

<b>Dasilva v Pratt Bros., Inc.</b>
2011 NY Slip Op 33042(U)
November 14, 2011
Supreme Court, Nassau County
Docket Number: 21555/09
Judge: Denise L. Sher
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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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ANTONIO DASILVA,  
  
Plaintiff,  
  
- against -  
  
PRATT BROTHERS, INC.,  
  
Defendant.

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TRIAL/IAS PART 32  
NASSAU COUNTY  
  
Index No.: 21555/09  
Motion Seq. Nos.: 01, 02  
Motion Dates: 08/02/11  
08/30/11

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PRATT BROTHERS, INC.,  
  
Third-Party Plaintiff,  
  
- against -  
  
VALENTE CONTRACTING CORP.,  
  
Third-Party Defendant.

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**The following papers have been read on these motions:**

	Papers Numbered
Notice of Motion, Affirmation and Exhibits, Affidavit and Exhibits and Memorandum of Law	1
Notice of Cross-Motion, Affirmation and Exhibits	2
Reply Memorandum of Law	3
Reply Affirmation in Further Support of Cross-Motion and Exhibit	4

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant/third-party plaintiff Pratt Brothers, Inc. ("Pratt") moves, pursuant to CPLR § 3212, for summary judgment in its favor against third-party defendant Valente Contracting

Corp. (“Valente”) on the Verified Third-Party Complaint.

Third-party defendant Valente opposes defendant/third-party plaintiff Pratt’s motion and cross-moves<sup>1</sup>, pursuant to CPLR § 3212, for summary judgment dismissing the third, fourth and sixth causes of action of the Verified Third-Party Complaint alleging negligence, common law indemnification and contribution respectively. Defendant/third-party plaintiff Pratt opposes third-party defendant Valente’s cross-motion.

### **BACKGROUND**

On April 9, 2009, plaintiff Antonio DaSilva (“DaSilva”) allegedly sustained injuries when he slipped and fell backward on asphalt/debris while attempting to remove a sixteen foot long wooden form with a pick at a construction project known as the NCDPW Hempstead Avenue Drain Reconstruction Project located in West Hempstead, New York. The project involved installation of drainage systems, curbing, replacement of asphalt shoulders and other related work. Plaintiff DaSilva testified that the accident occurred while he was attempting to remove a series of wooden forms, approximately sixteen feet long and six inches wide, into which concrete had been poured. When he placed the pick under one of the forms and pulled back on the pick to lever said form, he slipped and landed on the ground. According to his testimony, on the day before the accident, defendant/third party-plaintiff Pratt had put down temporary asphalt in the area where the accident occurred and there were pieces of asphalt of different sizes strewn around on the ground. *See* Defendant/third-party plaintiff Pratt’s Affirmation in Support Exhibit E.

Defendant/third-party plaintiff Pratt was the general contractor on the project and third-

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<sup>1</sup>As an initial matter, the Court notes that when a party makes a timely summary judgment motion, the court may, in its discretion, properly consider an untimely summary judgment motion, provided the late motion is, as here, based on nearly identical grounds. *See Leonard v. Kahn*, 69 A.D.3d 812, 893 N.Y.S.2d 572 (2d Dept. 2010).

party defendant Valente, plaintiff DaSilva's employer, was the subcontractor hired by general contractor, defendant/third-party plaintiff Pratt, to provide labor and materials as and for certain concrete and other related work on the project, including demolition of existing curbs and installation of new curbs. A Purchase Order, generated by defendant/third-party plaintiff Pratt and executed by third-party defendant Valente, reflects the parties' arrangement. The Purchase Order provides, in part, that:

"The subcontractor, Valente Contracting Corp. agrees to save, hold harmless and indemnify Pratt Brothers, Inc. on account of all expense, liability or payment by damage suffered through any act of Valente Contracting Corp. and/or its subcontractors. Valente Contracting Corp. further agrees to pay for all attorneys' fees, costs and related disbursements incurred by Pratt Brothers, Inc. in connection with the foregoing." See Defendant/third-party plaintiff Pratt's Affirmation in Support Exhibit K.

