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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ROSALYN RICHTER Justice

PART 24

DeBellis PSP

- v -

NY U. Hosp

INDEX NO. 106644-2000

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

SCANNED JAN 22 2004

FILED JAN 23 2004 COUNTY CLERK'S OFFICE NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

* PARTIES ARE DIRECTED TO APPEAR FOR A CONFERENCE IN PART 24, ROOM 418 ON 2/4/04 AT 3:00 P.M.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 1/21/04

Roalyn Richter

HON. ROSALYN RICHTER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

PAUL DEBELLLIS and PATRICIA DEBELLIS,

Plaintiffs,

-against-

NYU HOSPITALS CENTER.

Defendants,

Index No. 100641/00
Decision & Order
Sequence Numbers 2 and 3

N W HOSPITALS CENTER,

Third-party Plaintiff,

-against-

CHARLES CALDERONE ASSOCIATES, INC.,

Third-party Defendant.

Index No. 590878101

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NYU HOSPITALS CENTER,

Second Third-party Plaintiff,

-against-

PERKINS & WILL PARTNERSHIP, JOSEPH LORING ASSOCIATES, INC., THE OFFICES OF IRWIN CANTOR, TISHMAN REALTY & CONSTRUCTION,

Second Third-party Defendants.

Index No. 590623102

NYU HOSPITALS CENTER,

Third Third-party Plaintiff,

-against-

OTIS ELEVATOR COMPANY,

Third Third-party Defendant.

Index No. 2590648103

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NYU HOSPITALS CENTER,

Fourth Third-party Plaintiff, Index No. 590871103

-against-

ROCKEFELLER CENTER, WC.,

Fourth Third-party Defendant

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Justice Rosalyn Richter:

The present action was commenced by plaintiff Paul Debellis ("Debellis"), and his wife Paula Debellis derivatively, for injuries he allegedly suffered on January 6, 2000 while employed for Otis Elevator Company ("Otis") as part of a team assigned to conduct a five year test of an elevator car at 550 First Avenue in Manhattan. The plaintiff alleges that he was working in the elevator shaft when a section of the catwalk contained in an elevator hoistway gave way and fell, causing the plaintiff to fall into the pit floor below. The plaintiff alleges a number of injuries, including ankle and heel fractures in his left leg, a fracture of his heel on his right foot, a left shoulder sprain and strain, a hemia and posttraumatic stress disorder/depression

Otis brings this CPLR § 3211 motion in lieu of an answer dismissing NYU Hospitals Center's ("NYU") third third-party complaint against it for contribution and for common law indemnification.[1] Otis argues that Worker's Compensation Law § 11 bars NYU's third-party claims against it for contribution and common law indemnification because the plaintiffs injuries do not rise to the level of "grave injuries."

Otis also moves for an order dismissing the cross-claims of second third-party defendant, Tishman Realty & Conshuction ("Tishman") against it which alleges (1) breach of contract for failure to procure

[1]NYU initially asserted four causes of action, and has since dropped its claims for contractual indemnification and failure to procure insurance for NYU.

insurance and defend; (2) contractual indemnification; (3) common law indemnification; and (4) contribution. Otis seeks dismissal of Tishman's cross-claims against it for common law indemnification and contribution on the grounds that the claims are barred by § 11 since the plaintiff did not sustain grave injuries as defined under the statute. Otis seeks dismissal of Tishman's cross-claims for failure to procure insurance and contractual indemnification pursuant to CPLR § 3211(a)(7), arguing that the underlying service contract between Otis and NYU did not require Otis to procure and maintain insurance on behalf of Tishman. Alternatively, Otis seeks to dismiss and/or sever Tishman's cross claims.

The plaintiff cross-moves to sever the second third-party action, third third-party action and fourth third-party action on the grounds that there are numerous outstanding depositions. Third-party defendant Joseph R. Loring Associates, Inc., s/h/a Joseph Loring Associates submits its affirmation in support of the plaintiffs cross motion on the grounds that significant discovery remains outstanding in these actions. None of the other parties have responded to the severance motion.

The Court has already converted both of Otis' motions to dismiss pursuant to CPLR § 3211 into motions for summary judgment, and has provided adequate notice to the parties as set forth in $3211(c). **A** proponent of a motion for summary judgment seeking dismissal on the grounds that the plaintiff did not sustain a grave injury has the burden to make a prima facie showing of entitlement to judgment as a matter of law. *Fitzputrick v. Chase Manhattan Bank*, 285 A.D.2d 487 (2d Dept. 2001); *Castro v. United Container Much. **Group,*** 273 A.D.2d 337 (2d Dept. 2000). After the movant has satisfied their initial burden, the opposing party must raise a triable issue of fact through competent medical evidence to support its claim of grave injury and defeat summary judgment.

