

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
COUNTY OF WESTCHESTER,

Plaintiff,

-against-

UNITY MECHANICAL CORP., THE NETHERLANDS
INSURANCE COMPANY and EXCELSIOR
INSURANCE COMPANY,

Defendants.

-----X
WALKER, J.

DECISION & ORDER

Index No. 59897/2016

Seq. Nos. 13

The following papers were read on this motion sequence number 13, by the defendant, Unity Mechanical Corp. ("Unity"), for an order pursuant to CPLR 2221, granting reargument of its prior motion for summary judgment and its opposition to the plaintiff County of Westchester's (the "County") motion for summary judgment:

- Notice of Motion/Affirmation/Exhibits A-K
- Memorandum of Law in Support
- Affirmation in Opposition
- Memorandum of Law in Opposition
- Memorandum of Law in Reply/Exhibits A-B

Upon the foregoing papers, these motions are decided as follows:

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, the County, commenced this action on July 19, 2016 predicated on the defendant Unity's alleged breach of its contractual obligation to provide for the defense and indemnification of the County for tort claims occurring as a result of Unity's performance of boiler maintenance for the County¹. According to the County's complaint, on May 30, 2013, Joseph Gragnaniello ("Gragnaniello"), one of Unity's employees, fell from a ladder while performing HVAC maintenance work for the County at the Westchester County Courthouse, sustaining injuries. The Contract between Unity, the HVAC maintenance contractor engaged by the County, and the County required Unity to defend and indemnify the County from all claims arising out of Unity's performance of the contract and to

¹A more detailed recitation of the facts and background may be found in this Court's prior Decision and Order, dated May5, 2020.

maintain certain specified insurance identifying the County as an additional insured. The underlying action *Joseph Gragnaniello v County of Westchester, et ano.* was commenced on or about January 29, 2014 under Index No. 50912/2014. In the underlying action, the County was found liable under New York State Labor Law § 240 for the injuries claimed by Gragnaniello. The County settled this underlying action for \$2,875,000.00. The County alleges in its complaint that Unity refused and/or failed to provide for the defense and indemnification of the County and/or failed to otherwise provide effective insurance coverage in accordance with its contractual obligations to the County in the underlying action. The County filed an amended verified complaint on May 31, 2017.

The County, Unity and Netherlands Insurance Company ("Netherlands") all filed motions for summary judgment. The Court decided the motions, granting the County summary judgment on its fourth and fifth causes of action against Netherlands, determining and declaring that it breached its duty to defend and indemnify the County in the underlying action; granting the County summary judgment against Unity, determining and declaring that Unity breached its obligation to defend and indemnify the County for the underlying action; denying the Netherlands'² and Unity's motions for summary judgment to dismiss the amended verified complaint. The Court found that there were issues of fact as to whether the underlying settlement amount was reasonable and referred the matter for a trial.

Unity now files the instant motion to reargue its prior motion for summary judgment and its opposition to the County's motion for summary judgment, on the grounds that: 1) this Court misapprehended that as a private, non-insurance entity, Unity's duty to defend the County in an underlying lawsuit was no broader than Unity's duty to indemnify; 2) this Court failed to address whether the County's negligence in permitting a deficient ladder to be left in the boiler room for anyone to use constituted negligence which would preclude contractual indemnification to the County by non-insurer Unity; and 3) this Court failed to address whether the County's spoliation of evidence by disposing of the ladder that the County permitted to be left in its boiler room merits a sanction against the County and, upon reargument, deny the County's motion for summary judgment against Unity on the grounds that the issues of whether Unity breached its obligation to defend the County, and the County's comparative negligence in furnishing a defective ladder, are issues to be determined upon the trial of this matter, and granting Unity's motion for summary judgment dismissing the complaint on the grounds that Unity has been deprived of vital evidence by virtue of the County's spoliation of the ladder at issue herein, together with such other relief as the Court deems just and proper and the costs, disbursements and attorney's fees of the motion.

