

**Silva v Advanced Mgt. Servs. Ltd.**

2010 NY Slip Op 32305(U)

August 24, 2010

Supreme Court, New York County

Docket Number: 114324/08

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 61

ARMANDO SILVA,

Plaintiff,

-against-

ADVANCED MANAGEMENT SERVICES LTD.,  
*et al.,*

Defendants.

INDEX NO. 114324/08

MOTION DATE July 23, 2010

MOTION SEQ. NO. 003

MOTION CAL. NO. 130

(and a third-party action)

The following papers, numbered 1 to 5 were read on this motion for summary judgment

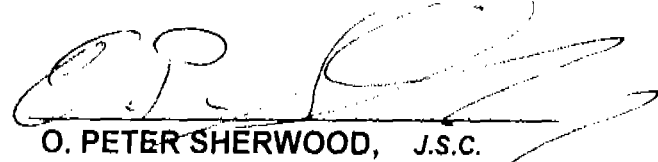
	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3, 4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, third-party defendant's motion for an order pursuant to CPLR § 3212 granting summary judgment in its favor dismissing the third-party complaint is decided in accordance with the accompanying decision and order.

**FILED**  
AUG 26 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/24/10

  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61**

-----X

**ARMANDO SILVA,**

**Plaintiff,**

**-against-**

**ADVANCED MANAGEMENT SERVICES LTD.,  
45 GREENE STREET CONDOMINIUM ASSOCIATION,  
a/k/a/ 45 GREENE STREET CONDOMINIUM,  
URBINOVA LLC, KAMRAN MALEKAN, JOHN  
BRITTON, MICHAEL W. LAFETRA REVOCABLE  
TRUST, JULIEN RUGGIERI and GEORGE H. WALKER,**

**Defendants.**

-----X

**ADVANCED MANAGEMENT SERVICES LTD.,  
45 GREENE STREET CONDOMINIUM ASSOCIATION  
a/k/a 45 GREENE STREET CONDOMINIUM and  
GEORGE H. WALKER,**

**Third Party Plaintiffs,**

**-against-**

**HERBERT ROSE INCORPORATED,**

**Third Party Defendant.**

-----X

**O. PETER SHERWOOD, J.:**

This is an action to recover damages for personal injuries plaintiff Armando Silva ("Silva" or "plaintiff") sustained in the course of his employment with third party defendant Herbert Rose Incorporated ("Herbert Rose" or "third party defendant") at a construction site on premises located at 45 Greene Street, in Manhattan ("the premises") predicated upon violations of Labor Law §§ 200, 240 and 241. Herbert Rose moves for summary judgment dismissing the third-party complaint on the grounds that: (1) no contract for indemnification exists between Herbert Rose and third-party plaintiffs Advanced Management Services Ltd. ("Advanced"), 45 Greene Street Condominium Association a/k/a 45 Greene Street Condominium ("45 Greene Street") and George H. Walker

**DECISION AND  
ORDER**

**Index No. 114324/08**

**FILED**  
AUG 26 2010  
NEW YORK  
COUNTY CLERKS OFFICE

**Third Party  
Index No. 591004/09**

(“Walker”) (collectively “third-party plaintiffs”); and (2) plaintiff has not suffered a “grave” injury as defined by the Workers Compensation Law. The motion is opposed by third-party plaintiffs and by defendant Michael W. Lafetra Revocable Trust as premature because at the time the motion was made no party depositions had been conducted. For the reasons that follow, the motion to dismiss the third-party complaint is denied.

On October 24, 2007, the plaintiff Silva, an employee of Herbert Rose, was injured during the course of his employment when he fell off the roof of the premises. Siva commenced this personal injury action against the owner of the premises, the owners of individual condominium units at the premises, the condominium management company and the general contractor. Defendants Advanced, 45 Greene Street and Walker then brought a third-party action against plaintiff’s employer for common-law contribution and indemnification. In turn, Herbert Rose asserted a cross claim and counterclaim for contribution and indemnification against defendants and third-party plaintiffs.

