

**Bottiglieri v Gotham Constr.**

2010 NY Slip Op 32863(U)

September 29, 2010

Supreme Court, New York County

Docket Number: 108386/09

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

WILLIAM BOTTIGLIERI,  
Plaintiff,

-against-

GOTHAM CONSTRUCTION and  
808 COLUMBUS, LLC,  
Defendants.

Index No. 108386/09  
DECISION AND ORDER

*Seq. # 001*

GOTHAM CONSTRUCTION and  
808 COLUMBUS, LLC,  
Third-Party Plaintiffs,

-against-

THYSSENKRUPP ELEVATOR CORPORATION,  
Third-Party Defendant.

**FILED**  
OCT 15 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 2 were read on this motion by third party defendant(s) motion to dismiss the third party complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits (Memo) \_\_\_\_\_  
Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

1

Cross-Motion:  Yes  No

Third-party defendant moves, pursuant to CPLR 3211 (a) (7), to dismiss the third-party complaint.

Plaintiff William Bottiglieri brings this action pursuant to New York Labor Law sections 200, 240 and 241 to recover for personal injuries sustained on January 20, 2009, while working at a construction site known as Park West Village, located at 808 Columbus Avenue, New York,

\* 2]

New York (the Premises). At the time of the accident, Bottiglieri was employed by the third-party defendant Thyssenkrupp Elevator Corporation (TKE). The Premises was owned by defendant 808 Columbus, LLC (808 Columbus). Defendant Gotham Construction (Gotham) was the Construction Manager. Gotham had contracted with TKE to design and install elevators and escalators at the Premises pursuant to a Trade Subcontract, dated May 4, 2007 (the Trade Subcontract).

Bottiglieri commenced the within action in June 2009. Thereafter, Gotham and 808 Columbus commenced the third-party action against TKE, seeking indemnification based upon TKE's negligence (first cause of action), breach of contract (second cause of action), breach of agreement to defend and indemnify (third cause of action) and breach of agreement to purchase liability insurance (fourth cause of action).

TKE moves to dismiss on the grounds that: (1) the action is unsustainable under the New York Workers' Compensation Law; and (2) an amendment to the Trade Subcontract stipulates that TKE's indemnity and additional insured obligations exclude all claims and/or suits by TKE's own employees who have received workers' compensation benefits. TKE asserts that Bottiglieri was an employee of TKE and has received workers' compensation benefits.

When a worker is injured in a job-related accident, the Workers' Compensation Law generally limits the right of recovery of the worker against the employer to the compensation and benefits provided by the Workers' Compensation Law (NY Workers Compensation Law §§ 11, 29 [6]). The Workers' Compensation Law does not preclude an employee from suing third parties for injuries sustained during the course of his employment. However, an employer cannot be held liable for contribution or indemnity to any third person based on liability for injuries sustained by an employee unless one of two conditions are met: (1) there is a pre-accident agreement providing for indemnification by the employer, or (2) the third party proves, through competent medical evidence, that the employee sustained a "grave injury" (*Fleming v*

*Graham*, 10 NY3d 296 [2008]; see also *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

Here, defendant/third-party plaintiffs Gotham and 808 Columbus acknowledge that they have not asserted any claim or made any allegation against TKE in which it is claimed that the plaintiff sustained a "grave injury" (Kowalski Aff., ¶ 2). They assert, however, that the Trade Subcontract contains several provisions obligating TKE to indemnify and procure insurance on their behalf. Specifically, Articles 9 (A) (1) and 9 (A) (2) of the Trade Subcontract obligate TKE to indemnify the 808 Columbus and Gotham "to the extent permitted by law" with respect to actions arising out of TKE's work, or accidents occurring "in or about where the work is being performed" (Weisburd Aff., Ex. B, at 18). In addition, exhibits annexed to the Trade Subcontract, including Exhibit C, entitled "Insurance Requirements," and Exhibit D, entitled "Indemnity and Hold Harmless Agreement" also provide for TKE to procure Workers' Compensation and Employers' Liability insurance and to indemnify and hold harmless Gotham and 808 Columbus.

TKE responds that Amendment No. 1 to the Subcontract between Gotham Construction Company, LLC and TKE modifies and supercedes these provisions and provides that there is no duty to insure or indemnify where, as here, the injured plaintiff is a TKE employee who has received workers' compensation benefits. Amendment No. 1 provides, in part, as follows:

This Amendment No. 1 shall be made a part of this agreement and in the event of conflict with other articles, terms, conditions, or contract documents, this Amendment shall be final:

Exhibit C - Insurance Requirements - Amend so that the additional insured coverage, wherever required, provides a defense and indemnity only for actions arising from Contractor's acts, actions, omissions or neglects; but does not provide defense or indemnity for the additional insureds' own acts, actions, omissions, neglects or for unproven allegations.

Amend so that Contractor's indemnity and additional insured obligations exclude all claims and/or suits by Contractor's own

employees who have received workers' compensation benefits of any kind.

Exhibit D - Indemnity and Hold Harmless - Amend so Contractor will fully indemnify and hold harmless parties indemnified under this provision for all our acts, actions and neglects, but we will not indemnify any other party for their acts, actions or negligence

(Weisburd Aff., Ex. C, "Amendment No. 1" at 1)..

Gotham and 808 Columbus argue that the above portion of the amendment which excludes indemnity and additional insured obligations with respect to suits by TKE's employees who have received workers' compensation benefits refers only to Exhibit C, since it immediately follows that portion of the amendment referring to Exhibit C. TKE argues that, by its terms, the amendment applies to both the insurance and indemnification clauses.

"It is an elementary rule of contract construction that clauses of a contract should be read together contextually in order to give them meaning" (*HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 253 [1<sup>st</sup> Dept 2001], citing *Bijan Designer For Men v Fireman's Fund Ins. Co.*, 264 AD2d 48, 51-52 [1<sup>st</sup> Dept 2000]).

Here, the language of the amendment, by its terms, refers to the Contractor's "indemnity and additional insured obligations." Exhibit C makes no mention of indemnification and refers only to the Contractor's insurance obligations. To hold that the amendment applies only to Exhibit C would mean ignoring the indemnity portion of the language of the amendment and render it meaningless. On the other hand, to apply the amendment to all of the TKE's indemnity and additional insured obligations gives that phrase its precise meaning.

Accordingly, given that TKE is not contractually obligated to indemnify Gotham or 808 Columbus, as here, the claimant is a TKE employee who has received workers' compensation benefits, it is

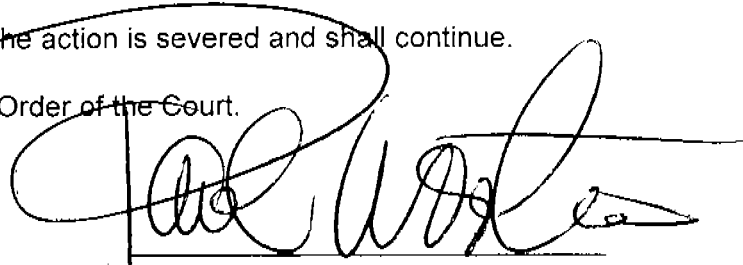
ORDERED that the motion by third-party defendant Thyssenkrupp Elevator Corporation to dismiss the third-party action is granted, and the third-party action is dismissed, with costs

and disbursements to said third-party defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the remainder of the action is severed and shall continue.

This constitutes the Decision and Order of the Court.

Dated: September 29, 2010



Paul Wooten J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST

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