Section 11, as amended in 1996, precludes third-party actions for contribution and common law indemnification against an employer of an injured worker unless there is evidence of a "grave injury," which is narrowly defined to be only those injuries stated in the list provided in the statute. *See Meis v.*

ELO Organization *L.L.C.*, 97 N.Y.2d 714 (2002); Konior *v.* Zucker, 299 A.D.2d 320 (2d Dept. 2002); *Castro*, 273 A.D.2d at 401. Under § 11, "permanent and total loss of use of ... a leg ... or foot" constitutes "grave injury." Workers' Compensation Law § 11.

The Court finds that Otis has met its burden of demonstrating that the plaintiffs injuries did not rise to the level of "grave injury" under § 11. Otis refers to the medical notes of Orthopedist Arthur Tiger, M.D., who treated the plaintiff after the accident. The doctor's notes indicate that although the plaintiff suffered extensive injuries, he had a limited range of motion in his legs and feet and walked with a cane. Otis also refers to the medical report of orthopedic surgeon Leonard Harrison, M.D., in which Harrison states that the plaintiff "will need to continue to ambulate with a cane," and that the plaintiff should "do sedentary type work, which does not involve any substantial amount of standing/or walking." Lastly, Otis cites to Dr. Etkind's affidavit, in which he states that his review of the Bellevue Hospital Center chart, Dr. Tiger's medical records and Dr. Hamson's medical report, and of the plaintiffs transcript, indicates that the plaintiff has some use of his legs, feet and ankles. Section 11's description of grave injury is precise, specifying "total loss of use." Based on Dr. Tiger's notes, Dr. Hamson's report and Dr. Etkind's affidavit, the plaintiffs injury, which is not a total loss, Otis has met its burden of showing that this injury does not rise to the level of "grave injury." *Trimble v. Hawker Dayton Corp.*, 307 A.D.2d 452 (2d Dept. 2003).

The evidence presented by Otis shifted the burden to NYU and Tishman to demonstrate the existence of a triable issue of fact. Both NYU and Tishman do not accept the position of the plaintiffs doctors relied on by Otis, and point out that the plaintiff has only been examined by his treating doctors and those doctors identified as experts by the plaintiff for trial purposes. They also argue that, in any event, the plaintiffs medical records and the statements of his doctors raise questions of fact as to whether the plaintiff suffered a "permanent and total loss of use" of his legs or feet. They cite to Dr. Tiger's notes about the plaintiff in which Dr. Tiger states, "[B]asically he is totally disabled," and "there is no chance

that he will go back to the type of work that he did before and retraining is imperative." NYU and Tishman also cite to Dr. Hamson's report, which indicates that the plaintiff has extensive disabilities involving the lower extremities with "no further improvement" expected. Further, NYU cites to the plaintiffs deposition testimony in which he testified that he always uses a cane to walk.

However, this evidence merely indicates that the plaintiff has lost some function and will be unable to do construction work. but it establishes that he continues to be able to walk with his cane and can use his legs and feet.[2] The plaintiffs injuries, although serious, do not constitute a "total loss of use" of his legs and feet, and therefore do not rise to the level of "grave" injuries within the meaning of § 11 *Meis v. ELO Organization, LLC.*, 97 N.Y.2d 714 (2002); *Aguire v. Castle American Construction, 307* A.D.2d 901 (2d Dept. 2003). Accordingly, the Court dismisses NYU's third third-party complaint against Otis. The Court also dismisses Tishman's cross claims for common law indemnification andcontribution.

The Court considers Tishman's remaining claims against Otis for breach of contract for failure to provide insurance and for contractual indemnification. Section 11 does not bar a third-party action against an employer for contribution or indemnification when the parties have entered into a written agreement prior to the accident. *See Majewski* v. *Broadalbin-Perth Cen. School Dist.*, 91 N.Y.2d 577 (1998); *Santos* v. *Floral Park Lodge of Free and Accepted Masons*, 261 A.D.2d 526 (2d Dept. 1999). Otis argues that Tishman's cross claims fail because the agreement hehveen NYU and Otis does not contain any indemnification clause or language that would require it to procure insurance for Tishman. Otis attaches the service agreement contract, which states, in pertinent part:

> We shall not be liable for any loss, damage or delay due to any cause beyond our reasonable control including, but not limited to, acts of government, strikes, lockouts, fire,

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[2] NYU requests that Otis' motion be denied because the plaintiffs IME has not occurred. If the plaintiffs IME were to reveal different information than that outlined below, it might provide basis for reargument or renewal.

