

Mahony v 275 Seventh Ave. Bldg. LLC

2016 NY Slip Op 31622(U)

August 23, 2016

Supreme Court, New York County

Docket Number: 154171/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
MICHAEL MAHONY,

Index No.: 154171/13

Plaintiff,

-against-

275 SEVENTH AVENUE BUILDING LLC, A W R
GROUP, INC., HOTEL 26 OPERATING LLC, RARE
CHELSEA RESTAURANT GROUP, LLC, DHR
RESTAURANT CO., LLC, RJIII-F26 MANHATTAN,
LLC and C&D RESTORATION, INC.,

Defendants.

-----X
275 SEVENTH AVENUE BUILDING, LLC,

Third-Party Plaintiff,

-against-

YORK SCAFFOLD EQUIPMENT CORP.,

Third-Party Defendant.

-----X
Joan A. Madden, J.:

In this action arising out of construction accident, third-party defendant York Scaffold Equipment Corp. (York) moves for an order (i) granting it leave to amend its verified answer to the third-party complaint to include an affirmative defense of lack of "grave injury," pursuant to New York Workers' Compensation Law § 11, and, (ii) based on the newly added defense, granting it summary judgment dismissing the third-party complaint and all cross claims against it (motion seq. no. 002). Defendant/third-party plaintiff 265 Seventh Avenue Building LLC (Seventh Avenue LLC) opposes the motion. Plaintiff Michael Mahony separately moves for summary judgment as to liability on his Labor Law § 240 (1) claim against Seventh Avenue LLC

(motion seq. no. 003),¹ and Seventh Avenue LLC opposes the motion.²

Background

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on October 21, 2011, when he fell from a retractable roof while working at a construction site located at 275 Seventh Avenue (275 Seventh)/152 West 26th Street (152 West), New York, New York (the Site). The property on which the Site is located is owned by Seventh Avenue LLC. On the day of the accident, plaintiff was employed as a carpenter by York, and his work at the Site included disassembling a scaffold and a sidewalk shed that had been installed over the retractable roof of a restaurant located at 152 West. The purpose of the scaffold and shed was to protect the retractable roof while work was being done at 275 Seventh, the building adjacent to and abutting 152 West.

At his deposition, plaintiff testified that, on the accident date, he was instructed to dismantle the scaffold located over the retractable roof of the restaurant located at 152 West. On that day, plaintiff was wearing a “full body harness” (plaintiff tr. at 25). However, at the time of the accident, his harness was not attached to anything, “[b]ecause [they] had dismantled everything over the retractable roof” (*id.* at 27). In addition, plaintiff’s supervisor had told him that “[attaching the harness] wasn’t done” (*id.* at 49).

¹By stipulation filed on October 23, 2016, the claims and cross claims defendants A W R Group, Inc., Hotel 26 Operating LLC, Rare Chelsea Restaurant Group, LLC,, DHR RESTAURANT CO. LLC, RLJ III-F26, Manhattan LLC and C&D Restoration, Inc were discontinued with prejudice, with the action continuing against 275 Seventh Avenue.

²Motion sequence numbers 002 and 003 are consolidated for disposition.

Plaintiff further testified that someone had notified his foreman, Robert Taylor (Taylor), that the retractable roof was not closing properly. Therefore, he and Taylor went up onto the retractable roof and “gave it a push so they were able to lock the retractable roof” (*id.* at 46). Plaintiff explained that after “[t]hey locked the retractable roof . . . [Taylor] went off the scaffold, and I was sliding down off the roof trying to get my feet down to the parapet wall and I slipped” (*id.* at 46). Plaintiff testified that he was injured when “my foot slipped, and my right arm just stayed straight behind me...[a]nd I went down to the parapet wall and ...I fell over to the scaffold” (*id.* at 51). Plaintiff testified that the distance between the retractable roof and the scaffold was “approximately three and a half feet” (*id.* at 47).

Taylor, who was also deposed, testified that he was a carpenter employed by York and plaintiff’s supervisor on the day of the accident. York, which was owned by Kenneth Buttner, was in the business of erecting and dismantling scaffolding at construction sites. Taylor’s job on the day of the accident was to dismantle the roof protection located at 152 West. The roof protection consisted of aluminum beams and planking propped up by 10-foot metal legs that pierced through a retractable roof. At the time of the accident, roof protection was still present over the retractable roof and materials were being stored there.

