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

PRESENT: Hon John A. Madden PART 11

Index Number : 112171/2006

COMPENSATION RISK MANAGERS

VS

MELIKIAN, WILLIAM P.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 8-9-07

MOTION SEQ. NO. 001

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 is decided in accordance with the annexed memorandum Decision + Order

FILED
NOV 27 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: Nov. 26, 2007

_____ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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COMPENSATION RISK MANAGERS, LLC, and
ELITE CONTRACTORS TRUST OF NEW YORK,
Plaintiffs,

Index No.: 112171/06

-against-

WILLIAM P. MELIKIAN, ANNE MELIKIAN, CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION, DIVISIONS OF BRIDGES, KISKA CONSTRUCTION CORPORATION U.S.A., U.S. REBAR OF NEW JERSEY, INC. and UNITED STATES REBAR, INC.,
Defendants.

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JOAN A. MADDEN, J.

Plaintiffs Compensation Risk Managers, LLC and Elite Contractors Trust of New York (hereinafter "Compensation Risk") move for summary judgment declaring that (1) the third-party action for common law indemnification asserted against its insured is invalid as the defendant William P. Melikian ("Melikian") who is the plaintiff in the underlying action did not suffer a "grave injury" under Workers' Compensation Law § 11, and that (2) they are relieved of any obligation to defend and indemnify under their Workers' Compensation insurance coverage. Defendants Melikian and Anne Melikian (together "the Melilkians") and defendants City of New York Department of Transportation Divisions of Bridges ("the City") and Kiska Construction Corporation, USA ("Kiska") oppose the motion, which is denied for the reasons below.

Background

Plaintiff Compensation Risk Managers, LLC is the workers' compensation carrier for defendants U.S. Rebar of New Jersey and United States Rebar, Inc. (together "Rebar"). Plaintiff

Elite Contractors Trust of New York is a workers' compensation trust fund. Rebar employed Melikian as labor foreman at a project to reconstruct and repair the Third Avenue Bridge. Kiska was the general contractor on the project and entered into a subcontract with Rebar to perform certain services on the project.

Melikian was injured on May 26, 2004, when he was working beneath the Bronx side of the bridge, and was hit in the head with a 90 pound steel frame horse that was thrown from a 30-foot abutment of the bridge. Melikian was wearing a hard hat at the time of the accident. According to a report from his treating neuropsychologist, as a result of the accident, Melikian suffered a traumatic brain injury and a subdural hematoma confirmed by MRI studies. He also sustained a facial laceration above the right eyebrow, loss of four front teeth, damage to his cervical and lumbar spine and damage to his right knee.

In January 2005, Melikian commenced an action in the Supreme Court, Bronx County (Index No. 6426/05) against the City and Kiska asserting claims for negligence and under various provisions of the Labor Law (hereinafter "the Bronx County"). In April 2005, the City and Kiska brought a third-party action against Rebar asserting claims for common law and contractual indemnification.[1]

Compensation Risk commenced this action in August 2006. Compensation Risk now moves for summary judgment on its complaint declaring that the claims asserted in the third-party action for common law indemnity are invalid under Workers' Compensation Law § 11. In

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[1]The City and Kiska assert that the claims for contractual indemnification are based on a provision in Rebar's subcontract with Kiska, but that Rebar has gone out of business and as of the date of their submission of opposition papers, Rebar's general liability carrier has not come forward to provide coverage on the contractual indemnity claims.

support of its motion, Compensation Risk relies on Melikian's Bill of Particulars, and various neurological evaluations of Melikian which it alleges does not show that Melikian suffered the type of catastrophic injuries that would render him permanently disabled.

The City and Kiska oppose the motion, asserting that the reports relied on by Melikian show that Melikian is permanently disabled and unable to work and that in any event, they have not had an opportunity in the third-party action to have Melikian examined by a psychiatrist or a neuropsychiatrist and therefore this motion is premature.

The Melikians also oppose the motion, and submit an October 30, 2006 report of Dr. Richard P. Benendetto, a neuropsychologist, who reviewed Melikian's medical records relating to his diagnosis and treatment in connection with the injuries suffered as a result of the accident. With respect to Melikian's prospects for future employment he writes that:

> Mr. Melikian's vocational experience and training is an the area of heavy construction. It is my understanding that his current and permanent physical injuries and relations limitations preclude him from returning to this form of employment.
>
> At the same time, Mr. Melikian has sustained permanent brain injury with his more significant deficits clustering in the area of verbal memory while more mild deficits continue to be expressed within the area of auditory attention. Notably, his significant impairments within the sphere of auditory (verbal) memory and auditory attention make the prospect of retraining in a sedentary, cognitively demanding vocation impractical if not impossible.
>
> For all practical intents and purposes, from the perspective of his current age[2] and degree of neurocognitive compromise, Mr. Melikian is permanently disabled and is not a candidate for vocational retraining. In point of fact, placing him in such a

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[2]Mr. Melikian was 54 years-old at the time the report was written.

> situation would undoubtedly result in failure which, in turn, would exacerbate and revive feelings of depression, hopelessness and anger which he has struggle[d] so effortfully to contain and resolve.

In reply, Compensation Risk submits Melikian's deposition testimony to argue that Melikian coherent and alert, and that he has no memory loss.

Discussion

Workers' Compensation Law section 11 provides that an employer cannot be liable on a claim for common law contribution or indemnification to any third person for injuries to an employee acting within the scope of his or her employment, unless the third person proves through competent medical evidence that the employee sustained "a grave injury." The statute defines "a grave injury to mean only one or more of the following: 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 or 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." (emphasis supplied).

