Supreme Court of the State of New York
Appellate Division, First Judicial Department

Webber, J.P., Mendez, Gesmer, Rodriguez, Hagler, JJ.

6840

JOSE MANUEL JUAREZ,
Plaintiff-Respondent,

-against-

AVACON MANAGEMENT LLC doing business as AVACON BUILDERS DEVELOPERS,
Defendant-Appellant,

PRIMEWORK CONSTRUCTION CORP., et al.,
Defendants.

Index No. 160728/17
Case No. 2024-07693

AVACON MANAGEMENT LLC doing business as AVACON BUILDERS DEVELOPERS,
Third-Party Plaintiff-Appellant,

-against-

SKITTLES SERVICES CORP.,
Third-Party Defendant-Respondent.

Kiernan Trebach LLP, New York (Peter Ghattas of the Bar of the Commonwealth of Massachusetts, admitted pro hac vice, of counsel), for appellant.

Brody Law Group, PLLC, New York (Kristine M. Taylor of counsel), for Skittles Services Corp., respondent.

Order, Supreme Court, New York County (Lyle E. Frank, J.), entered November 21, 2024, which, to the extent appealed from as limited by the briefs, granted third-party defendant Skittles Services Corp.'s motion for summary judgment dismissing the third-party complaint and denied defendant/third-party plaintiff Avacon Management LLC's

cross-motion for summary judgment on its third-party claims against Skittles, affirmed, without costs.

Plaintiff was injured in the course of his employment with third-party defendant Skittles when he fell from a scaffold while demolishing bricks from beams in the ceiling of the first floor of a construction project. As relevant to this appeal, plaintiff commenced this action against the owner of the premises 45 John LLC and against the general contractor Avacon. Avacon commenced a third-party action against Skittles for contractual indemnity and breach of contract for failure to procure insurance. 45 John filed a cross claim against Skittles for contractual indemnity.

Avacon's owner (John Andiocoecheea) and Skittles's manager (Isaias Barrera Perez) orally negotiated the terms for Skittles's work at the premises. However, their oral agreement and the specifics of the scope of Skittles's work were never reduced to writing.

The parties later entered into a written "Subcontract Agreement Rider" which indicates that Skittles would indemnify Avacon for injuries "arising out of or resulting from the Work covered by" the Avacon and Skittles oral agreement. The rider also indicated that Skittles would maintain commercial general liability insurance.

Deposition testimony revealed that the parties to the oral agreement did not define the scope of the work Skittles was hired to perform at the premises. Andiocoecheea testified that Skittles was hired to perform mostly general labor – cleanup of the job site, touch up paint, minor demolition such as removing a piece of sheetrock, or patching a hole - throughout all floors of the premises, but that the scope of their work was "never defined." He further testified that there was no written contract because the scope of the work was not defined, and the scope of the work would not be

defined "[b]ecause the client did not know what they were going to be designing until the building started to get cleaned up and they could assess the damages to the building . . . .The scope [of the] is undefined until [almost] the very end of the project." Andiocoecheea testified that he did not know what plaintiff was doing or attempting to do at the time of the accident and did not say whether the injury-producing work was within Skittles's scope of work.

Barrera testified that based on his conversation with Andiocoecheea about Skittles's work, it was limited to the second floor and above, and included painting, compounding, and cleaning, as well as repairing or removing small pieces of damaged sheetrock, which was the same type of work Skittles had done for Avacon at other sites. According to Barrera, cleaning meant taking out the garbage and debris, sweeping and maintaining the area clean, while compounding, which is the same as taping, meant placing compound and then sanding it. According to Barerra, Skittles removed damaged sheetrock but did not expose any bricks. Moreover, Skittles employees were prohibited from doing demolition work because Skittles did not have a demolition license, and no one from Avacon ever asked Barrera to have Skittles employees do demolition work. Barrera further testified that he would not have allowed plaintiff to perform demolition work and denied that the injury-producing work was work Skittles was retained to perform.