> explosion, theft, floods, civil commotion, war, malicious mischief or act of God. Under no circumstances shall we be liable for consequential damages.

Further, Otis contends that it is not liable for the claims asserted because Otis' scope of work during construction did not include the catwalk. Otis cites to the affidavits of Joseph Usewicz, a General Manager at Otis who viewed the accident site and examined the elevator layout diagrams, and of retired Otis adjuster Donald Froude, which indicate that Otis did not install or maintain the stationary ladder in the hoistway or the catwalk platform.

Tishman contends that its claims against Otis are based upon a contract between N W and Otis for construction at the premises, and that the 1978 service agreement that Otis provided was for maintenance work after such construction was complete. Tishman refers to the September 22,1977 shop drawings annexed to Mr. Usewicz's affidavit submitted on behalf of Otis, which contain the notation "Otis Elevator Company drawing complies with contract requirements." According to Tishman, this notation indicates that Otis performed separate construction work at the premises prior to the 1978 service agreement. Tishman argues that an agreement to perform such construction work would have obligated Otis to procure insurance, defend against lawsuits, and indemnify N Y U as the owner and Tishman as the construction manager. Tishman cites to an affidavit **by** William Motherway, the Vice President and Risk Manager of Tishman, who states that according to standard practice Otis would have signed an agreement requiring it to procure insurance and indemnify certain entities. **A** signed agreement has not yet been located, and Tishman maintains that the agreement is likely to be in Otis' possession. Otis indicates that this agreement has not been found yet, and believes it may not exist. Tishman argues that without the original contract between N W and Otis, a question exists as to whether Otis designed or installed the access ladder to the platform and the catwalk where the plaintiff was injured, Tishman contends that the elevator layout diagrams provided by Otis includenotations that indicate Otis was at least involved in the design of the elevator hoistway where the catwalk was located, and the overall construction process.

The Court finds that an issue exists as to whether a contract between N W and Otis ever existed, and what it included concerning Otis' obligation to procure insurance and defend or indemnify Tishman. It is therefore premature at this stage, before discovery has taken place, to determine whether Otis was obligated to procure insurance and defend or indemnify Tishman. Specifically, it is premature to make a determination on this issue without viewing the alleged contract agreement between NYU and Otis for construction work. Further, questions exist regarding Otis' scope of work during the design, installation and construction of the catwalk which preclude summary judgment. Discovery needs to be conducted in order to determine Otis' role and obligations to NYU and Tishman. Accordingly, the Court denies Otis' motion as premature with respect to Tishman's cross claims for failure to procure insurance and to defend or indemnify Tishman, and severs the cross claims into a separate action. ***Brennan v. Mead, 73*** A.D.2d 926 (2d Dept. 1980).

Lastly, the Court reserves its decision on the plaintiffs cross motion for severance of the second third-party action, third third-party action and fourth third-party action. The Court believes that some of the parties may not have been served and are considering motions to dismiss. As the plaintiff correctly notes, severance may be appropriate if this additional discovery and motion practice would unduly delay the plaintiffs right to trial. Furthermore, although no oppositio'nto severance has been filed, the Court is uncertain whether any statements regarding discovery schedules made at the recent conferences may have influenced the parties' positions on the severance request. The Court directs the parties to appear in Part 24, 60 Centre Street Room 418 on February **4** at 3:00 p.m. to discuss how much discoveryremains in these third-party actions and how the outstanding discovery would affect setting a trial date on the plaintiffs claims. Accordingly, it is

ORDERED that Otis' motion for summary judgment against NYU is granted; it is further

ORDERED that Otis' motion for summary judgment against Tishman is granted with respect to

Tishman's cross claims for common law indemnification and contribution, and it is further

ORDERED that Otis' motion for summary judgment against Tishman is denied with respect to Tishman's cross claims for failure to procure insurance and for contractual indemnification, and it is further

ORDERED that the parties are directed to appear for a conference in Part 24 at 60 Centre Street, Room 418 on February 4 at 3:00 p.m

This constitutes the order and decision of the Court

Rosalyn Richter

Honorable Rosalyn Richter