In moving for summary judgment, Herbert Rose argues that plaintiff has not suffered a grave injury as defined in Workers Compensation Law § 11, the predicate for any third-party action under these circumstances. In opposition, the third-party plaintiffs contend that third-party defendant’s motion for summary judgment is premature as it is made prior to the third-party defendant appearing for a deposition and facts may exist which are essential to opposing the motion but cannot be presented because they are in the third-party defendant’s possession. In any event, they note that plaintiff’s verified bill of particulars asserts that plaintiff sustained a “traumatic brain injury” and that he has been incapacitated from employment since the date of the accident. Defendant Michael W. Lafetra Revocable Trust also opposes the motion essentially adopting the arguments made by third-party plaintiffs.

Workers’ Compensation Law § 11 provides that third-party actions against employers, who furnish Workers’ Compensation coverage to their employees, are generally barred unless: (1) the employer has a written contract with the third party, entered into prior to the accident, in which the employer has agreed to indemnify the third party for the employee’s loss; or (2) the employee has suffered a “grave” injury as defined in the statute. For purposes of the instant action, the section itemizes “grave injury” to include “an acquired injury to the brain caused by an external physical

force resulting in permanent total disability.” A brain injury results in “permanent total disability” and thus is a “grave injury” within the meaning of the Workers’ Compensation Law only when the employee is no longer employable *in any capacity*, regardless of whether the employee is able to perform the usual activities of daily living (*see, Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004]).

Here, there is no evidence that the written contract between Herbert Rose and third-party plaintiff Advanced contains a provision for Herbert Rose to indemnify third-party plaintiffs for injuries to persons or property. Thus, in order to be granted summary judgment dismissing the third-party claim, Herbert Rose is required, in the first instance, to establish prima facie the absence of a “grave” injury; after such prima facie showing is made, the parties opposing the motion must come forward with competent medical evidence indicating that there is a triable issue of fact on the issue of “grave” injury (*see, Galindo v Dorchester Tower Condominium*, 56 AD3d 285, 286 [1<sup>st</sup> Dept 2008]; *Altonen v Toyota Motor Credit Corp.*, 32 AD3d 342, 343 [1<sup>st</sup> Dept 2006]; *Fitzpatrick v Chase Manhattan Bank*, 285 AD2d 487, 488 [2d Dept 2001]).

Herbert Rose asserts that plaintiff has failed to allege that he sustained a “grave” injury as defined in Workers’ Compensation Law § 11. Further, Herbert Rose’s attorney, in a reply affirmation, avers that plaintiff, at a deposition conducted on July 21, 2010, stated that no physician advised him that he sustained a brain injury in the accident and testified that he has no cognitive or mental difficulties that would prevent him from working. However, no copy of the deposition transcript is furnished to support these contentions as the deposition had only been conducted the same day as the reply affirmation.

The court concludes that Herbert Rose has failed to make the requisite prima facie showing that plaintiff has not suffered a grave injury and it is, therefore, not entitled to summary judgment. Plaintiff’s verified bill of particulars alleges a traumatic brain injury and further alleges that the injury is permanent. Plaintiff’s verified bill of particulars also asserts that plaintiff has been confined to bed and home since the date of the accident except for visits to medical providers and has been incapacitated from his job from the date of the accident to the present. If plaintiff’s allegations can be proven, the injury so alleged would be considered “grave” and, thus, would reach the threshold set under Workers’ Compensation Law § 11 for maintaining a third-party action against the employer Herbert Rose (*see, Meis v Elo Organization, LLC*, 282 AD2d 247 [1<sup>st</sup> Dept 2001]). Moreover,


Herbert Rose has presented no competent medical evidence demonstrating as a matter of law that plaintiff's injuries were not "grave" (see, *Eddine v Federated Dept. Stores, Inc.*, 2008 WL 2489491 [Sup. Ct. N.Y. Co. 2008]).

Accordingly, it is

**ORDERED** that third-party defendant's motion for summary judgment dismissing the third-party complaint is denied.

This constitutes the decision and order of the court.

DATED: 8/24/10

ENTER,  
  
O. PETER SHERWOOD  
J.S.C.

**FILED**  
AUG 26 2010  
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COUNTY CLERK'S OFFICE