In a prior motion, 45 John moved for summary judgment against Skittles on the contractual indemnity claim. Supreme Court denied the motion, finding a question of fact as to whether plaintiff was injured within the scope of the work pursuant to the Skittles and Avacon agreement.

Thereafter, Skittles moved for summary judgment. It argued that the rider was

not valid because it was not supported by consideration, and since there was no defined scope of its work for the project, it would be impossible to determine whether it owed Avacon indemnification pursuant to the terms of the rider. It also argued that it procured and maintained the required insurance for the benefit of Avacon.

Avacon cross-moved for summary judgment against Skittles on its contractual indemnity and breach of contract claims. It argued that law of the case precluded Skittles from arguing that there was no enforceable contract between the parties and that Skittles failed to procure the required insurance.

Supreme Court granted Skittles's motion, denied Avacon's cross-motion, and dismissed the third-party complaint. The court found that since the material terms of the indemnification provision, specifically the scope of work, were not defined nor understood by the parties in the oral agreement, there was no meeting of the minds so as to give the indemnity provision any meaning. The court found that since the unmistakable intent to indemnify Avacon for the work plaintiff was engaged in at the time of the accident was lacking, Skittles was entitled to judgment as a matter of law.

Supreme Court correctly determined that the law of the case doctrine does not bar Skittles from arguing that there was no enforceable contract between it and Avacon, as Skittles is not seeking to relitigate an issue of law that was previously determined at an earlier stage of the proceeding (*see Aspen Specialty Ins. Co. v RLI Ins. Co., Inc.*, 194 AD3d 206, 212 [1st Dept 2021]). In resolving 45 John's prior motion for summary judgment on its own indemnification claims against Skittles, the validity of the rider was not at issue and was neither briefed nor relevant to the determination of the 45 John summary judgment motion.

Nor is Skittles judicially estopped from arguing that there is no enforceable

contract between the parties. This is not a purely legal argument and was waived due to Avacon's failure to raise it below (*see U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 146 AD3d 603, 603 [1st Dept 2017]). Were we to consider the argument, we would find it unavailing because Skittles never took the definitive position that it had a valid and enforceable contract with Avacon (*cf. Becerril v City of N.Y. Dept. of Health & Mental Hygiene*, 110 AD3d 517, 519 [1st Dept 2013], *lv denied* 23 NY3d 905 [2014]).

Supreme Court properly determined that the rider's indemnification provision was unenforceable. There is no right to contractual indemnification without a clear and unambiguous right to such indemnification specifically set forth in a contract (*see Hooper Assoc. v AGS Computers,* 74 NY2d 487, 491 [1989]). The intention to indemnify must be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances (*see Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987]; *Kozeli v Renali Realty, LLC*, 243 AD3d 412, 414 [1st Dept 2025]).

Here, the parties never reached a meeting of the minds as to the project's scope of work (*see Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]). "A court will not find a duty to indemnify unless a contract manifests a clear and unmistakable intent to indemnify for particular liabilities" (*Millenium Holdings LLC v Glidden Co.*, 146 AD3d 539, 545 [1st Dept 2017] [internal quotation marks omitted]), contemplated within the scope of the indemnitor's work (*see Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153-154 [1973]; *Dibrino v Rockefeller Ctr. N., Inc.,* 230 AD3d 127, 136 [1st Dept 2024], *affd* -NY3d- , 2025 NY Slip Op 07077 [2025]; *cf. Tanksley v LCO Bldg. LLC*, 196 AD3d 1037, 1038 [4th Dept 2021]).

The project's scope of work was a material term in the parties' agreement because the rider's indemnification provision expressly stated that Skittles would indemnify and

hold Avacon harmless "against all liability or claimed liability for bodily injury or death to any person(s) . . . arising out of or resulting from the Work covered by this Contract Agreement." The fact that the applicability of the indemnification provision turns on whether the work was contemplated by the parties' overarching contract "emphasizes the materiality" of the project's scope of work (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 590 [1999] ["[D]efiniteness as to material matters is of the very essence of contract law. Impenetrable vagueness and uncertainty will not do"]).

