

**Prestigiacommo v Shorestein Realty Servs. E. LLC**

2011 NY Slip Op 31041(U)

April 20, 2011

Supreme Court, New York County

Docket Number: 102979/2009

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK  
J.S.G.  
*Justice*

PART 2

Prestigiacomo  
- v -  
Shorenstein

INDEX NO. 102979-2009  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. Mot 3  
MOTION CAL. NO. \_\_\_\_\_

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

	PAPERS NUMBERED
Notice of Motlon/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS GRANTED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.**

**FILED**  
APR 25 2011  
NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/20/11 \_\_\_\_\_  
*L. York*  
LOUIS B. YORK J.S.G.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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 2

----- X  
**JAMES PRESTIGIACOMO and CYNTHIA  
PRESTIGIACOMO,**

Index No. 102979/09

Plaintiffs,

-against-

**SHORENSTEIN REALTY SERVICES EAST LLC  
and SRI SIX 125 PARK LLC,**

Defendants.

----- X  
**SHORENSTEIN REALTY SERVICES EAST LLC  
i/s/h/a SHORENSTEIN COMPANY LLC and  
SRI SIX 125 PARK LLC,**

Third-Party Index No. 590453/09

Third-Party Plaintiffs,

-against-

**ABLE ENGINEERING SERVICES, INC.,**

Third-Party Defendant.

----- X  
**LOUIS B. YORK, J.:**

**FILED**  
APR 25 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

This decision addresses the motion for summary judgment pursuant to CPLR § 3212 made by defendant/third-party plaintiff Shorenstein Realty Services East LLC (hereafter Shorenstein) and SRI Six 125 Park LLC (hereafter SRI) for summary judgment against Able Engineering Services, Inc. (hereafter Able) and the cross-motion for summary judgment pursuant to CPLR § 3212 made by Able and opposed by Shorenstein and SRI. The motion for summary judgment by Shorenstein and SRI as against plaintiff James Prestigiacomo was addressed by the Court in an Interim Order dated December 21, 2010. For the reasons discussed *infra*, the motion for summary judgment is denied as against Able and the cross-motion for summary judgment is granted in part and denied in part.

## Facts

The present action was commenced by plaintiff James Prestigiaco against defendants Shorenstein and SRI. Mr. Prestigiaco seeks damages for personal injuries he alleges he sustained when he tripped and fell while walking on a defective floor in the Subway Electric Room, which is in the basement of the building located at 125 Park Avenue in Manhattan. SRI is the owner of the building and Shorenstein is its managing agent.

At the time of his injury, Mr. Prestigiaco was the Assistant Chief Engineer for the building and was employed by Able (Affirmation in Support of Motion for Summary Judgment, Ex. E, Examination Before Trial of James Prestigiaco [hereafter Prestigiaco Deposition], p. 51-52). Able provided maintenance services for the building under an "Engineering Services Agreement" executed between it and Shorenstein as agent for SRI (Affirmation in Support to Motion for Summary Judgment, Ex. K, Engineering Services Agreement). The agreement requires Able to "operate, monitor and maintain in good working order and condition, all heating, ventilating, air conditioning, plumbing and electrical systems, and other equipment" in the building (Engineering Services Agreement, Schedule 2, ¶ 1).

Mr. Prestigiaco had entered the Subway Electric Room to look at an air conditioning unit located there (Prestigiaco Deposition, p. 58). His supervisor, Roland Hontoria, had instructed him to check that the compressor for the air conditioner was running, following complaints that the lobby of the building was warm (Prestigiaco Deposition, p. 65). After listening to the air conditioner, Mr. Prestigiaco walked across the room to close a blast-proof door that connected to the transformer room (Prestigiaco Deposition, pp. 66-69). As he walked back towards the air conditioner he tripped on an uneven piece of flooring (Prestigiaco Deposition, pp. 69-70).

According to Mr. Prestigiacomio's Verified Bill of Particulars<sup>1</sup>, as a result of his fall he suffered the following injuries which are alleged to be of a permanent nature: central herniated disc at T6-T7, cervical radiculopathy, lumbar radiculopathy, left sided hemiparesis, spastic paraparesis, left sided hemisensory loss interfering with gait and station, tingling in upper extremities, numbness in upper extremities (Affirmation in Support of Motion for Summary Judgment, Ex. D, Verified Bill of Particulars).

The third-party complaint alleged four claims against Able. The first and second causes of action seek indemnification and contribution, respectively, based on Able's negligence being either completely or partially responsible for Mr. Prestigiacomio's injuries. The third cause of action is a claim for indemnification based on Able's contract with the third-party plaintiffs. The fourth cause of action is for breach of Able's covenant under its contract with the third-party plaintiffs, which required Able to procure and name the third-party plaintiffs as additional named insured on an insurance policy.

