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SHORT FORM ORDER

INDEX No. 05-8715
CAL. No. 10-00100-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 4-7-10 (#004)
MOTION DATE 5-5-10 (#005)
MOTION DATE 5-19-10 (#006)
ADJ. DATE 6-23-10
Mot. Seq. # 004 - MD
005 - MD
006 - MotD

JEFFREY SZCZEPANSKI, Plaintiff, - against - DANDREA CONSTRUCTION CORP., NICHOLAS LIBERATOSCIOLI and LUSITANO ENTERPRISES, INC., Defendants.	SIBEN & SIBEN, LLP Attorney for Plaintiff 90 East Main Street Bay Shore, NY 11706 PEREZ & VARVARO Attorney for Nicholas Liberatoscioli 333 Earle Ovington Blvd. P.O. Box 9372 Uniondale, NY 11553-3644
LUSITANO ENTERPRISES, INC., Third-Party Plaintiff, - against - BIG C CONSTRUCTION CORP., Third-Party Defendant.	DEVITT SPELLMAN BARRETT, LLP Attorney for Defendant/Third-Party Plaintiff Lusitano Enterprises, Inc. 50 Route 111 Smithtown, NY 11787 GOLDSTEIN & AVRUTINE Attorney for Third-Party Defendant 575 Underhill Boulevard, Suite 140 Syosset, NY 11791

Upon the following papers numbered 1 to 48 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 - 15; (#005) 16 - 25; (#006) 26 - 38 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 39 - 40; 41 - 44 ; Replying Affidavits and supporting papers 45 - 46; 47 - 48 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (004) by the defendant, Lusitano Enterprises, Inc., pursuant to CPLR §3212 for summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that this motion (005) by the defendant, Nicholas Liberatoscioli, pursuant to CPLR §3212 for summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that this motion (006) by the third-party defendant, Big C Construction, Inc., pursuant to CPLR §3212 for summary judgment dismissing the third-party plaintiff's complaint is granted as to that part of the third-party complaint premised upon contractual indemnification and is denied as to the remainder of the motion as it relates to common law indemnification and contribution.

In this action the plaintiff claims to have sustained injury while working at 6 Mystic Lane, Fort Salonga, New York (hereinafter job site) on July 23, 2004. The plaintiff asserts causes of action sounding in negligence, violation of Labor Law §200, §240, and §241(6) and violation of Title 12 NYCRR 23 §§ 23-1.5, 23-1.7, 23-1.8. In an unverified bill of particulars the plaintiff claims that Nicholas Liberatoscioli (hereinafter Liberatoscioli) was the owner of the premises and construction site (job site) where the plaintiff claims to have sustained injury, and that Liberatoscioli and Dandrea Construction Corp. were contractors or subcontractors at the job site. Liberatoscioli also was the principal in Lusitano Enterprises, Inc. (hereinafter Lusitano), also asserted to be the owner of the premises. The plaintiff claims that he was in the process of carrying a truss or beam used for framing of the second story of the construction site at the time of the accident while working for and employed by Big C Construction, Inc. (hereinafter Big C). Conrad Levesque, the principal of Big C (hereinafter Levesque), maintains that the plaintiff was not working for him at the job site at the time of the accident and that he took the plaintiff to the hospital because the plaintiff injured himself while skateboarding.

In the third-party action, Lusitano, as plaintiff, seeks indemnification from Big C and judgment over against Big C caused by the relative responsibility of Big C.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (004), Lusitano has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint and supplemental summons and complaint, answer to amended complaint, third-party summons and complaint and third-party answer, unverified bill of particulars; copies of the transcripts of the examinations before trial (hereinafter EBT) of the plaintiff, dated November 30, 2007, Patricia Kiley, dated July 16, 2009, Hillel Trope, D.O., dated June 15, 2009, Levesque, dated March 12, 2009; and copies of decisions for unrelated matters.

