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

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice PART 5

Index Number : 109524/2009
REGNO, JAMES G.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT
Cal # 84

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 04 2010
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 9/30/10
SEP 30 2010

J.S.C.
BARBARA JAFFE
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

JAMES G. REGNO and BRENDA REGNO,

Plaintiffs,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

----------x

ALMAR PLUMBING & HEATING CORP. s/h/a
ALMAR PLUMBING AND HEATING CORPORATION,

Third-Party Plaintiff,

-against-

BRUNO GRGAS, INC.,

Third-Party Defendant.

----------x

DART MECHANICAL CORP.,

2nd Third-Party Plaintiff,

-against-

BRUNO GRGAS, INC.,

2nd Third-Party Defendant.

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Index No. 109524/09

Motion Subm: 8/3/10
Motion Seq. No.: 002
Calendar No.: 84

DECISION AND ORDER

Third-Party Index No. 84289/08

Second Third-Party Index No. 83737/09

BARBARA JAFFE, JSC:

For Almar Plumbing:
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For Bruno Grgas, Inc.:
Peter J. Morris, Esq.
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By notice of motion dated April 8, 2010, third-party defendant Bruno Grgas, Inc. (Grgas) moves pursuant to CPLR 3212 for an order summarily dismissing defendant/third-party plaintiff

Almar Plumbing & Heating Corp.'s (Almar) third-party complaint against it. Almar opposes the motion.

I. BACKGROUND

By Indemnity Agreement and Agreement to Maintain Certain Insurance dated April 1, 2004, Almar, a plumbing contractor, and Grgas, a sub-contractor, agreed that "for any and all work performed by [Grgas] for [Almar]," Grgas would maintain certain liability insurance, would name Almar as an additional insured on its insurance policies, and would indemnify Almar against any claims arising out of its work and caused by it. (Affirmation of Peter J. Morris, Esq., dated May 5, 2009 [Morris Aff.], Exh. 1D). Sometime before June 9, 2008, Grgas obtained liability insurance, effective from June 9, 2008 to June 9, 2009, with "[Almar] added as additional insured provided additional insured status is required by written and executed contract." (*Id.*, Exh. 2J).

On July 14, 2008, Almar gave Grgas a purchase order for certain work to be performed by Grgas at Almar's premises at 650 West 57th Street a/k/a 780-786 12th Avenue in Manhattan (the premises). (Morris Aff., Exh. 1D). The purchase order contains no terms relating to either indemnification or insurance.

On August 15, 2008, plaintiff, a Grgas employee, was allegedly injured while performing insulation work for Grgas at the premises pursuant to the purchase order. (*Id.*, Exh. 1K). His injuries included fractures of his right arm and pelvis and a nose laceration. (*Id.*, Exh. 1F). On October 14, 2008, plaintiff commenced the instant action against defendants. (*Id.*, Exh. 1B). In his complaint, plaintiff alleges that he suffered severe and serious personal injuries and a loss of enjoyment of life. (*Id.*, Exh. 2C).

On or about December 18, 2008, Almar commenced a third-party action against Grgas in Supreme Court, Bronx County, asserting claims for contribution, common law and contractual indemnification, and breach of contract based on Grgas's failure to obtain insurance naming Almar as an additional insured. (*Id.*, Exh. 1B). On or about March 9, 2009, Grgas served its answer to Almar's complaint. (*Id.*, Exh. 1C).

On March 19, 2009, a certified public accountant employed by Almar sent an e-mail to Grgas seeking its signature on "last year's indemnity agreement and a new one for this year." (*Id.*, Exh. 1J). Attached to the e-mail are two documents, each identical to the 2004 indemnity agreement signed by the parties except that the typewritten portion of one document reflects that it is dated January 1, 2008 (the agreement), and the typewritten portion of the other reflects that it is dated January 1, 2009. (*Id.*). On March 23, 2009, in response to the e-mail, Grgas's president signed the agreement, thrice writing and underlining the date on which she signed it, March 23, 2009. (*Id.*, Exh. 2I). Almar's president signed it on April 1, 2009. (*Id.*). Neither party has submitted an executed copy of the second document.

