

Zaidi v New York Bldg. Contrs., Ltd.
2007 NY Slip Op 31126(U)
April 16, 2007
Supreme Court, Queens County
Docket Number: 0008641/2005
Judge: Patricia P. Satterfield
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162nd Street in Queens. At the time of the accident, the premises was owned by defendant/third-party plaintiffs New York Building Contractors, Ltd. Defendant Salvatore Valenza Contractors, Inc., and defendant/third-party plaintiff Valenza Contractors, Inc. were allegedly the general contractors for construction at the subject premises.

Plaintiff's amended verified complaint alleges common law negligence and violations of Labor Law sections 200,240 and 241(6). Plaintiff's amended bill of particulars alleges that he sustained the following injuries as a result of the accident: (1) arthroscopic surgery performed on right knee on February 19, 2003; (2) tear of the right anterior horn of the media meniscus; (3) partial tear of the anterior cruciate ligament; (4) grade I to II lateral and medial collateral ligament sprain; (5) joint effusion; (6) significant muscle wasting of the right leg.

Additionally, defendants/third-party plaintiffs filed a third party complaint asserting four causes of action against LTC Electric, as plaintiff's employer. The first cause of action asserts a claim for common-law indemnification. The second cause of action sounds in common law or contractual indemnification. The third cause of action seeks contractual indemnification. The fourth cause of action alleges breach of contract for failing to procure insurance on behalf of the third-party defendants.

LTC Electric seeks summary judgment dismissing the third party complaint against it, claiming that: (1) there was no contract between it and defendants/third-party plaintiffs requiring it to indemnify the latter or to procure insurance on their behalf for employee accidents at the subject work site; and (2) the third party claims for common-law indemnity and contribution are barred by Section 11 of the Workers' Compensation Law because plaintiff did not sustain a "grave injury" as defined by the statute.

In opposition to summary judgment, defendants/third-party plaintiffs New York Building Contractors and Valenza Contractors submit an affirmation by their attorney, Lawrence A. Kushnick. Mr. Kushnick states that the aforementioned retained LTC Electric to perform electrical work at the subject premises. According to Mr. Kushnick, LTC Electric verbally promised defendants/third-party plaintiffs that it would procure insurance to provide them with coverage, as additional insureds, in the event of a loss for personal injuries occasioned by a work site accident. Mr. Kushnick indicates that LTC Electric had instead merely procured a policy with a blanket endorsement indicating that only those who had agreed in a written contract to be named as an additional insureds would be treated as additional insureds. Since the purported agreement

that additional insured coverage would be provided for the benefit of the defendants/third-party plaintiffs was verbally made, the insurance obtained by LTC Electric does not provide coverage for plaintiff's accident. As a result, the defendants/third-party plaintiffs contend that LTC Electric did not comply with the verbal contract to provide full coverage for them.¹

That branch of the motion which seeks summary judgment dismissing the defendants/third-party plaintiffs' fourth cause of action for breach of contract arising from LTC Electric's failure to procure personal injury insurance coverage with respect to the subject project is denied. In light of the sharply disputed and contradictory documentary evidence submitted by the parties, a triable issue of fact exists with respect to whether LTC Electric agreed to provide the type of coverage that is at issue herein. (See generally, Daliendo v Johnson, 147 AD2d 312 [1989].)

The defendants/third-party plaintiffs are precluded from asserting a common-law indemnification claim against LTC Electric. There is no dispute that plaintiff received Workers' Compensation benefits flowing from the coverage provided by LTC Electric, his employer. Employers such as LTC Electric, who provide Workers' Compensation coverage, are immune from tort liability except in a narrow class of cases in which plaintiff has sustained a "grave injury." (See Workers' Compensation Law § 11; Rubeis v Aqua Club, 3 NY3d 408 [2004].) The term "'grave injury' is both narrowly and completely described as 'death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia, quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.'" (Spiegler v Gerken Bldg. Corp., 35 AD3d 715 [2006].) Since plaintiff's injuries specified in his amended bill of particulars and described upon his examination before trial do not fall within any of the prescribed categories, he did not sustain a "grave injury" as a result of the subject accident. Accordingly, that branch of the motion which seeks summary judgment dismissing the cause of action for common-law indemnity is granted. (See Angwin v SRF Partnership, 285 AD2d 568 [2001].)

¹ Defendants/third-party plaintiffs do not oppose that branch of the motion which seeks dismissal of the claims for common law and contractual indemnification.

Summary dismissal of the contractual indemnification claims is also supported by the evidence submitted on this motion. Despite the shield provided by the Workers' Compensation Law, employers are not free from liability as joint tortfeasors if there is a written agreement permitting a third party to recover against an employer. (Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 582 [1998].) The statute expressly permits indemnification claims "based upon a provision in a written contract." (Workers' Compensation Law section 11.) However, "[w]hether the parties did in fact have such an agreement involves a two-part inquiry. First, [the court must] consider whether the parties entered into a written contract containing an indemnity provision applicable to the site or job where the injury giving rise to the indemnity claim took place. Second, if so, [the court must] examine whether the indemnity provision was sufficiently particular to meet the requirements of section 11." (Rodrigues v N & S Building Contractors, Inc., 5 NY3d 427 [2005].) Testifying on behalf of defendants/third-party plaintiffs New York Building Contractors, Ltd. and Valenza Contractors, Inc., Mr. Sal Valenza, the president of both companies, conceded that with respect to the construction project at issue, the only written agreement between his company and LTC Electric was a work proposal which described the work to be done and the cost of the job. This agreement, which was submitted as an exhibit to the motion, does not contain an indemnification clause. Thus, the absence of a written indemnity agreement in this case is a bar to defendants/third-party plaintiffs' contractual indemnity claims. Accordingly, summary judgment dismissing the claims for contractual indemnity is granted.

Dated: April 16, 2007

J.S.C.