and employees of any of them from and against any and all claims, damages, losses and expenses,

including but not limited to court costs and attorney's fees, arising out of or resulting from performance of the Work, including but not limited to claims for personal injury. . . but only to the extent caused in whole or in part by the conduct, acts or omissions of, or breach of contract by, the Subcontractor, anyone directly or indirectly employed by it or anyone for whose acts it may be liable, regardless of whether or not such claim, damage, loss of expense is caused in part by a party indemnified hereunder."

Rubino's Hold Harmless Agreement with NHBS provides that Rubino and any subcontractors used by him "indemnifies and holds harmless NHHCo and NHBS. . . from and against each and every claim, demand, or cause of action of any liability, injury, loss, cost, damage, expenses (including but not limited to reasonable attorney's fees, costs and disbursements incurred in defense of the indemnified parties together with the costs of enforcing this indemnification) which may be made or asserted by the Subcontractor's employees and/or agents, any other subcontractors' employees and/or agents, and/or third parties on account of any personal injury, damage, death, property damage caused by, arising out of, or in any way incidental to, or in connection with the Chatham at North Hills, N.Y. (the "Property")."

P&R Carpentry also agreed in a Hold Harmless/Indemnification Agreement to indemnify and hold North Hills Building Systems LLC. harmless for work performed under that contract "against all losses, claims, actions, demands, losses, damages, liabilities, or expenses including but not limited to attorney's fees and all other costs of defense, by reason of the liability imposed by law or otherwise" including "damages because of bodily injuries, including death, at any time resulting therefrom sustained by any person or persons, including Sub-Contractors' employees, or on account of damages to property, including loss of use thereof, arising directly or indirectly from the

performance of Sub-Contractor's work or from any acts or omissions on the part of the Sub-Contractor, its employees, agent representatives, material man, suppliers and/or Sub-Contractors.”

P&R Carpentry's contract with Rubino required P&R Carpentry to defend, indemnify and hold Rubino harmless “from and against any and all claims, damages, losses and expenses, including but not limited to court costs and attorneys fees, arising out of or resulting from performance of the Work, including but not limited to claims for personal injury, property damage, economic loss, violations of law, mechanic's liens or patent, trademark or copyright infringement, but only to the extent caused in whole or in part by the conduct, acts or omissions of, or breach of contract by, the subcontractor, anyone directly or indirectly employed by it or anyone for whose acts it may be liable. . .” And, P&R Carpentry's Hold Harmless/Indemnification Agreement with Rubino provided “to the fullest extent permitted by law, subcontractor shall indemnify, hold harmless and indemnify James D. Rubino, Inc. for which work is performed under this contract against all losses, claims, actions, demands, losses, damages, liabilities, or expenses including but not limited to attorneys fees and all other costs of defense, by reason of the liability imposed by law or otherwise upon indemnity James D. Rubino, Inc. for damages because of bodily injuries, including death, at any time resulting therefrom sustained by any person or persons, including said Sub-Contractors' employees, or on account of damages to property, including loss of use thereof, arising directly or indirectly from the performance of said Sub-Contractors' work or from any acts or omissions on the part of the Sub-Contractor, its employees, agents, representatives, material man, suppliers and/or Sub-Contractors.”

The complaint against North Hills Realty and Island North is dismissed pursuant to Limited Liability Company Law § 609(a) without opposition.

