PUBLISH

INDEX NO.13428-2006

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 003 MD
Adj'd Date: 7-3-07
Return Date: 12-13-06

Present:
Hon. SANDRA L. SGROI

FELIX GUERRA and ISABEL GUERRA,
Plaintiffs,

-against-

ST. CATHERINE OF SIENNA and CATHOLIC HEALTH SERVICES OF LONG ISLAND,
Defendants.

ST. CATHERINE OF SIENNA and CATHOLIC HEALTH SERVICES OF LONG ISLAND,
Third Party Plaintiffs,

-against-

COLIN CARES, INC., and AMERICAN BUILDING MAINTENANCE CO. OF NEW YORK - MANHATTAN d/b/a ABM JANITORIAL NORTHEAST, INC.,
Third Party Defendants.

GRUENBERG & KELLY, P.C.
Attorney for the Plaintiffs
3275 Veterans Memorial Highway, Suite 13P
Ronkonkoma, New York 11779

MULHOLLAND, MINION & ROE, ESQS.
Attorney for Defendants/Third Party Plaintiffs
374 Hillside Avenue
Williston Park, New York 11596

GALLO VITUCCI KLAR PINTER & COGAN, ESQS.
Attorney for Third Party Defendants
185 Madison Avenue, 12th Floor
New York, New York 10016

Upon the following papers numbered 1 to 22 read on the Motion for summary judgment: Notice of Motion and supporting papers 1-11;; Affirmation in opposition and supporting papers 12-15;16-18; Affirmation in reply and supporting papers 19-22; it is,

ORDERED that the motion of the Third Party Defendants, Colin Cares, Inc. and American Building Maintenance Co. of New York - Manhattan d/b/a ABM Janitorial Northeast, Inc., to dismiss the third party

complaint and any and all cross claims interposed against the Third Party Defendants is denied at this time.

In this personal injury action, Felix Guerra, the injured Plaintiff, claims that on April 2, 2006, he slipped and fell while sweeping a stairwell at the St. Catherine of Sienna Medical Center. At the time of the accident, Felix Guerra was employed by American Building Maintenance Co. of New York - Manhattan d/b/a ABM Janitorial Northeast, Inc.(hereinafter "ABM") and he was working at St. Catherine of Sienna Medical Center. The Plaintiffs commenced this action against St. Catherine of Sienna Medical Center and the Catholic Services of Long Island and these Defendants commenced a third party action against the Third Party Defendants, Colin Cares, Inc. and American Building Maintenance Co. of New York - Manhattan d/b/a ABM Janitorial Northeast, Inc., seeking common law and contractual indemnification from those Third Party Defendants. The Third Party Defendants provided maintenance services at St. Catherine of Sienna hospital pursuant to a written contract.

The Third Party Defendants have moved for summary judgment dismissing the Third Party Complaint against the Third Party Plaintiffs. These movants allege that the Defendants/Third Party Plaintiffs are not entitled to common law indemnification from them because the Plaintiff's injury, a fractured wrist, does not fall within the ambit of the "grave injury" exception to the New York ***Workers' Compensation Law*** § 11. The movants further aver that since the Defendants failed to notify ABM, Felix Guerra's employer, of the accident within the time required by the contract, the Third Party Defendants have no obligation to defend and/or indemnify the Defendants in this civil negligence action.

In opposition, the attorney for the Defendants/Third Party Plaintiffs allege that Felix Guerra testified at his deposition that in addition to the only injury alluded to by the movants, a fractured wrist, Guerra fractured his clavicle, he ruptured a tendon, that "some of the disks in his back were loose"(affirmation of Christine Gibbons, Esq.), his wrist was swollen, he has a problem with his fingers, and he cannot open his hand.

An employer may be held liable for contribution or indemnification if the employee has sustained a "grave injury" as defined by the Workers' Compensation Law (see, ***Workers' Compensation Law*** § 11; ***Majewski v. Broadalbin-Perth Cent. School Dist.***, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978; ***Blackburn v. Wysong and Miles Co.***, 11 A.D.3d 421, 783 N.Y.S.2d 609). Grave injuries are only those injuries that are listed in ***Workers' Compensation Law*** § 11 and are determined to be permanent (see, ***Castro v. United Container Mach. Group***, 96 N.Y.2d 398, 401, 736 N.Y.S.2d 287, 761 N.E.2d 1014; ***Blackburn v. Wysong and Miles Co.***, supra at 422, 783 N.Y.S.2d 609; ***Ibarra v. Equipment Control***, 268 A.D.2d 13, 707 N.Y.S.2d 208). ***Workers Compensation Law*** § 11 states, in relevant part:

> 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" which ***shall 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 provided by the Court).

The enumerated injuries that limit a party seeking common law indemnification in ***Workers Compensation Law*** § 11 were "deliberately both narrowly and completely described. The list is exhaustive, not illustrative"(1996 Legis Ann 460; see, ***Castro v. United Container Mach. Group,*** 96 N.Y.2d 398, 401, 736 N.Y.S.2d 287, 761 N.E.2d 1014). The Court notes that the Appellate Courts of the State have read the statute restrictively. For example, the loss of half of the index finger of a Plaintiff was held to be insufficient to establish a "grave injury"in ***Blackburn v. Wysong & Miles Co.,(*** 11 A.D.3d 421, 783 N.Y.S.2d 609). In that case, the Plaintiff's index finger was amputated at the base of the middle phalanx, leaving him with a proximal interphalangeal joint. Similarly, in the case of ***Mentesana v. Bernard Janowitz Constr. Corp.***, (36 A.D.3d 769, 828 N.Y.S.2d 522), the Appellate Division, Second Department held that a partial amputation of the index finger to the level of the proximal interphalangeal joint did not constitute loss of the index finger.[1]

If the injured Plaintiff has lost total use of his hand, the motion to dismiss on the ground that ***Workers Compensation Law*** § 11 bars a claim for common law indemnification must be denied. While this Court recognizes that if the Plaintiff only retains passive use of the hand, that may qualify as a "grave injury" and be considered the total loss of use of the hand (see, ***Balaskonis v. HRH Constr. Corp.***, 1 A.D.3d 120, 120, 767 N.Y.S.2d 9; see ***Sexton v. Cincinnati Inc.***, 2 A.D.3d 1408, 769 N.Y.S.2d 773), the loss of use must be the substantial equivalent of an amputation to avoid dismissal (see, ***Millard v. Alliance Laundry Systems, LLC,*** 28 A.D.3d 1145, 814 N.Y.S.2d 433; see also, ***Bissell v. Town of Amherst,*** 41 A.D.3d 1228, 837 N.Y.S.2d 469).

Summary judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of a triable issue (see, ***Alvarez v Prospect Hospital,*** 68 NY2d 320, 508 NYS2d 923; ***Bennett v Knipfing,*** 262 AD2d 260, 692 NYS2d 403). The Court will not determine issues of credibility or the probability of success on the merits on a motion for summary judgment, and issue finding rather than issue determination is the key to summary judgment (***Grahm v Columbia-Presbyterian Medical Center,*** 185 AD2d 753, 588 NYS2d 2). If material facts are in dispute or if different inferences may reasonably be drawn from the facts or testimony, a motion for summary judgment must be denied (see, ***Gusek v Compass Transp. Corp.,*** 266 AD2d 923, 697 NYS2d 886; ***McShane v Foster,*** 235 AD2d 462, 652 NYS2d 1004; ***Morris v Lenox Hill Hosp.,*** 232 AD2d 184, 647 NYS2d 753, *aff'd* 90 NY2d 953, 665 NYS2d 399). The decision to grant or deny summary judgment is based on the facts in the entire record and not simply the pleadings (see , ***McIntyre v State,*** 142 AD2d 856, 530 NYS2d 898), and these facts must be analyzed in a light most

---

[1]The loss of more than two phalanges, according to the Appellate Division, Second Department in ***Castillo v. 711 Group, Inc.,***(41 A.D.3d 77, 833 N.Y.S.2d 642)is the loss of a finger (see also, ***VanWormer v. Gruppo Rizzi*** 1857 s.r.l., 2007 WL 2091224, N.D.N.Y. Jul 20, 2007; ***NY Jurisprudence 2d Workers' Compensation*** § 114).

favorable to a non-moving party, here the Plaintiffs (***Jastrzebski v North Shore School District,*** 223 AD2d 677, 637 NYS2d 439).

The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see, ***Winegrad v. New York University Medical Center,*** 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642; ***Zuckerman v. City of New York,*** 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718). Only after this showing has been made, the burden will shift to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (***Zuckerman v. City of New York,*** supra).

Here, the movant has submitted no proof to establish a prima facie right to judgment (see, ***Altonen v. Toyota Motor Credit Corp.,*** 32 A.D.3d 342, 820 N.Y.S.2d 263; ***Way v. George Grantling Chemung Contracting Corp.,*** 289 A.D.2d 790, 736 N.Y.S.2d 424). The affirmation by an attorney having no knowledge of facts is without probative value and cannot defeat summary judgment (see, ***Bendik v. Dybowski,*** 227 A.D.2d 228, 642 N.Y.S.2d 284). In addition, the Third Party Defendants have submitted part of the examination before trial of Felix Guerra wherein he states that he cannot properly open his hand, it is still swollen, he "***can't move it in any direction," and his fingers "just aren't working." (Third Party Plaintiffs' Exhibit "B"). According to this uncontroverted testimony, it is possible that the Felix Guerra may have suffered a permanent loss to his hand that is the substantial equivalent of an amputation. Therefore, the motion to dismiss the cause of action for common law indemnification must be denied at this time.

The motion for summary judgment dismissing the contractual claim for indemnification will also be denied. On March 1, 2002, St. Catherine of Sienna entered into a contract with Colin Services Systems, Inc. Thereafter, ABM purchased the business of Colin Services Systems, Inc. and assumed the responsibility for the contract between Colin Services Systems, Inc. and St. Catherine of Siena as of January 1, 2005. This assignment was approved by St. Catherine of Siena on March 29, 2005. The contract provides that the indemnification provision shall not apply if:

> The accident or occurrence was not reported to Colin by Client (for the purposes of investigation) within three(3) days after the happening of the accident or within three(3) business days after the Client learns of the accident or occurrence***

The movant alleges that it did not receive notice under this provision within three days and that notice was finally given two months later. However, both the attorneys for the Plaintiffs and the Defendants allege that the Third Party Defendants had actual notice of the accident because the person who was injured was one of their own employees who worked the day of the accident, did not return to work and filed for Worker's Compensation benefits. At Felix Guerra's deposition he testified that he gave his employer notice. In addition the Defendants have submitted an affidavit from Domenic Lorenzino, a Security Officer employed by St. Catherine of Siena Medical Center. Lorenzino states that on the date of the accident and

shortly after Guerra had been injured, Guerra approached him while he was in the cafeteria and told him that he had fallen down the stairs. Guerra asked Lorenzino to find Jose Alvarado, his supervisor, who was working in the hospital. Lorenzino alleges that he located Alvarado and told him that Felix Guerra had fallen and was in the hospital emergency room. Alvarado accompanied Lorenzino to the emergency room and Guerra told Alvarado at that time that he was sweeping the stairs and that he fell backwards.

The contract provision upon which the movant relies on this motion for summary judgment does not state to whom the accident must be reported or how the accident should be reported to it. Under these circumstances, where the facts alleged in the affidavit of Lorenzino are not in dispute, the motion for summary judgment dismissing the causes of action for contractual indemnification in the Third Party Complaint of the Defendants/Third Party Plaintiffs on the ground that the terms of the contract requiring reporting of the accident within three days have not been complied with must be denied. The Defendants have shown that a supervisor of the movants did receive notice of the accident within three days of the date that the accident occurred. In fact, the evidence submitted shows that the movants received notice the same day that the accident happened.

Dated: 12/21/07

SANDRA L. SGROI, J. S. C.