

Guzman v Ascension Evangelical Lutheran Church, Inc.
2010 NY Slip Op 30577(U)
March 16, 2010
Supreme Court, New York County
Docket Number: 109874/08
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHÉ

PRESENT: _____

PART 10

Index Number : 109874/2008

GUZMAN, GUADALUPE URAGE

vs

ASCENSION EVANGELICAL LUTHERAN

Sequence Number : 002

RESETTLE ORDER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

MAR 19 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAR 16 2010

HON. JUDITH J. GISCHÉ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
GUADALUPE URAGA GUZMAN, *mother and
natural guardian of ISSAC MORAN,*
an infant over the age of 14 years, and
GUADALUPE URAGA GUZMAN

Plaintiff (s),

-against-

Ascension Evangelical Lutheran
Church, Inc. and Improvements by
Design, LLC,

Defendant (s).

-----X
Improvements by Design, LLC,

3rd Party Plaintiff

-against-

Joe Koenig Construction, Inc. and Utica
First Insurance Company,

3rd Party Defendants

-----X

DECISION/ ORDER
Index No.: 109874/08
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

T.P. Index No.:
590419/09

FILED
MAR 19 2010
NEW YORK
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Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
3 rd PA Koenig n/m (clarification) w/SNP affirm, exhs	1
Amended n/m	2

-----X
Gische J.;

Upon the foregoing papers, the court's decision and order is as follows:

Third Party defendant Joe Koenig Construction, Inc. ("Koenig") seeks clarification of the court's decision and order dated January 14, 2010 ("prior decision/order"). The prior decision/order was made in connection with Koenig's and Utica First Insurance Company's (collectively "3rd party defendants") motion to dismiss Improvement By Design's ("IBD") 3rd party complaint against Koenig. Although due proof of service of this motion has been filed, none of the other parties take a position on the relief sought. It is, therefore, decided on default.

Discussion

Koenig argues that the court's prior decision/order needs to be clarified because the court did not squarely address its motion to dismiss the common law contribution and indemnification claims found in the 1st, 3rd and 4th causes of action in IBD's third party complaint, but the decision indicates that "any requested relief not expressly addressed is hereby denied." Thus, Koenig is concerned that the common law claims against it still exist.

In its prior decision, the court partly granted and partly denied Koenig's motion to dismiss. The court found that there was factual support for IBD's third party complaint to the extent that it had contract based claims against Koenig. The court found that IBD had presented facts to support its claim that Koenig breached its contractual obligation to obtain adequate insurance for IBD's benefit. IBD factually alleges that the insurance Koenig obtained was wholly inadequate. On page 12 of the court's prior decision/order appears the following language: "Except for the contribution (judgment over) and

contract based claims against Koenig, the third defendants' motion for the dismissal of the complaint against them is granted. . ." Although the court believed this language was clear, apparently some clarification is needed.

An employer may be held liable for common law contribution or indemnification if the employee has sustained a grave injury as defined by the Workers' Compensation Law (Workers' Compensation Law § 11; Majewski v. Broadalbin-Perth Cent. School Dist., 91 N.Y.2d 577 [1998]). "Grave" injuries are those listed in the statute and the burden is on the third party seeking contribution or indemnification against an employer to establish a "grave injury" (Ibarra v. Equipment Control, Inc., 268 A.D.2d 13 [2nd Dept 2000]). In the absence of a factual dispute about whether Moran sustained a grave injury, this is an issue of law for the court to decide.

Here, Koenig is Moran's employer. In his complaint Moran provides no factual description of his injuries except that they were "severe" and "permanent." Koenig argued that Moran only suffered some injuries to his fingers, but the injury was not "grave" within the meaning of the worker's compensation law. This point was not factually disputed on the underlying motion which is why the court allowed the contractual based claims for indemnification and judgment over to proceed against Koenig (the employer) but dismissed the other (common law claims) for indemnification and contribution. Even in absence of a grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract (Rodrigues v. N & S Building Contractors, Inc., 5 N.Y.3d 427 [2005]).

Consequently, the court reiterates and hereby clarifies that the only claims


remaining against Koenig have to do with its contractual obligations vis-a-vis IBD for contribution and indemnification. The common law claims have been dismissed. The court's prior decision order remains otherwise unmodified.

Any requested relief not expressly addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 16, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.

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