The Court of Appeals has written that "'[i]njuries qualifying as grave are narrowly defined...[and] [t]he words in the statute are to be given their plain meaning without resort to forced on unnatural interpretation.'" Meis v. ELD Organization, LLC, 97 NY2d 714, 716 (2002), quoting, Castro v. United Container Machinery Group, Inc., 96 NY2d 398, 401 (2001). In Castro, the Court of Appeals noted that Worker Compensation Law § 11 was amended for the purpose of limiting tort liability of employers who provide workers' compensation coverage, and

that "'[t]he grave injuries listed are deliberately both *narrowly* and *completely described*. The list is exhaustive and not illustrative; it is not intended to be extended absent further legislative action.'" Id., at 402 (emphasis supplied), quoting, Governor's Mem approving L 1996, ch 635, 1996 NY Legis Ann, at 460).

At issue here is whether Melikian suffered "an acquired injury to the brain caused by an external physical force resulting in permanent total disability." The Court of Appeals in Rubeis v. Aqua Club, Inc., 3 NY2d 408, 416 (2004), held that permanent total disability under section 11 "'relates to the injured party's employability and not his or her ability to otherwise care for himself or herself in modern society.'" citing, Way v. George Grantling Chemung Contracting Corp., 289 AD2d 790, 792 (3d Dept 2001). Specifically, it held that the "test... for permanent total disability under section 11 is one of unemployability *in any capacity*." Id., at 417 (emphasis in the original).

A proponent of a motion for summary judgment seeking to dismiss a third-party claim for want of a grave injury has the burden of proving that the plaintiff did not sustain a grave injury, and once this showing is made, the burden shifts to the opposing party to rebut this showing. See Fitzgerald v. Chase Manhattan Bank, 285 AD2d 487, 487 (2d Dept 2001).[3] Here, even assuming arguendo that evidence submitted by Compensation Risk is sufficient to satisfy its burden of

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[3]Compensation Risk relies on dictum in Ibarra v. Equipment Control, Inc., 268 AD2d 13 (2d Dept 2000) to argue that on a third party defendant's motion for summary judgment on the ground that plaintiff did not suffer a grave injury as defined by section 11, the third-party plaintiff has the initial burden of proving grave injury. Such reliance, however, is misplaced as the court addressing the issue since the decision in Ibarra v. Equipment Control, Inc. have rejected its dictum, and have found that a third-party defendant is not relieved of its burden on summary judgment in section 11 cases. See e.g., Fitzgerald v. Chase Manhattan Bank, 285 AD2d at 487; Way v. Grantling, 289 AD2d 790 (3d Dept 2001).

demonstrating that Melikian's brain injury was not a permanent total disability such that would render him unemployable in any capacity, the report of Dr. Benendetto, a neuropsychologist, in which he indicates that Melikian is not employable is sufficient to rebut this showing. Olszewski v. Park Terrace Gardens, Inc., 18 AD3d 349 (1st Dept 2005)(reversing trial court's dismissal of third-party claims for common law indemnification where record was insufficient to determine whether plaintiff is unemployable in any capacity). Moreover, contrary to Compensation Risk's characterization, the Bill of Particulars alleges that Melikian suffered a traumatic brain injury that rendered him totally incapacitated from employment. In addition, Melikian's deposition testimony submitted in reply does not eliminate factual issues as to Milikian's employability.

Furthermore, as third-party plaintiffs have not had an opportunity in the third-party action to have Melikian examined by a psychiatrist or a neuropsychiatrist, this motion is premature. Ibarra v. Equipment Control, Inc., 268 AD2d at 17 (in cases where third-party plaintiff is not in possession of medical evidence, summary judgment motion should be denied with leave to renew); Jablonski v. Fulton Corners Inc., 2001 WL 1603044 (App Term 2d and 11th Jud Dists 10-19-01)(where discovery has not been completed motion for summary judgment dismissing third-party claim for indemnification is premature).

Next, given the substantial identity of issues and parties involved in this action and the earlier commenced Bronx action, and as the simultaneous pursuant of this action will result in overlapping discovery regarding the Melikian's condition, a *sua sponte* stay of this action is warranted pursuant to CPLR 2221 pending the resolution of the Bronx action. See Halloran v. Halloran, 161 AD2d 562, 564 (2d Dept 1990)(trial court properly granted *sua sponte* stay of divorce proceedings subject to the determination of receivership proceeding) ; Pappas v. Freund,

172 Misc2d 466 (Sup Ct NY Co. 1997)(*sua sponte* stay warranted where substantial identity existed between pending federal action and state action based on issues of "comity, orderly procedure, judicial economy and discretion). During the stay, this action shall be marked off the calendar subject to restoration upon resolution of the Bronx action and upon 10 days notice to the court and all parties to this action.

In view of the above, it is

ORDERED that the motion for summary judgment by plaintiffs Compensation Risk Managers, LLC and Elite Contractors Trust of New York is denied; and it is further

ORDERED that pursuant to CPLR 2201 this action is stayed during pending the resolution of the action and third party action in Supreme Court, Bronx County (Index No. 6426/05); and it is further

ORDERED that this action is marked off the calendar subject to restoration upon resolution of the Bronx action and upon 10 days notice to the court and all parties to this action.

DATED: November 16, 2007

J.S.C.