In support of motion (005), Liberatoscioli has submitted, inter alia, an attorney's affirmation; copies of the pleadings and defendant's answer; copies of the transcripts of the EBTs of the plaintiff, dated November 30, 2007, Liberatoscioli, dated August 14, 2008, Levesque, dated March 12, 2009, Patricia Kiley, dated July 16, 2009, Hillel Trope, D.O., dated June 15, 2009 and a copy of a letter from Mary E. Szczepanski, undated and unsworn.

In support of motion (006), Big C has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, supplemental summons and complaint, answers and verified amended answers, third-party summons and complaint and third-party answer, plaintiff's bill of particulars; copies of the transcripts of the EBTs of the plaintiff, dated November 30, 2007 and June 9, 2009, a copy of the Notice of Approval-Section 32 Agreement, copy of the Southside Hospital Emergency Department (hereinafter hospital) record for the plaintiff, dated July 23, 2004, medical record by Biff McCann, M.D., photograph, and a report of independent medical examination of Peter Berman, M.D. (hereinafter Berman), dated July 30, 2008.

In motion(004), the defendant Lusitano seeks dismissal of the complaint because the plaintiff did not sustain an injury at the job site, that he was not employed by Big C and never worked at the job site, that he was injured in a skateboarding accident, and that his claim is nothing more than a feigned factual issue designed to avoid the consequences of his earlier contrary admissions at the hospital wherein he told the triage nurse, Patricia Kiley, and emergency room physician, Hillel Trope, D.O., that he was injured while skateboarding.

The Court finds that Lusitano has not demonstrated prima facie entitlement to summary judgment dismissing the complaint. There is conflicting testimony submitted in which Levesque asserts that the plaintiff was not employed by Big C, yet there was a settlement approved by the Workers' Compensation Board (hereinafter WCB) in favor of the plaintiff, after hearings attended by Levesque. The settlement was a waiver agreement relating to injuries claimed to have been sustained at the job site.

The existence of an employer-employee relationship is a factual issue for the WCB to resolve and a decision must be upheld if supported by substantial evidence even if there is also other evidence that could have supported a contrary conclusion (***In the Matter of the Claim of Asian Pilku v 24535 Owners Corporation et al,*** 19 AD3d 722, 796 NYS2d 150 [3rd Dept 2005; ***In the Matter of the Claim of Mary Kurzyna v Communicar, Inc. et al,*** 182 AD2d 924, 582 NYS2d 295 [3rd Dept 1992]). The WCB has primary jurisdiction to resolve the question of coverage and a plaintiff has no choice but to litigate this issue before the WCB (***Arvatz v Empire Mutual Insurance Company,*** 171 AD2d 262, 575 NYS2d 836 [1st Dept 1991]). "Workers' Compensation Board decisions affecting matters within its jurisdiction are entitled to res judicata effect, N.Y. Workers' Compensation Law §23, the 'finality' provision, specifically provides: an award or decision of the board shall be final and conclusive upon all questions within its jurisdiction, as against the state fund or between the parties, unless reversed or modified on appeal" ***Orzechowski et al, v Warner-Lambert et al,*** 92 AD2d 110, 460 NYS2d 64 [2nd Dept 1983]).

The waiver agreement approved by the WCB, filed December 22, 2008, provided for an award in the amount of $20,000.00. The agreement stated that the "Board's approval of this agreement cannot and should not be interpreted as a finding that any allocation set forth in the agreement between lost wage benefits and medical treatment is reasonable or accurately reflects the proportion of those benefits which would be expected to be paid had this claim not been settled."

Lusitano has not submitted any admissible evidence establishing as a matter of law whether or not the plaintiff worked at the job site as an employee of Big C. No payroll records or other records maintained by Big C's accountant have been submitted at his EBT of August 14, 2008. Liberatoscioli testified that when Levesque's brother Gil Levesque, arrived at the job site there would be a different

number of workers every day, anywhere from two to several more, but he did not pay attention to each individual and could not state whether or not the plaintiff was at the site. Liberatoscioli testified that he usually saw Gil Levesque at the site and never saw Levesque there that he could recall.

