

**McCann v Battery Place Green, LLC**

2013 NY Slip Op 31374(U)

June 25, 2013

Supreme Court, New York County

Docket Number: 103133/09

Judge: Cynthia S. Kern

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

PRESENT: \_\_\_\_\_  
*Justice*

PART \_\_\_\_\_

Index Number : 103133/2009  
MCCANN, JAMES  
vs.  
BATTERY PLACE GREEN  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 6/25/13

CRK, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X

JAMES MCCANN,

Plaintiff,

Index No. 103133/09

-against-

**DECISION/ORDER**

BATTERY PLACE GREEN, LLC, TURNER  
CONSTRUCTION COMPANY and BRICKENS  
CONSTRUCTION, INC.,

Defendants.

-----X

BATTERY PLACE GREEN, LLC and TURNER  
CONSTRUCTION COMPANY,

Third-Party Plaintiffs,

-against-

**FILED**

JUN 27 2013

**NEW YORK  
COUNTY CLERK'S OFFICE**

FIVE STAR ELECTRIC CORP. and BRICKENS  
CONSTRUCTION, INC.,

Third-Part Defendants.

-----X

FIVE STAR ELECTRIC CORP.,

Second Third-Party Plaintiff,

-against-

MASTERCRAFT MASONRY, INC.,

Second Third-Party Defendant.

-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers

Numbered

Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmations in Opposition to the Motion .....	<u>2</u>
Notice of Cross-Motion and Affidavits Annexed.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

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Plaintiff James McCann commenced the instant action against defendants Battery Place Green, LLC (“Battery Place”), Turner Construction Company (“Turner”) and Brickens Construction, Inc. (“Brickens”) to recover for injuries he allegedly sustained as a result of a slip on a blob of wet cement while working at a construction site. Third-Party Defendant/Second Third-Party Plaintiff Five Star Electric Corp. (“Five Star”) now moves (a) for an Order pursuant to CPLR § 3212 for summary judgment dismissing the third-party complaint and any and all cross-claims and/or counterclaims asserted against it; or, in the alternative, (b) for a Conditional Order of common-law indemnification against Second Third-Party Defendant Mastercraft Masonry, Inc. (“Mastercraft”). Defendants/Third-Party Plaintiffs Battery Place and Turner cross-move for an Order granting them contractual indemnity against Five Star. For the reasons set forth below, Five Star’s motion is granted in part and denied in part and Battery Place and Turner’s cross-motion is denied.

The relevant facts are as follows. Plaintiff commenced the instant action to recover for injuries he allegedly sustained when he was working as an electrician for Five Star at a construction project (the “project”) located at 70 Little West Street, New York, New York (the “subject premises”) on October 23, 2007. The project consisted of new construction for a residential apartment high-rise building and Five Star was retained by Turner, the general contractor of the project, to perform electrical work at the subject premises. On the date of the accident, plaintiff was allegedly performing work to subject premises’ fourth floor, which

consisted of an open deck, erected concrete walls and an electrical room. Plaintiff was working inside the electrical room, which was located in the middle of the floor, with his partner, Sal Sabitini, to run 3.5 inch pipes from electrical equipment to a splice box just outside of the electrical room. At the time of the accident, plaintiff was walking down an unfinished stairwell on the west side of the subject premises to the first floor in order to use the bathroom. He was descending the stairwell from the second to the first floor when he allegedly slipped on the fourth or fifth step on a grayish, round "blob of wet cement." Plaintiff testified that he stepped onto the cement with his right foot causing him to lean to his right side, at which point he braced himself against an existing wall but he did not fall to the floor.

