

Addonisio v City of New York
2011 NY Slip Op 31979(U)
July 11, 2011
Supreme Court, New York County
Docket Number: 100870/2010
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 19

Index Number : 100870/2010

ADDONISIO, NICK

vs

CITY OF NEW YORK

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the accompanying memorandum decision.*

FILED

JUL 15 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/14/11

Salvatore Caspulle
J.S.C.

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 — NEW YORK COUNTY

PRESENT: _____ PART _____

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NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/15/11

Barbara Cappullo

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
NICK ADDONISIO and LISA ADDONISIO,

Plaintiffs,

- against -

Index No.: 100870/2010
Motion Sequence No.: 3, 4
Submission Date: 03/02/2011

THE CITY OF NEW YORK, CONSOLIDATED
EDISON, INC., EMPIRE CITY SUBWAY
(LIMITED), VERIZON COMMUNICATIONS INC.,
VERIZON NEW YORK, INC., NYC & LI ONE
CALL/DIG SAFELY, INC., and ONE CALL
CONCEPTS, INC.,

DECISION AND ORDER

Defendants.

-----X

For Plaintiffs:
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FILED

JUL 15 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

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VERIZON COMMUNICATIONS INC.
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Papers considered in review of this motion for summary judgment (Motion Sequence 3):

- Notice of Motion.....1
- Aff in Opp.....2
- Aff in Reply.....3

Papers considered in review of this motion for summary judgment (Motion Sequence 4):

- Notice of Motion.....1
- Aff Regarding.....2

HON. SALIANN SCARPULLA, J.:

In this negligence action, defendants Verizon Communications Inc. (“Verizon”) and Empire City Subway Company (Limited) (“ECS”) each move for summary judgment dismissing the complaint and all counterclaims as against them. Verizon is a holding company, and ECS is a wholly-owned subsidiary of Verizon.

Plaintiffs Nick Addonisio’s (“Addonisio”) and Lisa Addonisio’s (“Mrs. Addonisio”) claims stem from an injury that Addonisio sustained in the course of his employment as a utility worker. Addonisio was injured on July 17, 2007 when he was using a saw to cut open the roadway at First Avenue between 77th Street and 78th Street. Addonisio’s saw came into contact with an underground conduit that contained an electrical wire and he was electrocuted.

Addonisio originally brought three separate actions in connection with his accident, but the three actions have been consolidated into this action. *See* Order of Tingling, J. (May 13, 2010) (Verizon’s Exhibit C). In Motion 3, ECS moves for summary judgment dismissing the complaint against it on the ground that, as Addonisio’s employer, it is immune from any action sounding in tort arising out of Addonisio’s injury under NY CLS Work Comp § 11. ECS’ motion has not been opposed by any of the co-defendants. However, Addonisio contends in opposition that the Workers’ Compensation Board previously found that Verizon Communications Inc., not ECS, is Addonisio’s employer. Addonisio urges the Court to adopt the alleged Workers’ Compensation Board finding.

In Motion 4, Verizon contends that it is merely a holding company and that it had no part in the roadway demolition that injured Addonisio. Verizon also argues that the City of New York's cross-claim against it should be barred by the antisubrogation rule. There was no opposition to Verizon's motion from Addonisio or any of Verizon's co-defendants. Motion Sequences 3 and 4 are consolidated herein for disposition.

Discussion

Motion for Summary Judgment by Empire City Subway Company (Limited)
[Motion Sequence 003]

Under the New York State Workers' Compensation Law, the employer of an injured employee cannot be held liable in a tort action. NY CLS Work Comp § 11. The Worker's Compensation Law provides injured workers with immediate access to needed funds. But, "[t]he price for these secure benefits is the loss of the common-law tort action in which greater benefits might be obtained." *O'Rourke v. Long*, 41 N.Y.2d 219, 222 (1976). Employers also "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 the employee has suffered from a "grave injury" as defined by the statute.¹ NY CLS Work Comp § 11. Here, there has been no grave injury, as defined by the statute, thus Addonisio's employer may not be

¹ The Worker's Compensation Law defines a "grave injury" as 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." NY CLS Work Comp § 11.

held liable for direct or third-party claims stemming from his injury. The only issue on this motion is whether Verizon or ECS is Addonisio's employer for purposes of the Worker's Compensation Law.

Here, the Workers' Compensation Board's Notice of Decision listed "Verizon Communications" as Addonisio's employer. However the Workers' Compensation Board decision is not binding upon this Court. "The [Workers' Compensation] Board's decision finally determines the controversy between the parties to the hearing who are normally the injured employee and the employer or his workers' compensation carrier." *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d 15 (1986) (internal citations omitted). However, such a "decision could not have a *res judicata* or *collateral estoppel* effect against [a party if that party] was not a party to the compensation proceeding, and the issue whether [that party] was an employer of plaintiff was not presented to or determined by the Workers' Compensation Board." *Bradford v. Air La Carte, Inc.*, 79 A.D.2d 553 (1st Dept. 1980).²

In this case, while the Workers' Compensation Board listed "Verizon Communications" as the employer of Addonisio at the time of his injury, the issue of

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To impose *collateral estoppel* with respect to a quasi-judicial determination "two basic conditions [must be] met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal." *Jeffreys v. Griffin*, 1 N.Y.3d 34, 39 (2003). Ultimately, "collateral estoppel is a flexible doctrine, such that '[i]n the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results.'" *Id.* at 40, quoting *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147 (1988).

whether Verizon or its wholly-owned subsidiary ECS was Addonisio's employer was not before the Board. Upon review of the parties' submissions, the Court finds that ECS has submitted sufficient evidence to support its claim that the use of "Verizon Communications" on the Workers' Compensation Board's Notice of Decision in fact refers to ECS. On the Notice of Decision, the Workers' Compensation servicer is listed as Sedgwick Claims Management ("Sedgwick"). ECS submits an affidavit from Addonisio's caseworker at Sedgwick, who explains that at the time of the incidents relevant to this proceeding, ECS was the only Verizon subsidiary whose claims were handled by Sedgwick. *See* Affidavit of Kathleen Taffner, ECS Exhibit H. The caseworker also states that all mentions of "Verizon Communications" on the Notice of Decision, actually refer to ECS. *Id.*

ECS also submits the affidavit of Dawn R. Moore ("Moore"), the supervisor of operations at ECS, whose duties include the handling of ECS' payroll records. Moore attached a printout from payroll accounting to her affidavit. The printout shows that Addonisio was working for ECS on July 17, 2007, the date of his accident. Addonisio does not deny that ECS paid his wages. In fact, in his deposition, Addonisio referred to ECS as his employer.

This evidence conclusively shows that ECS, not Verizon, was Addonisio's employer on July 17, 2007. Under NY CLS Work Comp § 11, ECS' sole liability is to pay worker's compensation benefits for Addonisio, and ECS may not be held liable to Addonisio or any co-defendants for Addonisio's alleged injuries.

The City of New York's ("NYC") indemnification cross-claims against ECS are not addressed in NY CLS Work Comp § 11. The tort immunity provided by the statute is not applicable to "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." NY CLS Work Comp § 11. *See also Rodrigues v. N & S Bldg. Contrs., Inc.*, 5 N.Y.3d 427 (2005) ("At the outset, it is clear that, despite the Workers' Compensation Law shield of employers from liability as joint tortfeasors, a third party may recover against an employer pursuant to contract [internal citations omitted].").

However, Verizon has agreed to indemnify NYC under its insurance policy with American Home Assurance ("AIG"), which also covers Verizon's subsidiary, ECS. AIG has provided for NYC's defense in this action, and has agreed to pay any damages arising out of this action on behalf of NYC. Because of this, NYC's cross-claim against ECS is barred under the antisubrogation rule.³ The cross-claim amounts to one insured suing another insured even though both are covered under the same insurance policy.

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"An insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered. This rule applies even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived and has procured separate insurance covering the same risk." *Pennsylvania General Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d 465, 468 (1986). "Public policy requires this exception to the general rule [allowing subrogation,] both to prevent the insurer from passing the incidence of loss to its own insured and to guard against the potential for conflict of interest that may affect the insurer's incentive to provide a vigorous defense for its insured." *North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281, 294-295 (1993).

Ultimately, the insurer is the only party in interest with respect to defendants NYC, ECS, and Verizon, and therefore NYC's indemnification cross-claim against ECS should be dismissed.

Motion for Summary Judgment by Verizon Communications Inc.
[Motion Sequence 004]

Verizon alleges that it is a holding company that does not perform construction work, and that it was not involved in opening up the roadway at First Avenue between 77th Street and 78th Street on July 17, 2007. Verizon submits the affidavit of Jane A. Schapker ("Schapker"), Verizon's Executive Director for Corporate Governance, who describes Verizon's business and discusses Verizon's role as a holding company that had no role in the construction project that injured Addonisio. Neither Addonisio nor any of the other defendants oppose Verizon's motion. Accordingly, the Court grants Verizon's motion for summary judgment dismissing the complaint and all cross-claims against it.

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by Empire City Subway (Limited) dismissing the complaint of the plaintiffs Nick Addonisio and Lisa Addonisio and all cross-claims against it is granted; and it is further

ORDERED that the motion for summary judgment by Verizon Communications Inc. dismissing the complaint of the plaintiffs Nick Addonisio and Lisa Addonisio and all cross-claims against it is granted; and it is further

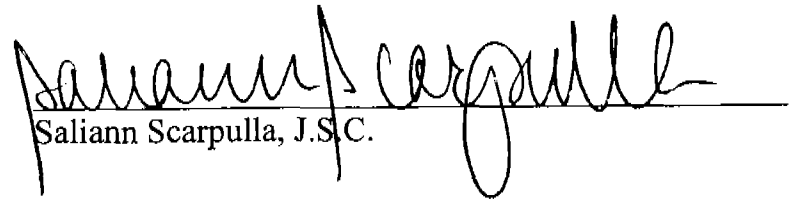
ORDERED that the Clerk of the Court is directed to sever and dismiss all claims and cross-claims against the two defendants, Verizon Communications Inc. and Empire City Subway (Limited).

This constitutes the decision and order of the Court.

Dated: New York, New York

July 11, 2011

ENTER :


Saliann Scarpulla, J.S.C.

FILED
JUL 15 2011
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