At his March 12, 2009 EBT, Levesque testified when asked if the plaintiff ever injured himself while working for Big C at the job site of the plaintiff's alleged injury, "I said no." He testified that he drove the plaintiff to the hospital because he was "around my house. He got hurt with a skateboard." He stated he was at home when the plaintiff's mother called him and told him the plaintiff got hurt. This testimony makes it unclear whether the plaintiff was at his house, and if so, whether there was a skateboard ramp from which the plaintiff fell at the Levesque house or the plaintiff's house. Levesque entered the hospital with the plaintiff, stayed a few minutes and left, speaking to no one there. He stated he never told the plaintiff to say he fell off his skateboard or to say that he had not injured himself at the job site. Levesque also testified that he did not know if the WCB made a determination that the plaintiff was his employee at the time of the accident. Levesque further testified that he only went to the job site on Fridays for payroll. He maintained no logs or records concerning who was working at the site on any given day. He testified that Big C had three employees at the job site: his brother Gil, now deceased, his son Paul and another worker, Jose, whose last name he did not know and who no longer worked for Big C. He further testified that the plaintiff did appear at the job site one morning looking for work.

Levesque's son, Paul Levesque, testified at his EBT on July 28, 2009 that the plaintiff was never considered an employee of Big C at the job site and he never saw him working there.

The plaintiff testified at his EBT on November 30, 2007 that he did not have a skateboard and never skateboarded and was not skateboarding when the accident occurred, but instead that he was working at the job site when he fell off the beam. The plaintiff further testified that he did not tell anyone at the hospital that he fell while skateboarding and that he passed out upon arrival at the hospital. The triage nurse, Patricia Kiley, and Hillel Trope, D.O, the emergency room physician, have no independent recollection of speaking to the plaintiff concerning how his injuries occurred, but indicated the hospital records stated that the plaintiff fell while skate-boarding.

Therefore, there are factual issues concerning whether the plaintiff was employed by Big C. There is also a factual issue concerning why Levesque consented to the WCB waiver and settlement agreement if the plaintiff was not working for him at the time he sustained injury. Whether or not the WCB made a determination as to the plaintiff's employment status is not known.

Based upon the foregoing, the Court finds that Lusitano has not demonstrated prima facie entitlement to summary judgment as a matter of law dismissing the complaint because the plaintiff feigned that he was working at the job site when the accident occurred, that the plaintiff was not employed by Big C, and that the plaintiff was not injured at the job site.

Accordingly, motion (004) is denied.

In motion (005), the defendant Liberatoscioli seeks dismissal of the plaintiff's causes of action premised upon violation of Labor Law §240 and §241 because as owner of a one or two-family dwelling who did not direct or control the construction work that caused the plaintiff's accident he was

exempt from liability; and he seeks dismissal of the causes of action premised upon negligence and Labor Law §200 in that he did not supervise, direct or control the plaintiff's work at the job site and had no actual or constructive notice or knowledge of the alleged defective condition which caused the plaintiff's claimed injuries.

Liberatoscioli has failed to demonstrate prima facie entitlement to summary judgment dismissing the complaint as asserted against him as the owner of the premises. There are factual issues and issues of credibility concerning whether or not the plaintiff was working at the job site and sustained injury at it. Therefore, this Court must speculate as to the facts and the testimony of the parties herein, precluding the Court from making a determination as a matter of law as to this motion.

Accordingly, motion (005) for summary judgment dismissing the complaint as against Liberatoscioli is denied.

In motion (006) Big C, the third-party defendant, seeks dismissal of the third-party plaintiff's complaint served by Lusitano because the plaintiff did not sustain a grave injury pursuant to the Workers' Compensation Law (hereinafter WCL) §29 and §11, and because Big C is an employer protected by the exclusive remedy provisions of the WCL.