By verified bill of particulars dated March 30, 2009, plaintiff described his injuries as fractures of his arm and pelvis and a nasal laceration, resulting in surgery and treatment, which caused pain, swelling, tenderness, and limitation of motion. (*Id.*, Exh. 1K).

By letter to Grgas dated April 21, 2009, Almar memorialized an alleged oral agreement by Grgas's president to notify Grgas's insurance company that it should indemnify Almar for plaintiff's accident. (*Id.*, Exh. K).

On or about May 6, 2009, Grgas filed a motion to change the venue of the action to New York County and for summary dismissal of Almar's complaint against it. (*Id.*). By decision and

order dated October 2, 2009, venue was changed to New York County and Grgas's summary judgment motion was denied with leave to renew once the action was transferred to New York County. (*Id.*, Exh. 5).

II. CONTENTIONS

Grgas argues that Almar's common law contribution and indemnification claims against it are barred as plaintiff did not sustain a grave injury and there was no written indemnification or contribution agreement with Almar which would cover plaintiff's accident. Grgas relies on the purchase order and Almar's March 19, 2009 e-mail which, it asserts, demonstrates that no indemnity agreement had been executed in 2008. It maintains that the 2004 indemnity agreement was effective for only one year as evidenced by Almar's request that it execute agreements for 2008 and 2009, and submits the affidavit of its president, who states that she found only the 2004 agreement in Grgas's files. (Morris Aff., Exh. 1A).

Almar alleges that the agreement signed in 2009 was intended to apply retroactively to 2008, as evidenced by Grgas's annual agreement to indemnify it and its president's alleged agreement to notify its insurance carrier that it should indemnify Almar, and its procurement in 2008 of insurance naming Almar as an additional insured. Almar thus argues that at the time of plaintiff's accident, a written agreement was in place between the parties requiring that Grgas indemnify it and procure insurance on its behalf. Moreover, absent any exchange of discovery relating to defendants' possible liability and the extent of plaintiff's injuries, Almar also claims that summary dismissal is premature. (Morris Aff., Exh. 2A).

In reply, Grgas asserts that Almar's claim that discovery is needed is conclusory and without factual basis, and observes that Almar has failed to submit an affidavit from someone

with personal knowledge of the agreement or the 2009 e-mail, or to support its claim that the parties intended that the agreement be applied retroactively, and that nothing in the agreement reflects that when the parties signed it in 2009, they intended it to apply retroactively to 2008. Although the agreement is dated January 1, 2009, Grgas maintains that it was actually dated later in 2009 when the parties signed it, respectively, in March and April. Finally, Grgas argues that having obtained insurance naming Almar as an additional insured, it may not be liable for breach of any agreement to do so. (Reply Affirmation of Peter J. Morris, Esq., dated July 13, 2010).

III. ANALYSIS

"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." (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers. (*Winegrad*, 64 NY2d 851, 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562). The opposing party must "lay bare" its evidence (*Silbertstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1st Dept 2003]); "unsubstantiated allegations or assertions are insufficient." (*Zuckerman*, 49 NY2d 557, 562).

A. Grave injury

Pursuant to section 11 of the Workers' Compensation Law, an employer may not be held liable for contribution to or for the indemnification of any third person for injuries sustained by an employee acting within the scope of his or her employment "unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury.'" A grave injury is, *inter alia*, 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, loss of nose, loss of ear, permanent and severe facial disfigurement, or loss of an index finger. Thus, a common-law contribution or third-party indemnification against an employer is barred unless the injured employee has suffered a grave injury. (*Petrillo v Durr Mechanical Constr., Inc.*, 306 AD2d 25 [1st Dept 2003]).