In opposition, Unity argues that the Court did not misapply the law or overlook any relevant fact and properly addressed the issues. Unity's attorney asserts that the Court's Decision recited the factual allegations contained in the complaint and detailed each argument proffered by Unity in the underlying motion, which were that; (i)the County was

²The County and Netherlands entered into a Stipulation resolving their dispute.

negligent and otherwise breached the covenant of good faith and fair dealing with Unity, in that, the County did not establish its rights to defense and indemnification under Netherlands' policy, (ii) the County provided a ladder to the underlying plaintiff which was not sufficient for the task, (iii) the County assumed the obligation to defend and indemnify the Dormitory Authority of the State of New York in violation of Netherlands' policy, (iv) the County settled the underlying suit for an exorbitant amount, and (v) the county destroyed the ladder and deprived Unity of establishing a defense that the County furnished the underlying plaintiff with a defective ladder (Unity's Memo of Law pg 2-3). Unity's attorney argues that the Court then carefully reviewed the evidence and found that the defendants did not make a prima facie showing to warrant summary judgment in their favor and conversely, the County made a prima facie showing to warrant summary judgment in its favor, determining that the defendants had not raised a triable issue of fact.

The County argues that Unity's contractual obligations to the County are clear and unequivocal and that Unity is required to defend the County for all claims demands or causes of action directly or indirectly arising out of the contract. The County further argues that Unity is required to indemnify and hold harmless the County from all liability, damage, claims, demands, costs, judgments, fees, attorneys' fees or loss arising directly or indirectly out of the performance or failure to perform under the contract and that Gragnaniello's claim against the County fell within the scope of the contract's indemnification provision because his injuries were sustained while he was working for Unity in performing under the contract with the County.

The County also argues against Unity's assertion that it negligently furnished Gragnaniello with an inadequate ladder. The County asserts that Unity fails to offer any evidence that the County had prior notice that the ladder was dangerous or defective at the time Gragnaniello decided to use it. The County contends that the Court determined that no issue of fact was raised as to the County's alleged comparative negligence. The County contends that all of the evidence establishes that it did not own the ladder and there is no evidence to suggest that the County was aware that the ladder was on the premises for Gragnaniello to use.

With regard to Unity's spoliation argument, the County argues that Unity offers no evidence that the ladder was destroyed. The County also argues that Unity effectively waived its right to inspect the ladder when it ignored its contractual obligations and failed to defend the County in the underlying action. Further, Unity waited three years after this action had commenced to request inspection of the ladder and its request for additional discovery was denied. The County also states that spoliation sanctions are inappropriate where there is no prejudice and there are photographs, reports, testimony, and other available information from which the party can adequately prepare for trial. The County additionally argues that the condition of the ladder six years after Gragnaniello fell, has no bearing on the condition of the ladder before he fell and there is no evidence that the County knew that the ladder was on the premises for Gragnaniello to use or that it was dangerous.

In reply, Unity's attorney argues that the County's attorney fails to cite where the Court dealt with the issues raised in its motion. The attorney reiterates that the Court made no distinction between the insurance defendant and Unity or the differing burdens which were applicable to each. Unity further asserts that the County's negligence in leaving a defective/inadequate ladder on the premises, for all to use, constitutes negligence. Regarding the spoliation argument, Unity contends that the dates of the demands for inspection do not taint its argument, since the obligation to preserve evidence arises once a party reasonably anticipates litigation.

ANALYSIS

A motion for reargument must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion," (CPLR 2221[d][2]). Such motions are addressed to the sound discretion of the Supreme Court, (see *Deutsche Bank Nat. Trust Co. v Ramirez*, 117 AD3d 674 [2d Dept 2014]). A motion for leave to reargue is thus not one which provides an unsuccessful party with successive opportunities to reargue the very questions previously decided; nor is it one that provides a platform for the presentation of arguments different from those already presented; or the taking of a position inconsistent from that assumed initially, (see *V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2d Dept 2010]; *Woody's Lumber Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590 [2d Dept 2006]; *Williams v Board of Educ. of City School Dist. of New York City*, 24 AD3d 458 [2d Dept 2005]; *Simon v Mehryari*, 16 AD3d 543 [2d Dept 2005]).

Upon a review of the arguments made on the motion to reargue, the Court now grants reargument and upon such reargument, sustains its prior determination, granting the County summary judgment.