Plaintiff DaSilva commenced this action against defendant/third-party plaintiff Pratt alleging negligence and violation of the Labor Law in its failure, *inter alia*, to provide him with a safe workplace, to properly supervise and oversee the job site and to provide proper safeguards.

Predicated on the theory that it is entitled to a defense and indemnity from third-party defendant Valente pursuant to the Purchase Order, defendant/third-party plaintiff Pratt commenced a third-party action against plaintiff DaSilva's employer, asserting causes of action for contractual indemnification, breach of contract, negligence, common law indemnification, declaratory judgment, contribution and breach of contract to procure insurance.

Defendant/third-party plaintiff Pratt has moved for summary judgment on its Verified Third-Party Complaint requiring third-party defendant Valente to indemnify and defend it in the first-party action contending that it was not negligent and that the area where the accident occurred was in the exclusive control of third-party defendant Valente, who supervised/directed plaintiff DaSilva's work and supplied him with the necessary tools, materials and safety

equipment.

In response, third-party defendant Valente has cross-moved to dismiss the claims asserted against it in the third, fourth and sixth causes of action of the Verified Third-Party Complaint for negligence, common law indemnification and contribution respectively, contending that the subject claims are barred by § 11 of the Workers' Compensation Law;<sup>2</sup>

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<sup>2</sup>§ 11 of the statute provides, in pertinent part, as follows:

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, except that if any employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his or her legal representative in case of death results from the injury, may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that injury was due to the contributory negligence of the employee.

\* \* \*

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.

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

defendant/third-party plaintiff Pratt's claim that third-party Valente has a duty to defend it in the underlying personal injury action is not properly before the Court in that the Verified Third-Party Complaint fails to assert a cause of action for such relief and defendant/third-party plaintiff Pratt's claim for contractual indemnification is premature.

### ANALYSIS

Absent an express indemnification agreement or a grave injury as enumerated in Workers' Compensation Law § 11, an employer's on-the-job liability is ordinarily limited to workers' compensation benefits. *See Fleming v. Graham*, 10 N.Y.3d 296, 857 N.Y.S.2d 8 (2008); *Cocom-Tambriz v. Surita Demolition Contr., Inc.*, 84 A.D.3d 1300, 924 N.Y.S.2d 145 (2d Dept. 2011). Where a grave injury results, a primary defendant may commence a third-party action against an injured worker's employer for common law indemnification and/or contribution. *See Tonking v. Port Auth. of N.Y. & N.J.*, 3 N.Y.3d 486, 787 N.Y.S.2d 708 (2004). Workers Compensation Law § 11 does not preclude defendant/third-party plaintiff Pratt from pursuing a contractual indemnification claim, despite the nature of the injury sustained, based on a provision in a written Purchase Order contract executed prior to the accident, wherein third-party defendant Valente, plaintiff DaSilva's employer, agreed to indemnify defendant/third-party plaintiff Pratt for liability arising from any act by third-party defendant Valente or its subcontractors. *See Mantovani v. Whiting-Turner Contracting Co.*, 55 A.D.3d 799, 869 N.Y.S.2d 544 (2d Dept. 2008).

It is well settled that a contract which provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous. *See Bradley v. Earl B. Feiden, Inc.*, 8 N.Y.3d 265, 832 N.Y.S.2d 470 (2007).

Here, the indemnification provision is clear and unambiguous. It provides that third-

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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.

party defendant Valente will indemnify defendant/third-party plaintiff Pratt:

“On account of all expenses, liability or payment by damage suffered through any act of Valente Contracting Corp. and/or its subcontractors . . . [including] all attorneys’ fees, costs and related disbursements . . . in connection with the foregoing.” See Defendant/third-party plaintiff Pratt’s Affirmation in Support Exhibit K.

A party seeking contractual indemnification, however, must prove itself free from negligence, *i.e.*, that no negligent act or omission on its part contributed to the underlying injury and that its liability is solely vicarious arising from a non-delegable duty under the Labor Law. See *Giangarra v. Pav-Lak Contr., Inc.*, 55 A.D.3d 869, 866 N.Y.S.2d 332 (2d Dept. 2008). To the extent that its negligence contributed to the accident, it cannot be indemnified therefore. See *Mott v. Tromel Const. Corp.*, 79 A.D.3d 829, 912 N.Y.S.2d 685 (2d Dept. 2010); *Cava Const. Co., Inc. v. Gaeltec Remodeling Corp.*, 58 A.D.3d 660, 871 N.Y.S.2d 654 (2d Dept. 2009).