### **Third-Party Plaintiff's Contentions**

Shorenstein and SRI contend that they are entitled to contractual indemnification, insurance defense and defense costs based on their contract with Able. The claim for contractual indemnification is based on Sections 5.7.1 and 5.7.2 of the Engineering Services Agreement. Section 5.7.1 of the contract provides in relevant part:

To the greatest extent allowed by law, Contractor shall indemnify, defend and hold harmless the Owner Parties and the officers, directors, agents, employees, clients, successors and assigns and authorized representatives of the Owner Parties ("Indemnified Parties"), from and against any and all claims, actions, demands, damages, liabilities, or losses, including (without limitation) attorney's fees and expenses ("Claims"), whether arising before, during, or after the term of

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<sup>1</sup> The plaintiff served an Amended Verified Bill of Particulars dated June 15, 2010 on defendants that claimed a number of additional injuries. However, in an order dated October 28, 2010, the Court granted the defendants motion to strike and preclude it after counsel for plaintiff failed to serve opposition to the motion and did not appear at the conference where it was heard.

the Contract, which actually or allegedly arise from, are related to or incidental to (a) the Work, including, without limitation, those Claims directly or indirectly caused or contributed to in whole or in part by any act or omission of Contractor Party, or (b) any breach or default by Contractor under the terms of the Contract; provided however, that the foregoing shall not apply to the extent of Claims caused by the gross negligence or willful misconduct of the party indemnified. . . The obligation of Contractor to indemnify the Owner Parties is to be measured by the allegations of the claim and not the merits thereof, and shall arise from the time of the events on which the claim is based. . .

Section 5.7.2 of the contract<sup>2</sup> provides in part as follows:

In addition to, and not in limitation of, any other indemnification obligation of Contractor hereunder, Contractor shall, except to the extent prohibited by law, indemnify, defend and hold harmless Owner and all other Indemnified Parties from any Claims asserted by any employee of Contractor under any statute, law or regulation or based on common law, . . . provided, however, that the foregoing shall not apply to the extent of Claims caused by the gross negligence or willful misconduct of the party indemnified. . .

In addition, Shorenstein and SRI raise factual issues of liability noting that plaintiff was under the supervision of Able and in the course of performing his routine engineering maintenance duties for Able at the time of the accident.

The claim for breach of contract to procure insurance is based on Section 10 of the agreement. Sections 10.1 and 10.1.1 requires Able to provide "Commercial General Liability Insurance including blanket contractual liability coverage sufficiently broad to cover the indemnification obligations under paragraph 5.7" of the contract. Section 10.3 requires that Shorenstein and the building owner must be listed as additional insured parties on the insurance and Section 10.4 requires that the general liability insurance policies must provide that they are primary to any liability insurance carried by Shorenstein and the building owner.

<sup>2</sup> Able argues in its Affirmation in Reply to Shorenstein and SRI's Opposition to the Cross-Motion that the Court should not consider ¶ 5.7.2 as a basis for recovery as it was not pled in the third-party complaint. However as neither the provision nor Mr. Prestigiacomo's status as an Able employee could possibly come as a surprise to Able, the Court reserves its rights both to award summary judgment on an unpleaded cause of action if the proof supports such a determination and to deem pleadings amended to conform with the proof (*see Weinstock v Handler*, 254 AD2d 165, 166 [1st Dept 1998]).

### Third-Party Defendant's Contentions

Able contends that it is entitled to Summary Judgment as to the first two claims by Shorenstein and SRI because New York Workers Compensation Law § 11 prohibits common law indemnity and contribution claims except where the plaintiff has suffered a "grave injury" which is not the case here. In addition Able argues that it not required to provide contractual indemnification as claimed in the third cause of action because the contractual provision violated New York General Obligations Law § 5-322.1. Finally Able contends that it is entitled to have the fourth cause of action for breach of contract dismissed because Able did in fact procure insurance naming both Shorenstein and SRI as additional insured as it was required.

### Discussion

#### **A. STANDARD FOR SUMMARY JUDGMENT**

Under New York CPLR § 3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." However, such a motion should not be granted where triable issues of fact are raised as "[i]ssue finding, not issue determination, is the appropriate function of summary judgment" (Epstein v Scally, 99 AD2d 713, 714 [1st Dept 1984] [citation omitted]). The initial burden lies upon the motion's proponent who "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.* [citation omitted]).

## B. CLAIMS FOR COMMON LAW INDEMNIFICATION AND CONTRIBUTION

Able argues that Workers Compensation Law bars the claims of Shorenstein and SRI for common law indemnification or contribution. In pertinent part, New York Workers Compensation Law § 11 states the following:

The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom . . .

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 of use 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 of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Furthermore, in the context of a motion for summary judgment it is the burden of the movant to demonstrate through competent admissible evidence that the plaintiff has not suffered a "grave injury" under the statute (*Altonen v Toyota Motor Credit Corp.*, 32 AD3d 342, 343 [1st Dept 2006]).

Here, it is undisputed that Mr. Prestigiaco was an employee of Able at the time of the incident and that he has received workers compensation benefits following his injury. Furthermore, Able has presented evidence that none of the injuries complained of by Mr. Prestigiaco are of the type classified as grave injuries by the statute. As such, Able has established prima facie entitlement to summary judgment. In their opposition to the motion, Shorenstein and SRI do not dispute any of these claims. Therefore Able's cross-motion for

summary judgment is granted with respect to the common law indemnification and contribution claims against it.

### C. CLAIM FOR CONTRACTUAL INDEMNIFICATION

Shorenstein and SRI point out however that Workers Compensation Law is not a bar to the claim for indemnification based on their contract with Able. New York Workers Compensation Law § 11 states in pertinent part:

For purposes of this section the terms "indemnity" and "contribution" shall not include a claim or cause of action for contribution or indemnification 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.

Thus, Shorenstein and SRI argue that based on Sections 5.7.1 and 5.7.2 of the Engineering Services agreement, they have made out a prima facie case of entitlement to indemnification and defense by Able in this action.

In response, Able argues that New York General Obligations Law § 5-322.1 prohibits the enforcement of those contract provisions as it would require indemnification of the third-party plaintiffs' own negligence, which is contrary to public policy. The statute states:

A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

Here, the contract sections in question do not violate § 5-322.1. Section 5.7.1 of the contract clearly states it is applicable only "[t]o the greatest extent allowed by law" and similarly section 5.7.2 states Able is required to indemnify "except to the extent prohibited by law". In cases where similar language has been used, courts have found that the agreements "should be read to give the provision effect, rather than in a manner that would render it void" (*Murphy v Columbia Univ.*, 4 AD3d 200, 202-203 [1st Dept 2004]). Therefore, the Court finds that under the contract, Shorenstein and SRI may be entitled to partial indemnification by Able excluding any portion that is attributable to Shorenstein and SRI's own negligence.

However, issues of fact preclude granting summary judgment for either party on this issue. As the Court stated in its Interim Order, questions of fact exist regarding the negligence of Shorenstein and SRI that cannot be resolved on this record. Since there is an outstanding question of fact as to whether Shorenstein and SRI were actively negligent, neither Shorenstein and SRI nor Able are entitled to summary judgment on this issue (*Mannino v J.A. Jones Constr. Group, LLC*, 16 AD3d 235, 237 [1st Dept 2005]). Furthermore, Shorenstein and SRI are not entitled to defense from Able at this time. As Able is not an insurance company, its duty to defend is no broader than its duty to indemnify which has yet to be established (*see e.g. George v Marshalls of MA, Inc.*, 61 AD3d 925, 931 [2d Dept 2009]). As such summary judgment on this issue is denied to both Able and Shorenstein and SRI on this claim.

#### **D. CLAIM FOR BREACH OF COVENANT TO PURCHASE INSURANCE**

With respect to Shorenstein and SRI's claim that Able breached its agreement to procure insurance, Able has provided a copy of its policy of insurance as well as a copy of certificates of insurance. These documents show Shorenstein and the building owners listed as additional

insureds and state that the insurance is primary. In response, Shorenstein and SRI do not argue that the policy does not meet the requirements of the contract but rather that the contract has been breached because Able's insurance carrier has not taken over defense of the action despite the tender by Shorenstein and SRI. However, the insurer's failure to defend Shorenstein and SRI is irrelevant to the question of whether Able has performed its obligation to procure insurance (see *Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497 [1st Dept 2004]). Therefore, Able is entitled to summary judgment on the claim of breach of contract to procure insurance.

Therefore, for the reasons stated above, the motion for summary judgment by Shorenstein and SRI as against Able is denied and the cross-motion for summary judgment by Able is granted in part and denied in part.

Based on the foregoing, it is

**ORDERED** that the Motion for Summary Judgment by Shorenstein and SRI against Third-Party Defendant Able is denied; and it is further

**ORDERED** that the Cross-Motion for Summary Judgment dismissing the first, second and fourth causes of action in the Third-Party Complaint is granted; and it is further

**ORDERED** that the Cross-Motion for Summary Judgment seeking dismissal of the third cause of action in the Third-Party Complaint is denied.

Dated: 4/26/11

**FILED**

APR 25 2011

*[Signature]*  
NEW YORK  
COUNTY CLERK'S OFFICE  
Louis B. York, J.S.C.

**LOUIS B. YORK**  
**J.S.C.**