

<b>Moran v Long Is. Power Auth.</b>
2015 NY Slip Op 30920(U)
May 7, 2015
Supreme Court, Suffolk County
Docket Number: 05-26561
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 05-26561

CAL No. 14-001700T

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

MOTION DATE 6-30-14 (#002)

MOTION DATE 10-22-14 (#003)

ADJ. DATE 1-28-15

Mot. Seq. # 002 - MD

# 003 - XMD

-----X

EDWARD MORAN and JANINE MORAN,  
  
Plaintiffs,  
  
- against -  
  
LONG ISLAND POWER AUTHORITY and  
KEYSPAN,  
  
Defendants.

CHRISTOPHER S. OLSON, ESQ.  
Attorney for Plaintiffs  
434 New York Avenue  
Huntington, New York 11743

CULLEN and DYKMAN LLP  
Attorney for Defendant/Third-Party Plaintiffs  
LIPA and National Grid/Keyspan  
100 Quentin Roosevelt Boulevard  
Garden City, New York 11530

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LONG ISLAND POWER AUTHORITY and  
NATIONAL GRID ELECTRIC SERVICES,  
LLC f/k/a KEYSpan ELECTRIC SERVICES,  
LLC s/h/a KEYSpan,  
  
Third-Party Plaintiffs,  
  
- against -  
  
TOWN OF BROOKHAVEN,  
  
Third-Party Defendant.

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ZAKLUKIEWICZ, PUZO & MORRISSEY, LLP  
Attorney for Third-Party Defendant  
2701 Sunrise Highway, P.O. Box 2  
Islip Terrace, New York 11752

Upon the following papers numbered 1 to 47 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers 24 - 27 ; Answering Affidavits and supporting papers 16 - 23, 28 - 35, 36 - 45 ; Replying Affidavits and supporting papers 46 - 47 ; Other \_\_\_\_: (and after hearing counsel in support and opposed to the motion) it is,

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**ORDERED** that the motion by the third-party defendant Town of Brookhaven for an order pursuant to CPLR Section 3212 granting summary judgment dismissing the complaint, the third-party complaint, and all cross claims against it, is denied; and it is further

**ORDERED** that the cross motion by the plaintiffs for an order granting them partial summary judgment and dismissing the third-party defendant Town of Brookhaven's seventh affirmative defense is denied.

This is an action to recover damages for personal injuries suffered by the plaintiff Edward Moran (Moran) when he struck an underground power line owned and operated by the defendants/third-party plaintiffs Long Island Power Authority and National Grid Electric Services, LLC, formerly known as Keyspan Electric Services, LLC, sued herein as Keyspan, (collectively LIPA). It is undisputed that this accident occurred on August 3, 2005, and that Moran was acting in the course of his employment with the defendant Town of Brookhaven (Town) at the time of this incident. On that date, Moran was installing a fence at premises owned by the Town. While using a metal "tamping bar" to dig a hole for a fence post, Moran struck a high voltage electrical cable and suffered personal injuries. Thereafter, Moran applied for, and received, workers' compensation benefits.

The plaintiffs commenced this action by the filing of a summons and complaint on November 9, 2005. Issue was joined by LIPA's service of an answer dated December 28, 2005. Thereafter, LIPA served an amended answer dated June 29, 2009. On June 30, 2009, LIPA filed a third-party summons and complaint against the Town. The Town's third-party answer dated September 10, 2009 includes as its seventh affirmative defense that the action "is barred pursuant to workers' compensation § 11."

The Town now moves for summary judgment dismissing the complaint, the third-party complaint and all cross claims against it on the sole ground that all claims and cross claims herein are barred by the exclusivity provisions contained in Workers' Compensation Law (WCL) §11. WCL §11 provides, in pertinent part:

The liability of an employer ... shall be exclusive and in place of any other liability whatsoever, to such employee. ... 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 ...

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, ... or an acquired injury to the

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brain caused by an external physical force resulting in permanent total disability.

WCL §11 exempts an injured plaintiff's employer from claims for contribution or indemnity in the absence of plaintiff's "grave injury," or a written contract entered into prior to the subject accident in which the employer expressly agreed to contribution or indemnification of the claimant (see Fleming v Graham, 10 NY3d 296; Persaud v Bovis Lend Lease, Inc., 93 AD3d 831). The term "grave injury" includes only those injuries listed in the statute and determined to be permanent (see Fleming v Graham, supra; Persaud v Bovis Lend Lease, Inc., supra).

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 eliminate any material issue of fact (see Alvarez v Prospect Hospital, 68 NY2d 320; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (Roth v Barreto, 289 AD2d 557; Rebecchi v Whitmore, 172 AD2d 600; O'Neill v Fishkill, 134 AD2d 487). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 AD2d 610).

In support of its motion, the Town submits, among other things, the pleadings, the plaintiffs' amended bill of particulars, the transcript of Moran's deposition testimony, and the stipulation settling the plaintiff's workers' compensation claim. At his deposition on June 15, 2012, Moran described how this accident occurred, and he testified extensively about his injuries and treatments. He indicated that he had not been employed since his last deposition in January 2009,<sup>1</sup> that he is able to drive a car, and that he had not looked into job training programs. In their amended bill of particulars, the plaintiffs allege that Moran's injuries include, among other things, electrical injury, tremors, migraine headaches, dizziness, anxiety and depression, central nervous systems dysfunction, and cognitive dysfunction.

The sole question before the Court is whether Moran suffered a grave injury as defined in the Workers' Compensation Law. It is the burden of an employer seeking summary judgment on a third-party complaint for contribution/indemnity against it to show, by admissible evidence, that the plaintiff's injuries were not "grave" (Altonen v Toyota Motor Credit Corp., 32 AD3d 342; see also Galindo v Dorchester Tower Condominium, 56 AD3d 285; Way v Grantling, 289 AD2d 790). Generally, an employer's burden of establishing its prima facie right to summary judgment on the issue is not met based on the submission of a party's bill of particulars and deposition testimony only (Altonen v Toyota Motor Credit Corp., supra) or without presenting medical evidence (Way v Grantling, supra).

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<sup>1</sup> The record reveals that Moran was previously deposed in this action. The parties have not submitted a copy of Moran's earlier testimony.

Here, the Town has failed to establish its entitlement to summary judgment dismissing the complaint, the third-party complaint, and all cross claims against it. The Town has failed to submit any evidence regarding Moran's injuries, and its submission is not sufficient to make a prima facie case that plaintiff's injuries do not constitute "grave" injuries within the meaning of Worker's Compensation Law §11. The failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med. Ctr., supra; Matinez v 123-16 Liberty Ave. Realty Corp., 47 AD3d 901). In addition, the plaintiffs are not entitled to maintain an action against the Town pursuant to the Workers' Compensation Law (Reich v Manhattan Boiler & Equip. Corp., 91 NY2d 772), and their complaint does not include any allegations against the Town. Moreover, there are no additional third-party defendants in this action meaning that no cross claims have been asserted against the Town. Accordingly, the Town's motion for summary judgment is denied.

The plaintiffs now cross move for "partial summary judgment and dismissing the third-party defendant Town of Brookhaven's seventh affirmative defense."<sup>2</sup> The record reveals that the plaintiffs are not seeking partial summary judgment as to LIPA or the Town's liability. Thus, it is determined that the plaintiffs' reference to partial summary judgment is directed solely to the dismissal of the Town's seventh affirmative defense. In support of their motion, the plaintiffs submit the affirmation of their attorney, the affirmation of Moran's treating neurologist, and the affidavit of Moran's treating neuropsychologist. In his affirmation, Frederic A. Mendelsohn, M.D., F.A.A.N. (Dr. Mendelsohn) swears that he is a physician duly licensed to practice medicine in the State of New York, that he is board certified in neurology, and that Moran has been his patient since September 2008. He indicates that the accident on August 3, 2005 subjected Moran to an electrical shock resulting in injury to his brain, hands, neck and back, and that his most recent physical examination of Moran reveals that Moran's symptoms "are consistent with combined spinal cord and brain injury." He states that "it is my opinion, to a reasonable degree of medical certainty, that [Moran] ... continues to suffer ... trauma to the brain [from this accident]. Furthermore, due to the length of time of his symptomatology has persisted unabated, this is a permanent condition and I feel he is completely unable to participate in the work force."

In his affidavit, Stephen Honor, Ph.D., P.C. (Dr. Honor), swears that the report attached as an exhibit thereto is accurate to the best of his knowledge, and that "all of the opinions contained therein are held to a reasonable degree of neuropsychological certainty." In his report dated October 10, 2014, Dr. Honor indicates that Moran has been his patient since 2005, that it is his "contention" that Moran "has suffered a grave work-related injury," and that these injuries "are of a permanent nature." He acknowledges that "Moran's life has been fraught with a number of serious difficulties" not associated with the subject accident, which "raises a question regarding the concept of a "grave injury." Nonetheless, Dr. Honor opines that Moran has "suffered such a grave injury resulting from

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<sup>2</sup> The plaintiffs' cross motion is not accompanied by an affidavit of service. The Court has considered the cross motion as it is evident that it was served on opposing counsel, who have submitted opposition papers.

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the electrical accident. He is a totally disabled man, not able to work in any capacity, resulting from the external forces of the injury on his body and brain.”

It is well settled that a brain injury results in “permanent total disability,” and constitutes a grave injury pursuant to WCL §11 when the evidence establishes that the injured worker is no longer employable in any capacity, regardless of whether the worker is able to perform day-to-day functions (Rubeis v Aqua Club Inc., 3 NY3d 408, 788 NYS2d 292 [2004]; see also Aramburu v Midtown West B, LLC, 126 AD3d 498). In addition, it has been held that a psychoneurologist’s testimony that a plaintiff’s brain injury rendered the plaintiff permanently and totally disabled is sufficient to establish that the plaintiff suffered a grave injury (Chelli v Banle Assoc., LLC, 22 AD3d 781). Here, the plaintiffs have established their prima facie entitlement to summary judgment dismissing the Town’s seventh affirmative defense.

In opposition to the cross motion, the Town submits, among other things, the affirmation of its attorney, and two reports by a neurologist who conducted independent medical examinations of Moran relative to his claim for workers’ compensation. In his affirmation, counsel for the Town contends, among other things, that the plaintiffs’ cross motion is untimely, and that the cross motion should not be considered by the Court. However, a court may entertain a belated cross motion for summary judgment if a timely motion for such relief has been made on “nearly identical” grounds (Grande v Peteroy, 39 AD3d 590, 592; Bressingham v Jamaica Hosp. Med. Ctr., 17 AD3d 496, 497). Here, the issues raised in the subject cross motion are identical to those raised in the Town’s motion, and it is considered herein.<sup>3</sup> In addition, counsel’s contention that the Town is entitled to summary judgment because the Town provided Moran with workers’ compensation coverage is without merit.

In two reports, affirmed pursuant to CPLR 2106, Ravi Tikoo, M.D. (Dr. Tikoo) indicates that he is a board certified neurologist, and that he examined Moran on May 25, 2006 and February 8, 2007 regarding the subject accident. In the report of his first physical examination, Dr. Tikoo found that Moran’s “electrocution injuries” were causally related to the accident. However, he states that Moran’s “subjective complaints ... are not corroborated by objective neurological testing.” Dr. Tikoo indicates that “there is no objective evidence from the neurological standpoint to support work restrictions due to the accident in question.” In his report of his second physical examination, Dr. Tikoo found that Moran’s injuries were causally related to the accident, and that Moran was “able to function in his pre-accident capacity,” and “[h]e is able to return to work from a neurological standpoint.”

Because summary judgment deprives the litigant of his or her day in court, it is considered a “drastic remedy” which should be invoked only when there is no doubt as to the absence of triable issues (Andre v Pomeroy, 35 NY2d 361, 364; Elzer v Nassau County, 111 AD2d 212). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (Chilberg v Chilberg, 13 AD3d 1089; Barclay v Denckla, 182 AD2d 658). Here, the reports

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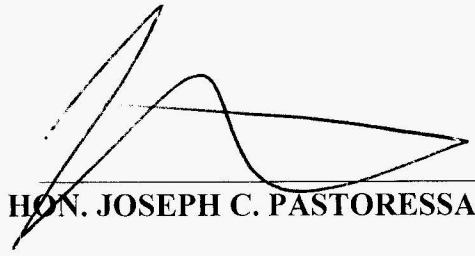
<sup>3</sup> To the extent that the subject cross motion could be read to seek partial summary judgment as to the Town and LIPA’s liability, already determined to be inapplicable here, the cross motion would be found to be untimely.

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of Dr. Tikoo raises a triable issue whether Moran is permanently and totally disabled within the definition of WCL §11.

In its opposition to the plaintiffs' cross motion, LIPA submits, among other things, the same reports as those submitted by the Town. In his reply affirmation, counsel for the plaintiffs contends that the Court has the discretion to conclude that Dr. Tikoo's opinions are too remote to carry any weight (citations omitted). However, the authorities cited all involve decisions made at the trial of the respective actions. All issues regarding the admissibility of, or the weight to be accorded, any evidence submitted herein are reserved for the jury or the Justice presiding at trial, as appropriate. Accordingly, the plaintiffs' cross motion to dismiss the Town's seventh affirmative defense is denied.

Dated: May 7, 2015

  
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**HON. JOSEPH C. PASTORESSA, J.S.C.**

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION