

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D25338  
O/cb

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Argued - November 13, 2009

JOSEPH COVELLO, J.P.  
FRED T. SANTUCCI  
CHERYL E. CHAMBERS  
L. PRISCILLA HALL, JJ.

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2008-05364

DECISION & ORDER

Mark Goodleaf, plaintiff-respondent, v Tzivos Hashem, Inc., defendant third-party plaintiff-appellant, H & H Builders, Inc., defendant-respondent; Arnold Steel Company, third-party defendant-respondent, et al., third-party defendant.  
(and a second third-party action)

(Index No. 32625/02)

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Zaklukiewicz & Puzo & Morrissey, LLP, Islip Terrace, N.Y. (Joseph M. Puzo of counsel), for defendant third-party plaintiff-appellant.

Epstein Harms & McDonald, New York, N.Y. (Kenneth E. Pinczower of counsel), for defendant-respondent.

Harrington, Ocko & Monk, LLP, White Plains, N.Y. (I. Paul Howansky of counsel), for third-party defendant-respondent.

In an action to recover damages for personal injuries, the defendant third-party plaintiff, Tzivos Hashem, Inc., appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Starkey, J.), dated April 14, 2008, as granted the motion of the third-party defendant Arnold Steel Company for summary judgment dismissing the third-party complaint insofar as asserted against it, denied that branch of its cross motion which was for leave to amend its third-party complaint to add a cause of action for contractual indemnification against Arnold Steel Company, and, in effect, granted that branch of the motion of the defendant H&H Builders, Inc.,

December 8, 2009

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which was for leave to amend its answer to assert a cross claim to recover damages for breach of contract against it.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs.

The Supreme Court properly granted the motion of the third-party defendant Arnold Steel Company (hereinafter Arnold) for summary judgment dismissing the third-party complaint insofar as asserted against it. In response to Arnold's prime facie showing that the plaintiff did not sustain a "grave injury" as defined by Workers' Compensation Law § 11, the appellant failed to raise a triable issue of fact (*see Rubeis v Aqua Club, Inc.*, 3 NY3d 408; *DePaola v Albany Med. Coll.*, 40 AD3d 678; *O'Berg v MacManus Group, Inc.*, 33 AD3d 599; *Fitzpatrick v Chase Manhattan Bank*, 285 AD2d 487, 487-488; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

The Supreme Court providently exercised its discretion in denying that branch of the appellant's cross motion which was for leave to amend the third-party complaint to add a cause of action for contractual indemnification against Arnold, since the proposed amendment was patently devoid of merit (*see Mackenzie v Croce*, 54 AD3d 825, 826; *Lucido v Mancuso*, 49 AD3d 220, 222).

The appellant's remaining contentions are not properly before this Court.

COVELLO, J.P., SANTUCCI, CHAMBERS and HALL, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court