Moreover, Supreme Court correctly determined that the scope of work was undefined based on the testimony of Andiocoecheea and Barrera. Andiocoecheea testified that no document outlined the project's scope of work, which was undefined and intended to remain so until the very end of the project, and the record does not indicate that the scope of work was ever defined. Barrera, meanwhile, described the nature of Skittles's work on the project but did not testify that the parties agreed to a scope of work for the project as part of their oral agreement. Accordingly, the vagueness in the oral agreement's scope of work is evidence that the rider did not manifest a clear and unmistakable intent to indemnify Avacon for particular liabilities (*see Millenium Holdings LLC*, 146 AD3d at 545).

Finally, Avacon has abandoned its argument that Skittles breached the rider's insurance procurement requirements by failing to address it in its brief (*see People v DiTommaso*, 127 AD3d 11, 21-22 [1st Dept 2015], *lv denied* 25 NY3d 1162 [2015]). In any event, the record reflects that Skittles maintained the insurance required by the rider, and its insurance carrier's purported refusal to indemnify Avacon as an additional insured does not constitute a breach of contract by Skittles, the named insured (*see*

Grala v Structural Preserv. Sys., LLC, 242 AD3d 1181, 1184-1185 [2d Dept 2025], *appeal & lv dismissed* 45 NY3d 958 [2026]).

We have considered Avacon's remaining arguments and find them unavailing.

All concur except Rodriguez J., who dissents in part in a memorandum as follows:

RODRIGUEZ, J. (dissenting in part)

Both Avacon Management LLC and Skittles Services Corp.'s motions should have been denied to the extent they sought summary judgment on Avacon's third-party claim for contractual indemnification from Skittles (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] ["On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party"] [internal quotation marks omitted]). Accordingly, I dissent in part.

The record demonstrates that Avacon's subcontractor Skittles provided general labor work under the parties' oral agreement without incident for more than a year before plaintiff's injury (*see Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 401 [1977]). Although Avacon and Skittles dispute the precise scope of work for the project as it pertains to plaintiff's accident, their long period of stable operation under the agreement—as well as the voluminous evidence of Skittles's work logs and Avacon's payments during the pre-accident term—makes plain that the scope of work was adequately defined for "the objectives they were striving to attain" (*id.* at 400; *see Kolchins v Evolutions Mkts., Inc.*, 31 NY3d 100, 106 [2018], citing *Brown Bros.* at 399-400). Consequently, Skittles's argument that there is no enforceable agreement is unpersuasive, as "the terms of a contract do not need to be fixed with absolute certainty to give rise to an enforceable agreement" (*Kolchins*, 31 NY3d at 107 [internal brackets and quotation marks omitted]; *see Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991] ["Striking down a contract as indefinite and in essence meaningless is at best a last resort"] [internal quotation marks omitted]).

Although Avacon and Skittles's oral agreement and rider are enforceable, the record prevents summary determination of whether plaintiff's accident is covered by the

oral agreement's scope of work and, by extension, the rider's indemnification provision. The rider's indemnification provision expressly stated that Skittles would indemnify and hold Avacon harmless "against all liability or claimed liability for bodily injury or death to any person(s) . . . arising out of or resulting from the Work covered by this Contract Agreement." Indemnification thus arises from no mere implication (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417 [2006] [a promise of contractual indemnity " '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' "], quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]), but rather from an expressly articulated promise. Under the circumstances, including the rider's reference to property owner 45 John NY LLC as a required additional insured for this specific project, the indemnification provision established the parties' intentions with the requisite clarity.

Nevertheless, an issue of fact warrants denial of summary judgment to both parties as to contractual indemnification from Skittles. With respect to the oral agreement's scope of work, Skittles's manager Isaias Barrera Perez testified that Skittles and Avacon agreed that Skittles would perform any work assigned by Avacon on a day-to-day basis. However, Barrera further stated that Skittles's work would not include demolition and would instead be limited to "cleaning, painting, and compound." Avacon's principal John Andiocoecheea testified that the project was a "design-build," meaning contractors' tasks were developed and assigned concurrent with the work's progression. According to Andiocoecheea, Skittles was contracted to perform general labor work, including cleaning, demolition, patching, and painting. Plaintiff, for his part, described the work at the time of his accident as "cleaning the beams," which involved

using an "electrical hammer" to "break the block and the beam would be uncovered." Whether plaintiff's activity at the time of the accident was covered by the parties' oral agreement and the rider's indemnification provision should therefore be resolved by the factfinder (*see Four Seasons Hotels v Vinnik*, 127 AD2d 310, 316-318 [1st Dept 1987] ["the fact finder should not put disproportionate emphasis on any single act, phrase or other expression but, instead, on the totality of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain"], citing *Brown Bros.*, 41 NY2d at 399-400; *see also Kozeli v Renali Realty, LLC*, 243 AD3d 412, 414 [1st Dept 2025]).

The majority's conclusion that the rider's indemnification provision was invalid due to scope of work indefiniteness strongly suggests that the parties' oral agreement for performance of the work was invalid as well. These conclusions are unsupported by the record and the applicable law.

It is well settled that "[d]etermination as to the existence of a contractual agreement and its terms depends, not upon the subjective intent of either of the parties, but rather upon 'the objective manifestations of the intent of the parties as gathered by their expressed words and deeds' " (*P.J. Carlin Constr. Co. v Whiffen Elec. Co.*, 66 AD2d 684, 684 [1st Dept 1978] [internal citations omitted], *appeal dismissed* 46 NY2d 1075 [1979], quoting *Brown Bros.*, 41 NY2d at 399; *see Wu v Uber Tech., Inc.*, 43 NY3d 288, 299 [2024] ["It is therefore most precise to say, as we repeatedly have, that a binding contract requires an objective manifestation of mutual assent, through either words or conduct, to the essential terms comprising the agreement" (internal quotation marks omitted)]). By operating under the oral agreement for more than a year, objective criteria—the parties' deeds—demonstrated that the agreement was adequately definite,

as was the indemnification provision (*see Wu*, 43 NY3d at 298-299).

Contrary to the majority's implicit reasoning, it is not dispositive that Andiocoecheea testified that the scope of work was "never defined." Significantly, Barrera acknowledged a minimum scope of work including cleaning, painting, and compound work. Thus, there can be little dispute that had plaintiff been injured while painting, for example, the accident would have been covered. Put differently, the simple fact that plaintiff's activity tests the boundaries of the scope of work does not invalidate an otherwise enforceable agreement (*see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 590 [1999] [" 'at some point virtually every agreement can be said to have a degree of indefiniteness' "], quoting *Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989]). In any event, on this record the parties' testimony regarding their subjective intent is less probative than their conduct (*see Brown Bros.*, 41 NY2d at 399-400).

Considering the above, the dispute as to whether plaintiff's "cleaning" or "demolition" activity was work covered by the parties' agreements cannot be resolved as a matter of law (*see Millenium Holdings LLC v Glidden Co.*, 146 AD3d 539, 545-546 [1st Dept 2017] [summary judgment denied as to contractual indemnification-related issues for consideration of relevant "provisions in light of the extrinsic evidence"]; *Kramer v Greene*, 142 AD3d 438, 440 [1st Dept 2016] ["where questions of fact and credibility

exist with respect to . . . the terms" of an oral agreement, "summary judgment in favor of either side is inappropriate"]; *Focus on Sports v Newsweek Inc.*, 158 AD2d 351, 352 [1st Dept 1990]).

I therefore dissent in part.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: September 22, 2026



Susanna Molina Rojas
Clerk of the Court