"In a personal injury action alleging violations of the Labor Law, the plaintiff's employer is entitled to summary judgment dismissing the claims for contribution or indemnification asserted by the owner of the premises where the WCB determined that plaintiff's injuries were work related, that plaintiff had not suffered a "grave injury" and that the employer was responsible to the plaintiff for compensation benefits. The plain language of Workers' Compensation Law §11 extinguishes the owner's third-party claim. To allow the owner to obtain indemnification from the employer would result in the latter paying both compensation benefits as well as damages, a result not permitted by the statute" (***Gonzales v 17 Murray Street Corporation et al,*** 189 Misc2d 158 [Supreme Court of New York, New York County 2001]). Under the amended law, third-party impleaders, against an employer who provide WCL coverage to his employees, are generally barred, but the three exceptions are where there is (1) a contractual obligation specifically requiring the employer to indemnify the third-party, or (2) when the employee has suffered a "grave injury" as defined and enumerated by the statute, or (3) where such employer has failed to procure workers' compensation insurance (see***, Garcia v St. John's Church,*** 2007 NY Misc. Lexis 234 [Supreme Court of New York, Kings County 2007]).

In the instant action, no party has submitted a copy of an agreement providing for Big C to contractually indemnify the owner of the job site where the accident is alleged to have occurred, and no party has presented the terms of any agreement between Lusitano and Big C. Therefore, Big C has demonstrated prima facie entitlement to dismissal of the third party complaint on the basis that it is not contractually liable to Lusitano for indemnification.

Accordingly, that part of the motion (006) which seeks dismissal of the third-party complaint on the basis that Big C is not contractually liable to Lusitano is granted.

Additionally, the plaintiff was awarded a settlement as approved by the WCB. Therefore, a determination must be made whether or not the plaintiff sustained a grave injury within the meaning of WCL §11. The Omnibus WC Reform Act of 1996 (§2) amended the WCL §11 (***Lagano et al v***

Chrysler Corporation et al, 957 F Supp 36 [United States District Court for the Eastern District of New York 1997]). WCL §11 provides that "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 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 or ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by external physical force resulting in permanent total disability."

Big C has not established prima facie, with the submission of competent medical evidence, that the plaintiff did not sustain a "grave injury" within the meaning of WCL §11 concerning whether or not the plaintiff sustained permanent and severe facial disfigurement. The plaintiff has claimed in his bill of particulars that he sustained a permanent facial injury and fracture of the right zygomatic arch, fracture of the right orbit, fracture of the right maxillary sinus with acute hemorrhage, and tripod fracture. The hospital emergency record indicates that the plaintiff has a displaced facial fracture. The plaintiff testified that he has not had the recommended reconstructive surgery for his face because he has no medical insurance. Big C has submitted Berman's report concerning the independent medical examination for facial plastic surgery on July 30, 2008, which presents Berman's impression, after careful review of the itemized records and physical examination, that the plaintiff has a right zygomatic arch fracture which is impinging on his temporomandibular joint area causing asymmetry of his facial appearance and mild disability. The report does not establish whether the asymmetry of the appearance of the face and mild disability are permanent or temporary and whether or not the asymmetry and mild disability can be corrected with surgery or treatment. The photographs submitted by Big C do not establish prima facie that the plaintiff does not have a severe facial disfigurement. Therefore, Big C has not established prima facie that the plaintiff did not suffer a grave injury within the meaning WCL §11 in that the competent medical submission does not rule out that the plaintiff did not sustain permanent and severe facial disfigurement.

When an employee does not "suffer a grave injury within the meaning" of WCL §11, the employer's obligation to indemnify in a third-party action is extinguished by that statute (*see*, ***Bartek, Jr. et al v Murphy et al,*** 266 AD2d 865 [4th Dept 1999]). There is a factual issue concerning whether or not the plaintiff sustained a grave injury. Big C has not established prima facie entitlement to summary judgment dismissing the third-party complaint.

Additionally, there are factual issues concerning whether or not the plaintiff was employed by Big C at the time of the accident. Levesque has testified that the plaintiff was not his employee, and yet seeks dismissal of the third-party complaint on the basis that Big C is an employer protected by the exclusive remedy provisions of the WCL. Such issues of credibility preclude summary judgment.

Accordingly, that part of motion (006) by Big C for dismissal of Lusitano's third-party complaint because the plaintiff did not sustain a grave injury pursuant to WCL §29 and §11 and that Big C is protected by the exclusive remedy provisions of the WCL is denied.

Dated: August 27, 2010

J.S.C.