

Uddin v 950 WoodyCrest, LLC
2015 NY Slip Op 31912(U)
September 29, 2015
Supreme Court, Bronx County
Docket Number: 307291/2010
Judge: Jr., Kenneth L. Thompson
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*Uddin v.
Tri-Circle*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 _____ X
MOHAMMED UDDIN and JASMIN AKHTER,

Index No: 307291/2010

Plaintiffs,

-against-

DECISION AND ORDER

950 WOODYCREST, LLC,

Present:

HON. KENNETH L. THOMPSON, JR.

_____ Defendant X

950 WOODYCREST, LLC,

3rd Party Plaintiff,

Third Party Index No.: 83828/2012

-against-

J&G GENERAL CONTRACTING INC. and TRI-CIRCLE
ENTERPRISES, INC.,

3rd Party Defendants

_____ X

The following papers numbered 1 to 3 read on this motion for summary judgment

No	On Calendar of July 10, 2015	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1
	Answering Affidavit and Exhibits	2
	Replying Affidavit and Exhibits	3
	Affidavit	
	Pleadings -- Exhibit	
	Memorandum of Law	
	Stipulation -- Referee's Report --Minutes	
	Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Third-party defendant, Tri-Circle Enterprises, Inc., (Tri-Circle), moves pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint as against it. This action arose as a result of personal injuries sustained by plaintiff, Mohammed Uddin, (Uddin), when he fell from a ladder while in the employ of Tri-Circle. The claims of plaintiff, Jasmin Akter, are derivative. Defendant, 950 Woodycrest, LLC, (Woodycrest), is the owner of the property upon which Tri-Circle was performing work at the behest of Woodycrest.

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 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."

Workers' Compensation Law 11

It is undisputed that the only category of "grave injury" under the Worker's Compensation Law that is not conceded to be inapplicable to plaintiff is "an acquired injury to the brain caused by an external physical force resulting in permanent total disability." In defining "permanent total disability" the Court of Appeals held that "the test we adopt for permanent total disability under section 11 is one of unemployability *in any capacity*. "In any capacity" is in keeping with legislative intent and sets a more objectively ascertainable test than equivalent, or competitive, employment." *Rubeis v. Aqua Club Inc.*, 3 N.Y.3d 408, 417, 821 N.E.2d 530 (2004). Woodycrest argues that under the standard set in *Rubeis*, if plaintiff is not employable in an equivalent or competitive position post brain injury, he has a grave injury. Woodycrest's argument is unpersuasive and relies upon a misreading of *Rubeis*. The Court of Appeals clearly set the threshold for a grave injury as one in which a plaintiff is unemployable "in any capacity" due to a brain injury. Equivalent or competitive employment is mentioned solely for purposes of contrast with the "in any capacity" standard.

Tri-Circle submitted the unsigned report of Alan Getreu, (Getreu), a Vocational Rehabilitation Consultant/Case Manager. After Woodycrest objected to consideration of

Getreu's affirmation on grounds that it was inadmissible evidence that cannot be considered on a motion for summary judgment, Tri-Circle submitted an affidavit from Getreu that adopted the report submitted on the motion under oath, curing the deficiency in Tri-Colors evidence. It is true that it is a rule:

in the context of summary judgment motions to prevent a movant from remedying basic deficiencies in its prima facie showing by submitting evidence in reply, thereby shifting to the nonmoving party the burden of demonstrating the existence of a triable issue of fact at a time when that party has neither the obligation nor opportunity to respond (*Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1993]; *see e.g. Batista v Santiago*, 25 AD3d 326 [2006]; *Migdol v City of New York*, 291 AD2d 201 [2002]). This rule, however, is not inflexible, and a court, in the exercise of its discretion, may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence (*see e.g. Fiore v Oakwood Plaza Shopping Ctr.*, 164 AD2d 737, 739 [1991], *affd* 78 NY2d 572 [1991], *cert denied* 506 US 823 [1992]; *Hoffman v Kessler*, 28 AD3d 718, 719 [2006]; *Basile v Grand Union Co.*, 196 AD2d 836, 837 [1993]; *see also* CPLR 2001).

Kennelly v. Mobius Realty Holdings LLC, 33 A.D.3d 380, 382, 822 N.Y.S.2d 264 (2006).

In opposition to the motion, Woodycrest has interposed its substantive opposition to the Getreu vocational report, in the event the Court considers Getreu's report. Therefore, Woodycrest has had an opportunity to respond to Getreu's report and has taken that opportunity. The Getreu report will be considered in the absence of any prejudice to Woodycrest. CPLR 2001.

Getreu's report established a number of occupations plaintiff would be capable of working, including sales manager, quality control manager, first line supervisor of production, assembler, assembly-line inspector, driver and press-box custodian.

Tri-Circle also submitted the affirmation of William B. Head, Jr., M.D., who opines that plaintiff is not psychiatrically disabled. Dr. Head opined that there is no evidence of brain injury

in plaintiff. (Aff. p. 10). Dr. Head further opines that plaintiff does have a **partial, permanent** neurological disability with a lifting restriction of 40 pounds, as a result of cervical spine surgery.

The medical report of plaintiff's treating physician, Aric Hausknecht, MD, dated September 23, 2010, indicates that the MRI of the brain was "essentially unremarkable." In a May 22, 2013 report, Dr. Hausknecht opines that plaintiff suffered a "[c]losed head trauma with post-concussion syndrome and **mild** traumatic brain injury." (Emphasis added). In the same report, Dr. Hausknecht found plaintiff to be "totally disabled and I have advised him to restrict his activities." However, it is clear that Dr. Hausknecht diagnosed plaintiff with a **mild** traumatic brain injury while also diagnosing plaintiff with neck, back and right shoulder injuries, that resulted in a cervical surgery. "The daily headaches and frustrating loss of focus from which plaintiff testified he suffered do not satisfy the acquired brain injury standard (*see Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004]; *Tzic v Kasampas*, 93 AD3d 438, 440 [1st Dept 2012])." *Anton v. W. Manor Const. Corp.*, 100 A.D.3d 523, 524, 954 N.Y.S.2d 76 (2012).

The branch of Tri-Circle's motion that seeks dismissal of the third-party claims for contractual indemnification on grounds that no contract exists is unopposed.

Accordingly, Tri-Circle's motion of summary judgment is granted.

The foregoing shall constitute the decision and order of the Court.

Dated: SEP 29 2015


KENNETH L. THOMPSON JR. J.S.C.