In or around March 2009, plaintiff commenced this action. Battery Place, the owner of the subject premises, and Turner, the general contractor of the project, then commenced a Third-Party Action against Five Star for indemnification and/or contribution and breach of contract for failure to procure insurance. Five Star then commenced a Second Third-Party Action against Mastercraft, Turner's subcontractor, for indemnification and/or contribution.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant case, Five Star's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing the third-party complaint is granted. As an initial matter, Five Star has established its prima facie right to summary judgment dismissing that portion of the third-party complaint which alleges a cause of action for contractual indemnification. The indemnification clause in the subcontract between Turner and Five Star states,

The subcontractor hereby assumes entire responsibility and liability for any and all damage or injury of any kind or nature whatever....to all persons, whether employees of any tier of the subcontractor or otherwise, and to all property *caused by, resulting from, arising out of or occurring in connection with the execution of the Work, or in preparation for the Work, or any extension, modification, or amendment to the Work by change order or otherwise...*

(emphasis added). However, it is well-settled that in order for a claim to "arise out of" or result from a party's work, thereby triggering such indemnification, there must be a showing of a particular act or omission in the performance of such work that was causally related to the claimed accident. *See Worth Constr. Co., Inc. v. Admiral Ins. Co.*, 10 N.Y.3d 411 (2008); *see also Greco v. Archdiocese of N.Y.*, 268 A.D.2d 300 (1<sup>st</sup> Dept 2000); *see also Pepe v. Center for Jewish History, Inc.*, 59 A.D.3d 277 (1<sup>st</sup> Dept 2009). In the instant action, Five Star has established that the work it was hired to perform pursuant to the subcontract, specifically electrical work, did not play any role in the creation of the claimed defect, the wet blob of cement on the stairs. Plaintiff was merely walking down the stairs on the way to the bathroom when the accident occurred and it is undisputed that he was not performing electrical work at the time of the accident. Daniel Marra, Turner's field engineer, has affirmed that Five Star's sole function as a subcontractor was to provide the electrical work and that such work did not involve the use of mortar or cement. Furthermore, Ralph Cristiano, Mastercraft's bricklayer foreman, affirmed that

Mastercraft was retained to perform block work and wall building, which included building out the walls surrounding the building's stairwells and that it would be Mastercraft's employees alone who would mix mortar on site and transport said mortar to the specific work area where it was required, at which point it would be placed on mortar stands to be used solely by Mastercraft's workers. Moreover, Mr. Cristiano affirmed that during the course of Mastercraft's work, mortar would fall on the stairs and it was Mastercraft's responsibility to clean it up. Furthermore, Five Star has established, through these affidavits, that it bore no site safety responsibilities as part of its work on the project.

In response, Battery Place and Turner fail to raise an issue of fact as to whether plaintiff's accident "arose out of" or was caused by the performance of his work at the construction site. Battery Place and Turner's assertion that Five Star must indemnify them for plaintiff's injuries based solely on the fact that plaintiff was located within the subject premises at the time of the accident is without merit as such argument would open the floodgates to hold Five Star liable for any defective condition anywhere in the building simply by virtue of maintaining employees on the subject premises. Moreover, such assertion is not supported by the relevant caselaw. Battery Place and Turner's reliance on *Daily News v. OCS Sec.*, 280 A.D.2d 576 (2d Dept 2001) is misplaced. In *Daily News*, a visitor to the Daily News facility was injured when he was struck by a descending elevator door operated by an employee of third-party defendant OCS Security Company while the employee was on his lunch break. The Second Department granted indemnification to the Daily News as against OCS on the ground that the nature of OCS's security work required its employees to use the very elevator whose door struck the injured visitor and the employee was operating the elevator when the injured party's accident occurred.

However, in this case, the instrumentality causing plaintiff's accident, the wet blob of cement, was neither part of the materials or equipment used by Five Star nor was it Five Star's work obligations pursuant to the subcontract. Additionally, Battery Place and Turner's reliance on *Morales v. Spring Scaffolding, Inc.*, 24 A.D.3d 42 (1<sup>st</sup> Dept 2005) is also misplaced. In *Morales*, the plaintiff fell from a defective parapet wall of a sidewalk bridge that collapsed while plaintiff was on his lunch break. In granting indemnification, the First Department found that plaintiff's accident arose out of the work plaintiff was hired to perform because the parapet wall was specifically used by plaintiff's employer as a staging area for tools and equipment and as an area to mix cement and that the plaintiff would have returned to work in that very area after his lunch break anyway. In this case, none of Five Star's electrical materials or equipment contributed to the cement on which plaintiff slipped. Further, the movants have not shown that Five Star's work involved the mixing of or applying of cement materials or the use of any mortar as part of its work on the project. Finally, Battery Place and Turner's reliance on *W & W Glass Sys., Inc. v. Admiral Ins. Co.*, 91 A.D.3d 530 (1<sup>st</sup> Dept 2012) for the proposition that indemnification is warranted merely because plaintiff was Five Star's employee is also misplaced. In *W & W Glass*, an employee of defendant Metal Sales Company, a subcontractor, was injured. Although the court noted that the loss involved an employee of the subcontractor, the court granted indemnification on the ground that said employee was "injured while performing the named insured's work under the subcontract." Here, this court cannot find that plaintiff's injury arose out of his performance of the work pursuant to the subcontract and thus, the mere fact that he was employed by the subcontractor is insufficient by itself to warrant indemnification.

