

Jaspaul v Toyota Lift of N.Y.

2013 NY Slip Op 30900(U)

April 24, 2013

Sup Ct, Queens County

Docket Number: 1944 2011

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

DEO JASPAUL,
Plaintiff,

Index
No. 1944 2011

-against-

Motion
Date January 9, 2013

TOYOTA LIFT OF NEW YORK, etc., et al.,
Defendants.

Motion
Cal No. 65

MOBIL AIR TRANSPORT, INC., et ano.,
Third-Party Plaintiffs,

Motion
Seq. No. 5

-against-

KAWAL TRUCKING, INC.,
Third-Party Defendant.

The following papers numbered 1 to 16 read on this motion by third-party defendant Kawal Trucking, Inc. (Kawal) pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint asserted against it by defendants/third-party plaintiffs Mobil Air Transport, Inc. (Mobil Air), and The Air Group, Inc. (Air Group), on the grounds that it is not a proper party to the action, and that it has a defense founded upon documentary evidence and failure to state a cause of action, and for an order awarding it attorneys' fees pursuant to 22 NYCRR 130-1.1.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-10
Reply Affidavits	11-16

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained during the course of his employment as a dock worker for third-party defendant Kawal. Plaintiff alleges that, on February 19, 2008, while he was at the loading docks, he was struck by a forklift operated by a “servant, agent, contractor, permittee and/or employee upon said premises, loading docks and work site.”

Mobil Air and Air Group commenced a third-party action against Kawal alleging causes of action sounding in common-law contribution and indemnification, and contractual indemnification for liability for personal injuries sustained by plaintiff as a result of the accident.

On its motion, Kawal asserts that plaintiff did not sustain a grave injury and it did not contractually agree to indemnify Mobile Air and Air Group for liability for personal injuries sustained by plaintiff. Mobil Air and Air Group, and second third-party defendant Summit Handling Systems, Inc. (Summit), oppose the motion.¹ Plaintiff, defendants Toyota Lift of New York d/b/a Toyota Lift of New York, Inc., and Fork Lift Headquarters, Inc., and third-party plaintiff Hi-Lift of New York Inc. d/b/a Toyota Lift of New York (i/p/a Toyota Lift of New York a/k/a Toyota Lift of New York, Inc.), have not appeared in relation to the motion.

It is well established that 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 demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad*, 64 NY2d 851).

Workers’ Compensation Law § 11, among other things, provides that:

“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

1. It is noted that any affirmative relief sought by Summit in its opposition was not considered, as this defendant did not make any motion.

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.”

A proponent of a motion for summary judgment dismissing a third-party complaint because the plaintiff did not sustain a grave injury is required to make a prima facie showing of entitlement to judgment as a matter of law (*see Fitzpatrick v Chase Manhattan Bank*, 285 AD2d 487 [2001]).

Plaintiff alleges in his complaint that defendants are liable for his injuries insofar as he has a “grave injury” as defined in Workers’ Compensation Law § 11 (paragraph no. 142). Third-party defendant Kawal has failed to provide the court with a copy of plaintiff’s bill of particulars or a copy of the transcript of a deposition of plaintiff so that it can be determined the nature of plaintiff’s alleged grave injuries. In the absence of such bill of particulars or transcript, the court cannot determine whether the submissions of third-party defendant Kawal are sufficient to show plaintiff did not sustain a grave injury. In addition, to the extent third-party defendant Kawal seeks to prove that plaintiff did not sustain a grave injury to his left foot, third-party defendant Kawal relies upon medical reports and copies of medical and hospital records. The act of simply providing hundreds of pages of plaintiff’s medical records does not, in and of itself, establish a prima facie case that plaintiff did not suffer a grave injury as defined in Workers’ Compensation Law § 11.

Third-party defendant Kawal, thus, has failed to meet its prima facie burden of showing entitlement to summary judgment dismissing the third-party claims for common-law contribution and indemnification by establishing that plaintiff’s alleged injury was not a “grave injury” as defined in Workers’ Compensation Law § 11. Therefore, it is unnecessary to determine whether the papers submitted by defendants/third-party plaintiffs Mobile Air and Air Group and third-party defendant Summit in opposition were sufficient to raise a triable issue of fact (*see Winegrad*, 64 NY2d at 853).

With respect to the third-party claim against Kawal based upon contractual indemnification, Kawal offers the affidavit of its president, Churaman S. Persaud, and a copy of the handling contract entered into between it and defendant Air Group in March 2005. According to Mr. Persaud, Kawal agreed to provide dock and handling services for Air Group but never agreed to indemnify third-party plaintiffs Mobile Air and Air Group against liability for personal injuries resulting from negligence of third-party defendant Kawal in the course of operations in Kawal’s fulfillment of the contract. He states that third-party plaintiff Air Group agreed, under paragraph no. 2 of the portion of the handling contract denominated

“The Air Group, Inc. requirements,” only to reimburse third-party plaintiff Air Group for property damage to Air Group’s equipment and facilities caused by negligence by Kawal’s dock/driver staff members.

Third-party plaintiffs Mobile Air and Air Group contend that paragraph no. 2 of the handling contract contains language whereby third-party defendant Kawal agreed to indemnify defendant Air Group against liability for personal injuries resulting from negligence of third-party defendant Kawal caused due to the negligence of the Kawal dock/driver staff. Third-party plaintiffs Mobile Air and Air Group also assert that the injuries sustained by plaintiff were the result of the negligence of plaintiff’s coworker, also employed by third-party defendant Kawal.

Paragraph no. 2 of the portion of the handling contract denominated “The Air Group, Inc. requirements,” provides:

“2. The Air Group as well supplies the facility and is responsible for facility maintenance (i.e. doors, dock plates, lights, walls, heaters, security cameras, etc.). The contractor [Kawal] will be held responsible for any and all damage caused due to negligence on the part of the dock/driver staff. The Air Group reserves the right to bill the contractor for repairs or the contractor may submit damage claims through the contractors [sic] insurance.”

The right to contractual indemnification depends upon the specific language of the contract (*see Reyes v Post & Broadway, Inc.*, 97 AD3d 805 [2d Dept 2012]; *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]). When there is no legal duty to indemnify, “a contractual indemnification provision ‘must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed’ ” (*Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d at 1255–1256, quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]; *see Baginski v Queen Grand Realty, LLC*, 68 AD3d 905, 907 [2d Dept 2009]). The promise to indemnify should not be found except when it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*see Hooper Assoc. v AGS Computers*, 74 NY2d at 491–492; *see Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d at 1255–1256).

Here, the disputed contract language, i.e. “contractor [Kawal] will be held responsible for any and all damage caused due to negligence on the part of the dock/driver staff” does not clearly indicate that third-party defendant Kawal promised to indemnify third-party plaintiff Air Group for liability for personal injuries resulting from negligence of third-party defendant Kawal’s dock/driver staff. Rather, it appears based upon the surrounding contractual references to items of property and repairs, that third-party defendant Kawal

agreed only to reimburse third-party plaintiff Air Group for property damage caused by negligence by Kawal's dock/driver staff members. Although third-party plaintiffs Mobile Air and Air Group assert that third-party defendant Kawal has yet to appear for a deposition, they offer no proof, including an affidavit by someone with personal knowledge who is within their control, regarding the purpose of the handling contract and the disputed contract language, and the facts and circumstances surrounding the entry of the contract. A party cannot have the determination of a summary judgment motion postponed upon the mere speculation and hope that discovery will reveal facts supporting a cause of action (*see Keeley v Tracy*, 301 AD2d 502 [2d Dept 2003]; *Weltmann v RWP Group, Inc.*, 232 AD2d 550 [2d Dept 1996]). In addition, third-party plaintiffs Mobile Air and Air Group have failed to present any evidence that third-party Kawal entered into any contract with third-party plaintiff Mobile Air.

Third-party defendant Kawal therefore is entitled to summary judgment dismissing the third-party claims asserted against it by third-party plaintiffs Mobile Air and Air Group for contractual indemnification for liability for personal injuries suffered by plaintiff in the accident.

The motion by third-party defendant Kawal is granted only to the extent of granting third-party defendant Kawal summary judgment dismissing the third-party claims asserted against it by third-party plaintiffs Mobile Air and Air Group for contractual indemnification for plaintiff's personal injuries, and is denied in all other respects.

Dated: April 24, 2013

J.S.C.