Plaintiff's negligence and Labor Law § 200 claim against NHHCo and NHBS are **dismissed**. As owner and general contractor, they cannot be held responsible for plaintiff's accident as they did not direct nor control the work being done. Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 (1993); Ross v Curtis Palmer Hydroelectric Co., 81 NY2d 494 (1993); Lombardi v Stout, 80 NY2d 290 (1992); see also, Dupkanicova v Vasiloff, 35 AD3d 650 (2nd Dept. 2006) ("[w]here the alleged defect or dangerous condition arises from the method or manner in which the worker performs her duties and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or Labor Law § 200"); DeBlase v Herbert Construction Company, Inc., 5 AD3d 624 (2nd Dept. 2004) ("the defendant general contractor made a *prima facie* showing of entitlement to summary judgment dismissing the causes of action alleging violations of Labor Law § 200 and common-law negligence by demonstrating that it did not exercise supervisory control over the injured plaintiff's work, and that it neither created nor had actual or constructive knowledge of the allegedly dangerous condition. . . ."). A general duty to supervise and/or coordinate the work and an ability to stop it to ensure compliance with safety requirements does not constitute the supervision and control over a work site that is necessary to support these claims. See, Singh v Black Diamonds, LLC, 24 AD3d 138 (1st Dept. 2005); DosSantos v STV Engineers, Inc., 8 AD3d 223 (2nd Dept. 2004), lv to app den. 4 NY3d 702 (2004).

A defendant seeking summary judgment on a claim for contractual indemnification must make a *prima facie* showing that it was not at fault for the accident. Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786, 795, n. 5 (1997), rearg den. 90 NY2d 1008 (1997), citing Hawthorne v Southern Community Corp., 78 NY2d 433 (1991) and Brown v Two Exchange Plaza, 76 NY2d 172 (1990); see also, Storms v Dominican College of Blauvelt, 308 AD2d 575, 577 (2nd

Dept. 2003). “A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.’ ” Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 (1987), quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 (1973); see also, Brown v Two Exchange Plaza Partners, supra. “[I]ndemnification is warranted where a defendant’s role in causing the plaintiff’s injury is solely passive, and thus its liability is purely vicarious.” Storms v Dominican College at Blauvelt, 308 AD2d 575, 577 (2nd Dept. 2003). Defendants NHHCo and NHBS are **granted** a defense and contractual indemnity from third-party defendant Rubino. Defendants NHHCo and NHBS are also **granted** a defense, contractual and conditional common law indemnity from fourth-party defendant P&R Carpentry. NHHCo and NHBS have established the contractual obligations in their favor as well as their freedom from fault. Santos v BRE/Swiss, LLC, 9 AD3d 303 (1st Dept. 2004); Turner v Sano-Rubin Construction Company, 6 AD3d 910 (3rd Dept. 2004); Walsh v Morse Diesel, Inc., 143 AD2d 653 (2nd Dept. 1988). And, under the circumstances, they have also established their entitlement to common law indemnity from P&R Carpentry.

NHHCo’s and NHBS’ negligence claim and Labor Law § 200 claims against third-party defendant Rubino are **dismissed**. Despite its contractual obligation to, *inter alia*, supervise the ongoing construction, there is simply not a scintilla of evidence that Rubino actually exercised any control over or had anything at all to do with P&R Carpentry and the plaintiff’s work, absent which there is no basis for a finding of negligence. See, Ross v Curtis-Palmer, supra. As Rubino aptly states, NHHCo and NHBS, as well as P&R Carpentry, have confused breach of contract claims with negligence.

Fourth-party plaintiff Rubino's application for contractual indemnification from P&R Carpentry is also *granted*. See also, Santos v BRE/Swiss, LLC, supra; Turner v Sano-Rubin Construction Company, supra; Walsh v Morse Diesel, Inc., supra. Contrary to P&R Carpentry's argument, there is not a scintilla of evidence that Rubino exercised any control whatsoever over its work or that it in any way contributed to plaintiff's accident. At worst, Rubino breached its contractual obligation with NHBS. As between Rubino and P&R Carpentry, pursuant to their contract, the pertinent obligations were exclusively and in actuality P&R Carpentry's. Rubino is entitled to contractual indemnification by P&R Carpentry. See, Brown v Two Exchange Plaza Partners, supra; Drzewinski v Atlantic Scaffold & Ladder Co., supra.

The remaining parties are directed to appear in Central Jury On October 11, 2007 for trial.

This constitutes the Decision and Order of the Court.

DATED: September 7, 2007
Mineola, NY

ENTER: 
HON. MICHELE M. WOODARD, J.S.C.

ENTERED
SEP 11 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE