Guerra v St. Catherine of Sienna
2009 NY Slip Op 31931(U)
August 17, 2009
Supreme Court, Suffolk County
Docket Number: 13428-2006
Judge: Sandra L. Sgroi
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INDEX NO.13428-2006

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

Present:
Hon. SANDRA L. SGROI

Mot Seq: 005 MD

Adj'd Date: 7-23-09
Return Date: 4-28-09

FELIX GUERRA and ISABEL GUERRA,

Plaintiffs,

-against-

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

Defendants.

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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.

GALLO VITUCCI KLAR PINTER & COGAN, ESQS.
Attorney for Third Party Defendants
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New York, New York 10016

Upon the following papers numbered 1 to 23 read on the Motion for summary judgment: Notice of Motion and supporting papers 1-14;; Affirmation in opposition and supporting papers 15-20; Affirmation in reply and supporting papers 21-23; 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; and it is further

ORDERED that the parties are directed to complete discovery, if any outstanding disclosure remains.

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. When the accident occurred, Felix Guerra was employed by the Third Party Defendants, American Building Maintenance Co. of New York - Manhattan d/b/a ABM Janitorial Northeast, Inc. and Colin Cares, Inc. and he was working at St. Catherine of Sienna Medical Center for his employer. The Plaintiffs, Felix Guerra and Isabel Guerra, commenced this civil action against St. Catherine of Sienna Medical Center and the Catholic Services of Long Island to recover for the injuries sustained in the fall. 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 did not incur a "grave injury" as that term is defined by the ***Workers Compensation Law***, the Plaintiff's injury was caused by inadequate lighting over which the Third Party Defendants had no control and the Third Party Plaintiffs cannot establish that they are entitled to contractual indemnification pursuant to a contractual clause. The Plaintiffs have not opposed this motion although the Defendants/Third Party Plaintiffs have submitted opposition to this motion for summary judgment.

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 upon the allegations in the pleadings (see, ***McIntyre v State,*** 142 AD2d 856, 530 NYS2d 898), and these facts must be analyzed in a light most 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 its entitlement to judgment as a matter of law by 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). 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).

The Third Party Defendants first allege that the injury to the Plaintiff Felix Guerra does not fall within the ambit of the "grave injury" exception to the New York ***Workers' Compensation Law*** § 11. Therefore, according to the Third Party Defendants, since the Plaintiff did not suffer a "grave injury", there can be no common law indemnification and the Third Party Complaint should be dismissed to the extent that it alleges a claim for common law indemnification.

"Grave injuries" are only those injuries that are listed in ***Workers' Compensation Law*** § 11 and must be injuries that 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] In ***Kraker v. Consolidated Edison Co., Inc.***, (23 A.D.3d 531, 806 N.Y.S.2d 651), the Second Department stated that substantial loss of use would not qualify as a "grave injury" where the Plaintiff could type with his right hand one key at a time, brush his hair with his right hand, and carry his shoes in his right hand (see, ***Millard v. Alliance Laundry Systems, LLC***, 28 A.D.3d 1145, 814 N.Y.S.2d 433).

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).

On the motion, the Third Party Defendants failed to submit any medical proof concerning the nature and extent of the injury other than the deposition of Felix Guerra, wherein he stated "I cannot do anything that requires strength. I have no strength in my hand. In other words, I can't do anything***" (Deposition of Felix Guerra, page 69). Further, Guerra stated that he was unable to make a fist with his right hand, he can lift nothing with his right hand, and he cannot write with his right hand. (Deposition of Felix Guerra, page 77-78).

Movants' Exhibit "I", submitted in support of the motion to dismiss, is labeled "Carrier's Request for Further Action" and it fails to address the issue concerning Guerra's use of his right hand, it is an incomplete copy of a form filled out by an employee of an insurance carrier and it fails to provide evidentiary support for the allegation of the attorney for the Defendants that the Plaintiff has not suffered a "grave injury".

In the reply, the movants have attempted to submit an affirmed report prepared by Alan J. Zimmerman, M.D., an orthopedic surgeon, wherein he concludes:

> The claimant demonstrated multiple, non-anatomic findings of symptom

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[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).

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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.

Since this subsequent motion for summary judgment with regard to the issue of whether the Defendants/ Third Party Plaintiffs received sufficient notice under the contract is essentially based on the same arguments and facts that the movants raised on the prior motion to dismiss, this Court's prior determination constitutes the law of the case on those issues (see, ***EDP Hosp. Computer Systems, Inc. v. Bronx-Lebanon Hosp. Center***, 63 A.D.3d 665, 880 N.Y.S.2d 349; ***J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey***, 45 A.D.3d 809, 809, 847 N.Y.S.2d 130; ***Quinn v. Hillside Dev. Corp.***, 21 A.D.3d 406, 407, 800 N.Y.S.2d 206).

The motion of the Third Party Defendants for summary judgment dismissing the Third Party Complaint is denied in its entirety.

Dated: 8/17/09

SANDRA L. SGROI, J. S. C.