As plaintiff does not allege, in either his complaint or verified bill of particulars, that he suffered an injury which may be characterized as grave within the meaning of the Workers Compensation Law, Grgas has established, *prima facie*, that plaintiff did not suffer a grave injury. (*See eg Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203 [3d Dept 2008] [plaintiff's allegation in bill of particulars that leg and knee injuries included swelling, loss of ability to walk properly, significant limp, and loss of range of motion sufficient to establish *prima facie* that plaintiff did not suffer grave injury absent claim of total loss of use of leg]; *Marshall v Arias*, 12 AD3d 423 [2d Dept 2004] [summary dismissal of third-party complaint warranted as employee's bill of particulars showed that he did not suffer grave injury]; *Ibarra v Equip. Control, Inc.*, 268 AD2d 13 [2d Dept 2000] [relying on employee's bill of particulars to find employee did not suffer grave injury]; *Tikunov v The Museum of Modern Art*, NYLJ, Nov. 2, 2004, at 18, col 3

[Sup Ct, New York County] [description of injuries in bill of particulars did not describe grave injury]; *Deluca v Fashion Mall Partners, L.P.*, NYLJ, May 2, 2002, at 21, col 5 [Sup Ct, New York County] [same]).

And, absent any pleading or allegation that plaintiff suffered a grave injury, Almar is not entitled to discovery on the issue (*see Brownstein v LeCroy Corp.*, 178 Misc 2d 197 [Sup Ct, Richmond County 1998] [as employee did not plead grave injury, discovery by third-party as to employee's medical condition unwarranted]), and as its claims for common-law contribution and indemnification depend on plaintiff having suffered a grave injury, those claims are dismissed.

B. Contractual indemnification

A party is entitled to indemnification from another party pursuant to a contract or agreement if the intent to indemnify is "clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774 [1987]; *see also Podhaskie v Seventh Chelsea Assocs.*, 3 AD3d 361 [1st Dept 2004] [indemnity contract must be viewed in light of "purpose of entire agreement and surrounding facts and circumstances"]). A contractual assumption of an obligation to indemnify "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." (*Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487 [1989]).

Pursuant to Workers' Compensation Law § 11, a claim for indemnification or contribution against an employer for its employee's injury may be maintained if "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered." Of particular significance here is that

while the statute requires an agreement that has been entered into prior to an employee's accident, an agreement entered into thereafter may be applied retroactively where "evidence establishes as a matter of law that the agreement pertaining to the contractor's work 'was made "as of" [a pre-accident date], and that the parties intended that it apply as of that date.'" (*Podhaskie*, 3 AD3d at 362, *quoting Stabile v Viener*, 291 AD2d 395, 396 [2002], *lv denied* 98 NY2d 787).

Here, it is undisputed that the 2004 agreement was in effect in 2004 only, that the 2008 purchase order contains no terms relating to indemnification, that during 2008 and at the time of plaintiff's accident there was no express written indemnity agreement between the parties, and that the agreement on which Almar relies was not signed until 2009, seven months after plaintiff's accident. Grgas has thus established, *prima facie*, that there is no written indemnity agreement covering plaintiff's accident. The burden thus shifts to Almar to establish that there exist material issues of fact as to whether the evidence establishes as a matter of law that the agreement signed in 2009 was made as of a date before plaintiff's accident and that the parties intended it to apply as of that date.

1. Was the agreement "made as of" a date before plaintiff's accident?

Although the typewritten portion of the agreement is dated January 1, 2008, there is no further indication on it that the parties intended it that it be "made as of," "entered into as of," or "effective on" January 1, 2008 or that it was intended to apply retroactively. Rather, Grgas's president clearly indicated on it that she signed it in March 2009. (*Compare Lafleur v MLB Industries, Inc.*, 52 AD3d 1087 [3d Dept 2008] [no language in contract that parties intended its terms to be retroactive or that effective date was date other than execution]; *Temmel v 1515*

Broadway Assocs., L.P., 18 AD3d 364 [1st Dept 2005] [purchase order containing indemnification clause was dated more than one month after accident and contained no language showing that parties intended it to be retroactively applied]; *Burke v Fisher Sixth Ave. Co.*, 287 AD2d 410 [1st Dept 2001] [indemnity contracts were dated and executed after plaintiff's accident; nothing about them suggested any intend that it apply retroactively]; *Beckford v City of New York*, 261 AD2d 158 [1st Dept 1999] [contract executed two days after accident]; *with Elescano v Eighth-19th Co., LLC*, 13 AD3d 80 [1st Dept 2004] [contract expressly provided, just above signature lines, that it was entered into as of date written on first page]; *Manns v Norstar Bldg. Corp.*, 4 AD3d 799 [4th Dept 2004] [while contract signed in January 2001, it expressly provided that it was "made as of" August 2000 and was "entered into" then]; *Pena v Chateau Woodmere Corp.*, 304 AD2d 442 [1st Dept 2003], *appeal dismissed* 2 AD3d 1488 [although contract signed after accident, it expressly provided that date of its commencement was date written therein, before accident]; *Stabile*, 291 AD2d at 395 [evidence showed that agreement was "made as of" date before plaintiff's accident and parties intended that it apply retroactively even though it was not executed until after accident]).

Thus, the agreement does not show that it was made as of a date before plaintiff's accident.

2. Did the parties intend the agreement to be applied retroactively?

Neither party submits an affidavit from someone with personal knowledge as to whether the agreement was intended to apply retroactively, although Grgas's president asserts that the only agreement that Grgas entered into with Almar for the 2008 project was the June 2008 purchase order which contains no indication that the parties had entered into an indemnity agreement in 2008.

Moreover, Almar fails to submit a statement by anyone with personal knowledge of any indemnity agreement entered into between the parties in 2008 or the circumstances surrounding the 2009 agreement, or any support for its allegation that the parties intended that the agreement be applied retroactively, relying solely on its counsel's inadmissible assertions.

Even if the parties' intent may be gleaned from the surrounding facts and circumstances, and while Almar's March 2009 e-mail reflects that it requested "last year's [2008] indemnity agreement," the e-mail contains no indication that both parties agreed in 2008 or thereafter to enter into an indemnity agreement. Moreover, the same e-mail contains a request for a 2009 agreement, and absent any allegation that the parties signed a separate agreement for 2009, the execution of the agreement in 2009 permits an inference that the parties intended that it apply in 2009 rather than in 2008.

That Grgas obtained liability insurance in 2008 does not prove that it did so pursuant to any specific agreement with Almar as the certificate of insurance reflects that Almar was named as an additional insured only if there was a written and executed contract requiring it to be so named, and it is not conceded that such a contract existed. In any event, an agreement to procure insurance does not constitute evidence of the existence of a separate agreement to indemnify. (*Rodriguez v Seven Seventeen HB Buffalo Corp.*, 56 AD3d 1280 [4th Dept 2008] [rejecting contention that certificate of liability insurance obtained before plaintiff's accident constituted "recognition" that indemnification agreement was in effect at time of accident]).

Almar has thus failed to allege sufficiently, much less sustain its burden of demonstrating, that the parties intended the agreement to be applied retroactively. Its claim that discovery is needed on this issue is conclusory. (*See Fleischman*, 51 AD3d at 1205-1206

[defendants' request for further discovery to determine existence of contracts between parties denied as they had sufficient time to locate documents which would presumably be in their possession]; *Brown v Transcare New York, Inc.*, 27 AD3d 350 [1st Dept 2006] [plaintiff's vague and conclusory claims that further discovery may lead to evidence relevant to triable issues of fact insufficient]).

C. Insurance

As Almar has failed to establish that at the time of plaintiff's accident, Grgas was contractually obligated to procure insurance on its behalf and to name it as an additional insured (*supra*, III.B.), its claim for breach of contract is without merit.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that third-party defendant Bruno Grgas, Inc.'s motion for summary judgment is granted, and the third-party complaint by Almar Plumbing & Heating Corp. s/h/a Almar Plumbing and Heating Corporation against Bruno Grgas, Inc. is dismissed with costs and disbursements to third-party defendant Bruno Grgas, Inc. as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: September 30, 2010
New York, New York