"The right to contractual indemnification depends upon the specific language of the contract" (*George v Marshalls of MA, Inc.*, 61 AD#D 925, 930 [2d Dept 2009]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*Id.*). Further, since Unity is not an insurer, its duty to defend is no broader than its duty to indemnify (*Id.* @ 931).

Here, the contract provides in relevant part that:

The contractor agrees:

a. That except for the amount, if any, of damage contributed to, caused by or resulting from the negligence of the County, the Contractor agrees to indemnify and hold harmless the County of Westchester, its officers, employees and agents from and against any and all liability, damage, claims, demands, costs, judgments, fees, attorneys' fees or loss arising directly or indirectly out of the performance or failure to perform hereunder by the

Contractor or third parties under the direction or control of the Contractor;
and

b. to provide defense for and defend, at its sole expense, any and all claims, demands or causes of action directly or indirectly arising out of the Agreement and to bear all other costs and expenses related thereto.

Therefore, under the contract, the County is entitled to indemnification from Unity. “However, a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Cava Const. Co., Inc., v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]). In the underlying action, this Court found that the County violated Labor Law § 240(1). Nevertheless, “[a] violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence” (*Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 179 [1990]). Thus, the Court did not find the County negligent in the underlying matter. To the extent that Unity now seeks a finding of negligence against the County, the Court must determine if there are issues of fact with regard to common law negligence or Labor Law § 200, which is the codification of the common law duty of property owners and general contractors to provide workers with a safe place to work (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). “Liability under the statute is governed by common-law negligence principles” and “[l]adders fall within the scope of the protection afforded by the statute” (*Id.*).

“[W]hen a property owner lends its own equipment to a worker, which then causes injury, the legal standard that governs claims under Labor Law § 200 is whether the owner created the dangerous or defective condition or had actual or constructive notice...” (*Chowdhury v Rodriguez*, 57 AD3d 121, 123 [2d Dept 2008]).

“Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed.” (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

“Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident.” (*Id.*). “By contrast, when the manner of work is at issue, “no liability will attach to the owner solely because [it] may have had notice of the allegedly unsafe manner in which work was performed” (*Id.*). It has to be “shown that the party to be charged had the authority to supervise or control the performance of the work” (*Id.*). “A defendant has the authority to supervise or control the work for the purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed” (*Id.*).

In this case, the accident involved a ladder, allegedly left at the premises and allegedly defective, making an argument for the applicability of either the “supervisory authority” standard or the “defect creation/actual or constructive notice” standard (*Chowdhury v Rodriguez*, 57 AD3d 121, 129). The Appellate Division has held in *Ortega*

v Puccia, 57 AD3d 54, ‘that the “supervisory authority” standard governs defendants’ liability for worksite injuries under Labor Law § 200, where the dangerous or defective equipment is provided by the plaintiff’s employer rather than by the property owner’ (*Id.*). Unity has asserted that the County, not Unity, provided its worker with the ladder. However, although the ladder was found on the County’s property, the testimony and evidence established that the alleged defect was unbeknownst to the County, which showed that it did not create the condition, nor did it have actual or constructive notice of it. It established its prima facie entitlement to judgment as a matter of law in regard to any negligence and Labor Law § 200 claims by testimony and affidavits averring that it did not supply any equipment to Gragnaniello or Unity, including the ladder from which Gragnaniello fell. The County also provided evidence that its policy was to chain all of its equipment, so that it could not be used by contractors. Furthermore, the contract between the County and Unity stated that Unity was to provide its workers with all equipment necessary to perform the job. In opposition, Unity did not provide any evidence to show that the County provided Gragnaniello with the ladder, thereby, not creating any issues of material fact.

With regard to Unity’s spoliation claim, such is also denied. A party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that ‘a litigant, intentionally or negligently, dispose[d] of crucial items of evidence ... before the adversary ha[d] an opportunity to inspect them’, thus depriving the party seeking a sanction of the means of proving his claim or defense. The gravamen of this burden is a showing of prejudice (*Kirschen v Marino*, 16 AD3d 555, 555-556 (2d Dept 2005), quoting *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]) (other citations omitted).

“Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party of the ability to prove its claim, the responsible party may be sanctioned by the striking of its pleading” (*Gotto v Eusebe-Carter*, 69 AD3d 566, 567 [2d Dept 2010]). “However, a less severe sanction [or no sanction] is appropriate where the absence of the missing evidence does not deprive the moving party of the ability to establish his or her case” (*Id.*); see also *Denoyelles v Gallagher*, 40 AD3d 1027 [2d Dept 2007]).

Where spoliation occurs, the decision to impose sanctions on the guilty party lies within the sound discretion of the trial court; discretion predicated upon the two-fold considerations of whether the sanctions are warranted, in the first instance, and if so the degree or the severity, (*Dennis v City of New York*, 18 AD3d 599 [2d Dept 2005]; *Barahona v Trustees of Columbia University in the City of New York*, 16 AD3d 445 [2d Dept 2005]; *Allstate Ins. Co. v. Kearns*, 309 AD2d 776, 765 [2d Dept 2003]). “The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party” (*Samaroo v Bogopa Service Corp.*, 106 AD3d 713, 714 [2d Dept 2013]).

The striking of a party’s pleading is a drastic remedy and should be used sparingly and only in the most severe cases. Thus, in order to warrant the imposition of such a drastic sanction, the destroyed evidence must have been so essential to the movant’s case that the party is irreparably prejudiced, that their cause of action or defense is “fatally

compromised" and [that] such party is "prejudicially bereft of appropriate means of presenting [or confronting] a claim with incisive evidence" (*DiMonenico, supra @ 53*; see also, *Canaan v Costco Wholesale Membership, Inc.*, 49 AD3d 583 [2d Dept 2008]).

In this case, Unity seeks dismissal of the action against it or at a minimum, an adverse inference as to the condition of the ladder. However, there was no evidence and Unity failed to establish that the alleged spoliation was willful, contumacious or in bad faith or that the conduct deprives it of proving its case. Unity has not shown that the missing ladder is so essential to its case that it is irreparably prejudiced, that its defense is fatally compromised or that it is prejudicially deprived of appropriate means of presenting its claim. Unity has failed to establish that the unavailability of the subject ladder leaves it prejudicially bereft of the ability to present its defense.

Further, Unity has "never demonstrated that the [County was] responsible for discarding the ladder, or that the spoliation of the ladder left [it] without the means to prove [its] case" (*Ashford v Tannenhauser*, 108 AD3d 735 [2d Dept 2013]). In addition, Unity first asserted its spoliation claim in 2019, more than three years after the County commenced the action and the Court declined to extend discovery for Unity to establish that the ladder had been destroyed. Therefore, it is this Court's determination that preclusion or an adverse inference is not warranted.

Therefore, upon reargument, the Court still finds that the County has made a *prima facie* showing that summary judgment in its favor is warranted against Unity and in opposition, Unity has failed to come forward to raise a triable issue of fact as to whether the County was entitled to a defense and to be indemnified under the policy.

All other arguments raised and evidence submitted by the parties has been considered by this Court notwithstanding the specific absence of reference thereto.

Accordingly, based on the foregoing it is,

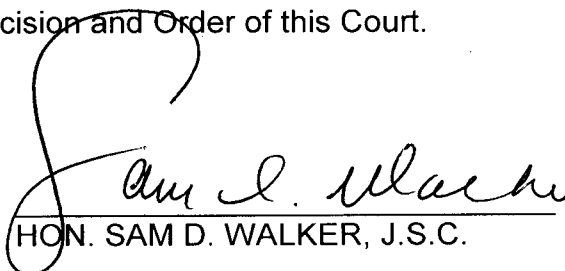
ORDERED that leave to reargue is granted, but upon reargument, the Court's prior Decision and Order dated May 5, 2020, is sustained and motion sequence number 13, filed by the defendant Unity Mechanical Corp., is denied and it is further.

ORDERED that plaintiff shall serve a copy of this Decision and Order, with notice of entry, upon all other parties within five (5) days of entry.

The parties are directed to appear in the Settlement Conference Part on a date and time to be determined.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
December 31, 2020


HON. SAM D. WALKER, J.S.C.

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