Five Star has also established its prima facie right to summary judgment dismissing that

portion of the third-party complaint which alleges a cause of action for common law indemnification on the ground that the plaintiff has not sustained a “grave injury” as defined by Workers’ Compensation Law § 11. Pursuant to Workers’ Compensation Law § 11,

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.”

Workers’ Compensation Law § 11. Workers’ Compensation Law § 11 provides that a “grave injury” shall mean 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.

*Id.* The only determination to be made in evaluating whether a plaintiff suffered a “grave injury” is whether the injuries fall within the statute’s narrow objective requirement. *See Castro v. United Container Machinery Group, Inc.*, 96 N.Y.2d 398 (2001). The Court of Appeals has determined that “the grave injuries listed are both narrowly and completely described. The list is exhaustive, not illustrative, it is not intended to be extended absent further legislative action.” *Id.* at 492.

In the instant case, Five Star has established its prima facie right to summary judgment dismissing that portion of the third-party complaint alleging a cause of action for common-law indemnification as it has demonstrated that plaintiff did not suffer a “grave injury.” As an initial matter, it is undisputed that plaintiff was an employee of Five Star at the time of his accident and

that he was acting within the scope of his employment for Five Star when his accident occurred. To establish that plaintiff did not suffer a grave injury, Five Star points to the injuries set forth in plaintiff's bill of particulars, none of which falls into the statutory definition of "grave injury." Plaintiff alleges medial and lateral meniscal tears of the right knee requiring two arthroscopic surgeries; cortisone injections; and three synvisc injections to the knee. Plaintiff does not allege that he suffered any of the injuries enumerated in the statute nor does he claim a total permanent disability of any kind. Based upon the bill of particulars, the court finds that Five Star has met its burden of establishing the absence of a "grave injury." See *Barbieri v. Mount Sinai Hospital*, 264 A.D.2d 1 (1<sup>st</sup> Dept 2000)(employer met his burden of showing the absence of a grave injury through plaintiff's pleadings as amplified by the bill of particulars...). As Battery Place and Turner have failed to raise an issue of fact as to whether plaintiff suffered a "grave injury" pursuant to Workers' Compensation Law § 11, Five Star's motion for summary judgment must be granted.

Additionally, Five Star has established its prima facie right to summary judgment dismissing that portion of the third-party complaint which alleges a cause of action for breach of contract for failure to procure insurance on the ground that Five Star has fulfilled such obligations. Five Star has provided its commercial general liability policy which establishes the appropriate additional insured endorsement, thus evidencing Five Star's compliance with the subcontract's requirements.

Finally, Five Star's request for a Conditional Order of common-law indemnity against Mastercraft is denied as moot as there are no claims remaining against Five Star upon which indemnification would be based. Finally, Battery Place and Turner's cross-motion for an Order

granting them contractual indemnity against Five Star must be denied as this court has already dismissed the third-party complaint as against Five Star on the ground that Battery Place and Turner are not entitled to indemnification from Five Star.

Accordingly, that part of Five Star's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing the third-party complaint and any and all cross-claims or counterclaims asserted against it is granted; that part of its motion requesting a Conditional Order of common-law indemnity against Mastercraft is denied; and Battery Place and Turner's cross-motion for an Order granting them contractual indemnity against Five Star is denied. The third-party complaint is hereby dismissed as against Five Star. This constitutes the decision and order of the court.

Dated: 6/25/13

Enter: \_\_\_\_\_

CR  
J.S.C.

**FILED**

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