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| Delrosario v United Nations Fed. Credit Union |
| 2014 NY Slip Op 30757(U) |
| February 21, 2014 |
| Sup Ct, Bronx County |
| Docket Number: 303940/2008 |
| Judge: Lucindo Suarez |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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SANDY DELROSARIO,

Plaintiff,

- against -

UNITED NATIONS FEDERAL CREDIT UNION,
TISHMAN CONSTRUCTION CORPORATION OF
NEW YORK and PETROCELLI ELECTRIC CO., INC.,

Defendants.

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UNITED NATIONS FEDERAL CREDIT UNION,
TISHMAN CONSTRUCTION CORPORATION OF
NEW YORK,

Third-Party Plaintiff,

- against -

EUROTECH CONSTRUCTION CORPORATION,

Third-Party Defendant.

-----X

PETROCELLI ELECTRIC CO., INC.,

Second Third-Party Plaintiff,

- against -

EUROTECH CONSTRUCTION CORPORATION,

Second Third-Party Defendant.

-----X

PRESENT: Hon. Lucindo Suarez

DECISION AND ORDER

Index No. 303940/2008

Third-Party Index No.
84176/2008

Second Third-Party Index No.
383791/2013

Upon the notice of motion dated July 25, 2013 of second third-party defendant Eurotech Construction Corp. s/h/a Eurotech Construction Corporation and the affirmation, affirmed report, and

exhibits submitted in support thereof; plaintiff's affirmation in opposition dated October 23, 2013 and the affirmed reports and exhibits annexed thereto; the affirmation in opposition dated October 24, 2013 of defendant/second third-party plaintiff Petrocelli Electric Co., Inc. and the exhibits annexed thereto; the reply affirmation dated February 13, 2014 of second third-party defendant Eurotech Construction Corp. s/h/a Eurotech Construction Corporation and the affirmed report annexed thereto; and due deliberation; the court finds:

Plaintiff, a carpenter employed by third-party and second third-party defendant Eurotech Construction Corp. s/h/a Eurotech Construction Corporation ("Eurotech"), commenced this Labor Law action to recover damages for personal injuries sustained on October 31, 2006 during the construction of an office building in Long Island City, Queens County. Defendant/third-party plaintiff United Nations Federal Credit Union owned the property. Defendant/third-party plaintiff Tishman Construction Corporation of New York served as the general contractor, and defendant/second-third party plaintiff Petrocelli Electric Co., Inc. ("Petrocelli") was the electrical subcontractor. Eurotech now moves pursuant to CPLR 3212 for summary judgment dismissing the second third-party complaint on the ground that the action is barred by Workers' Compensation Law § 11. Eurotech submits the third-party pleadings; plaintiff's verified supplemental bill of particulars and supplemental bill of particulars; an affirmed report from neurologist Robert A. Bonomo, M.D.; records from New York Presbyterian Hospital; and the deposition transcripts for plaintiff, Michael Meere ("Meere") and Mario Leotta.

Plaintiff allege in his bill of particulars that he suffered numerous disc bulges and herniations in his cervical and lumbar spine; cervical and lumbar radiculopathy; myofascial pain syndrome; loss of consciousness and concussion; post-concussion syndrome; cephalalgia; and electrical burns to his face. On July 11, 2008, plaintiff underwent a lumbar discectomy and decompression of the L5-S1 disc. On March 12, 2009, plaintiff underwent an anterior cervical discectomy with decompression of the spinal cord and nerve roots, partial corpectomies at C5-C6, placement of a biomechanical device at C5-

C6, and spinal fusion at C5-C6.

Plaintiff testified that he felt pain in his head and throughout his neck after falling from an A-frame ladder. He was treated and released from New York Presbyterian Hospital the same day. He sought further medical treatment for neck and back pain two days later, and he was informed that MRI studies revealed positive findings for a herniated disc in his neck and a bulging disc in his lower back. He suffers from headaches "once in a while" but "not very often."

Robert A. Bonomo, M.D. conducted a neurologic examination of plaintiff on March 21, 2012 and reviewed the medical records. Dr. Bonomo opined that the spine injuries were not the cause of any symptoms or the effect of any trauma. The MRI and x-ray reports noted positive findings for disc bulges and herniations but did not indicate any spinal cord compression. The studies also revealed degenerative disc disease and diffuse osteophyte disc/ridge complexes at C4-C5 and C5-C6. He found a full range of motion of the cervical spine and straight leg raising was negative. CT scans of the head and cervical spine taken at New York Presbyterian Hospital were normal, and subsequent neurological examinations performed by plaintiff's physicians were also normal. He opined that plaintiff's headaches were mild, easily managed and not disabling. Dr. Bonomo concluded that plaintiff could return to work without restriction.

Generally, an employer's liability for an on-the-job injury is limited to workers' compensation benefits, but when an employee suffers a grave injury, the employer may be liable to third parties for indemnification or contribution. *Rubeis v. Aqua Club Inc.*, 3 N.Y.3d 408, 412-413, 821 N.E.2d 530, 532, 788 N.Y.S.2d 292, 294 (2004). A "grave injury" is defined as "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." See Workers'

Compensation Law § 11. The grave injuries listed in Workers' Compensation Law § 11 are "deliberately both narrowly and completely described" and it is an "exhaustive" list. *Castro v. United Container Mach. Group, Inc.*, 96 N.Y.2d 398, 402, 761 N.E.2d 1014, 1015, 736 N.Y.S.2d 287, 288 (2001). The burden rests with the moving party to demonstrate that plaintiff's injuries were not "grave." *See Altonen v. Toyota Motor Credit Corp.*, 32 A.D.3d 342, 820 N.Y.S.2d 263 (1st Dep't 2006). Eurotech has demonstrated that plaintiff did not suffer a grave injury as defined in Workers' Compensation Law § 11. It is not disputed that plaintiff was employed by Eurotech or that he received workers' compensation benefits. Moreover, injuries such as a concussion and disc bulges or herniations do not constitute a grave injury. *See Spiegler v. Gerken Bldg. Corp.*, 35 A.D.3d 715, 826 N.Y.S.2d 674 (2d Dep't 2006); *Angwin v. SRF P'ship, L.P.*, 285 A.D.2d 568, 729 N.Y.S.2d 151 (2d Dep't 2001). Accordingly, the second third-party complaint must be dismissed.

Petrocelli in opposition submits that the motion is premature since medical discovery, including an orthopedic evaluation of plaintiff, is still outstanding. To the extent that medical records have been exchanged or obtained, two reports from treating physician Andrew Merola, M.D. indicate that plaintiff was "totally disabled." Petrocelli also contends that plaintiff suffered "an acquired injury to the brain caused by an external physical force resulting in permanent total disability" which would constitute a grave injury, *see* Workers' Compensation Law § 11, based on plaintiff's claims for post-concussion syndrome and cephalalgia. However, any claim for an acquired brain injury is not supported, and plaintiff's spine injuries are not defined as grave injuries in the statute. Plaintiff testified that he received treatment only for his neck and back *injuries*, and Dr. Merola did not reference a brain injury in either report. A CT scan of the head and brain taken at New York Presbyterian Hospital within hours of the accident showed no evidence of a traumatic brain injury, acute infarction, fracture, or intracranial hemorrhage. Moreover, headaches do not satisfy the acquired brain injury standard. *See Anton v. West Manor Constr. Corp.*, 100 A.D.3d 523, 954 N.Y.S.2d 76 (1st Dep't 2012).

Plaintiff in opposition submits affirmation from Dr. Merola and treating physician Arden Kaisman, M.D. to refute Dr. Bonomo's claim that the medical procedures were unnecessary. His physicians, though, failed to establish whether plaintiff's injuries were grave within the meaning of the Workers' Compensation Law, and they made no reference to a brain injury.

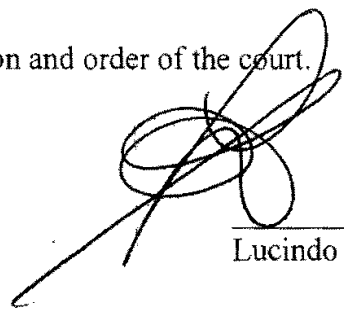
Accordingly, it is

ORDERED, that the motion of second third-party defendant Eurotech Construction Corp. s/h/a Eurotech Construction Corporation for summary judgment dismissing the second third party complaint against it is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of Eurotech Construction Corp. s/h/a Eurotech Construction Corporation dismissing the second third-party complaint against it.

This constitutes the decision and order of the court.

Dated: February 21, 2014



Lucindo Suarez, J.S.C.