Upon the limited record before this Court, which has not been sufficiently developed to make a determination as to whether defendant/third-party plaintiff Pratt was actively negligent and contributed to plaintiff’s accident, no decision as to its right to contractual indemnification from third-party defendant Valente can be made at this juncture. See *Mannino v. J.A. Jones Constr. Group, LLC*, 16 A.D.3d 235, 792 N.Y.S.2d 32 (1<sup>st</sup> Dept. 2005). Inasmuch as the possibility exists that defendant/third-party plaintiff Pratt could be found one hundred percent (100%) liable for plaintiff DaSilva’s injury, there is no basis to grant summary judgment on its claim for contractual indemnification. See *Callan v. Structure Tone, Inc.*, 52 A.D.3d 334, 860 N.Y.S.2d 62 (1<sup>st</sup> Dept. 2008). Plaintiff DaSilva testified that there were pieces of asphalt debris strewn about the area where he fell at the time of the accident and it appears from the daily time sheets that defendant/third-party plaintiff Pratt’s crews were excavating/removing concrete sidewalks in the area on the day leading up to the accident.

Given the existence of factual issues as to whose negligence, if any, caused plaintiff DaSilva’s accident, it would be premature to reach the issue of contractual indemnification at

this juncture. See *McAllister v. Construction Consultants L.I., Inc.*, 83 A.D.3d 1013, 921 N.Y.S.2d 556 (2d Dept. 2011).

With respect to common law indemnification, it is well settled that an employer's liability for an employee's on-the-job injury is ordinarily limited to Workers' Compensation benefits. See *Fleming v. Graham, supra*. Employers, such as third-party defendant Valente, who provide Workers' Compensation coverage, are immune from tort liability except in a narrow class of cases in which an employee has sustained a grave injury. See Workers' Compensation Law § 11; *Maxwell v. Rockland Community College*, 78 A.D.3d 793, 911 N.Y.S.2d 130 (2d Dept. 2010); *Spiegler v. Gerken Bldg. Corp.*, 35 A.D.3d 715, 826 N.Y.S.2d 674 (2d Dept. 2006). By statute "grave injury" is both narrowly and completely described as:

"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."

Because plaintiff DaSilva's alleged injuries to his back, as described in his deposition testimony and as amplified in his Bill of Particulars, do not fall within any of the above enumerated categories, he did not suffer a "grave injury", and therefore, defendant/third party plaintiff Pratt is barred from asserting a common law indemnification claim against third-party defendant Valente and the causes of action for common law indemnification/contribution asserted in the Verified Third-Party Complaint must be dismissed.

Accordingly, defendant/third-party plaintiff Pratt's motion, pursuant to CPLR § 3212, for summary judgment in its favor against third-party defendant Valente is hereby **DENIED** given the existence of factual issues as to whether defendant/third-party plaintiff Pratt, as the general contractor on the project, created or caused the defective/unsafe condition which caused plaintiff to fall.

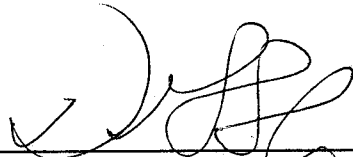
Third-party defendant Valente's cross-motion, pursuant to CPLR § 3212, for summary judgment dismissing the third, fourth and sixth causes of action of the Verified Third-Party Complaint is granted to the extent that the **fourth and sixth causes of action** of the Verified Third-Party Complaint are **DISMISSED**.

The Court notes that issues as to the third-party defendant Valente's duty to defend claims arising out of the subcontract, and whether it procured the required insurance coverage, are now pending in a separate declaratory judgment action presently pending against Hanleysville Worcester Insurance Company under Index No. 22344/10, Supreme Court, Nassau County.

The parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on November 17, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

  
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DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
November 14, 2011

**ENTERED**  
NOV 17 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE