

Boudreau v Broadway Houston Mack Dev., LLC
2007 NY Slip Op 30626(U)
April 10, 2007
Supreme Court, New York County
Docket Number: 0110373/2004
Judge: Leland G. DeGrasse
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: DeGrasse
Justice

PART 25

Boudreau, Dana

INDEX NO.

110373/09

MOTION DATE

APR 09 2007

MOTION SEQ. NO.

85

MOTION CAL. NO.

- v -

Broadway Houston Mack

The following papers, numbered 1 to _____ were read on this motion to/for Dismiss 3rd party action

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

*Terms dictated in accordance with
accompanying Memorandum Decision.*

FILED

APR 11 2007

NEW YORK
COUNTY CLERK'S OFFICE

APR 10 2007

Dated: APR 09 2007

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X

DANA BOUDREAU, as Administratrix of the Estate of
DAVID BOUDREAU and DANA BOUDREAU
individually,

Plaintiff,

-against-

Index No. 110373/04

BROADWAY HOUSTON MACK DEVELOPMENT, LLC
and IDI CONSTRUCTION CO., INC.,

Defendants.

-----X

BROADWAY HOUSTON MACK DEVELOPMENT, LLC
and IDI CONSTRUCTION CO., INC.,

Third-Party Plaintiffs,

-against-

COSNER CONSTRUCTION CORP.,

Third-Party Defendant.

-----X

DeGrasse, J.:

Third-party defendant, Cosner Construction Corp., moves for an order dismissing the third-party complaint pursuant to CPLR 3211 (a) (1) and 3212. Plaintiff's decedent, a Cosner employee, was injured in a workplace accident on June 21, 2004 and died on October 29, 2005. The third-party complaint prays for contractual indemnity, common-law indemnity and contribution. Workers' Compensation Law § 11 provides that :

“An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a ‘grave injury’ “

The statute's definition of “grave injury” includes death. The coverage of the statute does not

include indemnity or contribution based upon a provision of a written contract.

The certified report of an autopsy performed on the decedent's body lists the cause of death as arteriosclerotic heart disease. In support of its motion, Cosner argues that there is no causal connection between the decedent's death and the accident. The decedent sustained a back injury which required him to undergo multiple spinal surgeries the last of which was performed on October 26, 2005. Plaintiff submits the affidavit of Howard Schwartz, M. D., who swears that the decedent had been given post operative pain medications which can cause decreased blood pressure and poor perfusion of the heart. Based upon those facts Dr. Schwartz opines that the accident was a substantial factor in bringing about the decedent's death because it necessitated the surgeries and post operative pain medication. In *Leroux v Stone & Webster* (301 AD2d 760 [2003]) the Court upheld a determination that a fatal intracerebral hemorrhage was causally connected to a work-related injury because the injury required a regimen of anticoagulants which may have precipitated the hemorrhage. Under similar reasoning Dr. Schwartz's affidavit raises a triable factual issue as to whether the decedent's death was caused by the accident.

Defendants / third-party plaintiffs Broadway Houston Mack Development and IDI Construction Co., Inc. (collectively "Broadway-IDI") oppose the motion on the ground that Cosner agreed to indemnify them against claims that may arise in connection with its work. An agreement to answer for the debt, default or miscarriage of another must be in writing (General Obligations Law § 5-701 [a][2]). Therefore, the blank, unsigned subcontract agreement form proffered by Broadway-IDI does not suffice as an agreement to indemnify.

Cosner asserts that the third-party action should be severed because it has not had an opportunity to conduct discovery. The note of issue was filed on September 1, 2006 and the third-party summons and complaint were served on November 8, 2006. Broadway-IDI has

annexed to its answering papers copies of documents purportedly responsive to Cosner's discovery demands. Although Broadway-IDI has delayed the commencement of the third-party action, severance would still be inappropriate. On July 28, 2006, plaintiff amended the complaint by adding a wrongful death cause of action. Undeniably the main and third-party actions both require a determination of whether the accident caused the decedent's death. Under analogous facts the Appellate Division held that "dilatory conduct should not outweigh the consideration that the main action and the third-party action involve common issues of law and fact and should proceed together" (*Stark v Greenberg, Dauber & Epstein*, 219 AD2d 571 [1995]). To do otherwise would invite inconsistent determinations on a pivotal issue. Plaintiff asserts that the third-party action should be dismissed because the third-party summons and complaint were not served at all let alone within the 120-day period required by CPLR 306-b. Cosner, however, does not make that argument and acknowledges that the required service was effected on November 8, 2006.

For the foregoing reasons, Cosner's motion is granted to the extent that the contractual indemnity cause of action set forth in the third-party complaint is dismissed. The remaining claims are severed and continued. In all other respects, the motion is denied.

Dated: April 10, 2007

FILED
 APR 11 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

J. S. C.

HON. LELAND DeGRASSE