Taylor explained that, at times, workers accessed the retractable roof by taking an elevator up to the roof and then using a “small [permanent] staircase on top of the roof . . . [that] was adjacent to the retractable roof” (Taylor tr at 38). The workers also sometimes accessed the retractable roof via the scaffold. In order to exit the retractable roof via the scaffold while the roof protection was in place, the workers typically climbed down piping onto the top of the parapet wall, which was located five feet below the top of the retractable roof. The scaffold’s

platform was located approximately two feet below the parapet wall.

Taylor recalled that the accident occurred toward the start of the roof protection dismantling process when he and plaintiff were exiting the retractable roof via the scaffold so that they could “send[] material down” (*id.* at 60). He explained that the retractable roof was the “access point for [them] to get on the [s]caffold,” and that they intended to send the subject material down utilizing a “rope and wheel system. A pulley system” (*id.* at 62, 65). As he had already stepped down onto the scaffold’s platform, Taylor could not state the method that plaintiff used to exit the roof. After the accident, however, he saw plaintiff on the scaffold’s platform holding his arm and shoulder (*id.* at 55).

Notably, Taylor testified that none of the workers working on the roof ever tied off, because “[t]here was nothing to tie off to” (*id.* at 42). When asked why the workers did not tie off to the scaffold itself, Taylor replied, “Well, its’s difficult to tie off and climb down the actual scaffold. We usually use the lanyard . . . at a stationary position to tie off. As us, as individuals up there working, we need to move around more freely, so that’s my reason” (*id.* at 66).

Taylor also testified that, as plaintiff’s supervisor, he never instructed plaintiff to attach the end of his lanyard to anything. In addition, plaintiff never refused to use any safety devices offered to him, nor did he fail to follow any safety instructions on the date of the accident. Taylor did not recall ever being advised that the retractable roof was stuck on the day of the accident.

Kenneth Buettner, who was the President of York, testified at his deposition, that it was possible for workers to access the retractable roof through “the staircase that was on the hotel roof itself that went up to the mechanical space” (Buettner tr at 105). When asked if the workers

could tie off once they gained access to the roof, Buettner replied, “I don’t know that they could have” (*id.* at 110).

Plaintiff’s Summary Judgment Motion

“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 issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendant. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

“All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

“Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

“Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein”

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff’s injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

In support of his motion, plaintiff relies on his own deposition testimony, as well as that of Taylor and Buettner, that plaintiff was not provided adequate safety devices to prevent him from falling from the retractable roof to the scaffold’s platform, and was not tied off to anything at the time of the accident. Plaintiff also submits his affidavit in which he states that before the accident, Taylor directed him to assist him in a task that needed to be performed on the retractable roof (Plaintiff aff, ¶ 4). Afterwards, the two men intended to exit the retractable roof via a scaffold, which was located on the other side of the parapet wall, and that “[u]nfortunately, there was no safe means by which to get from the top of the retractable roof to the surface of the

scaffolding on the other side of the parapet wall.” (*id.*) Plaintiff explains that the “height difference between the surface of the retractable roof that I was on and the walking surface of the scaffold on the other side of the parapet wall was between five and six feet. The width between the retractable roof and scaffold was approximately three-and-a-half feet” (*id.*, ¶ 6). Plaintiff further states that “[t]here were no safety devices or ladders or other devices in place to allow me to safely traverse from on level to the next level to prevent me from falling” (*id.*).

According to plaintiff, although he was wearing a full body harness at this time, due to the dismantling of the roof protection, there was no longer anywhere to tie it off to (*id.* ¶ 5). In order to get onto the scaffold’s platform, plaintiff attempted to “shimmy down from the retractable roof and place [his] foot on a metal fence post attached to the parapet wall to prevent [him] from falling” (*id.*, ¶ 7). Plaintiff was injured when his foot “slipped off of the fence pole,” causing him to fall approximately five-to-six feet from the retractable roof to the platform of the scaffold (*id.*). Plaintiff states that if he been provided with a safety device, like a ladder, he would have been able to reach the scaffold’s platform without falling (*id.*, ¶ 8).

Plaintiff also submits an affidavit, from his expert, Scott Silberman, P.E. (Silberman), a licensed professional engineer, who states he has “extensive experience in construction” (Silberman aff, ¶ 3). Silberman opines that defendants violated Labor Law § 240 because

“[t]he metal pole is not a safety device constructed, placed and operated to prevent a worker from falling. [Plaintiff] should have been provided a ladder that was secure so that he could safely access the level below. A secured ladder would have been sufficient and allowed [plaintiff] to climb down from the retractable rooftop . . . to the walking surface of the scaffold below The defendants failed to provide any safety device that was constructed, placed or operated to as to protect [plaintiff] from falling. The defendants’ failure to place any enumerated safety device to allow [plaintiff] to safely traverse from one level of the work site to a level below was a cause of [plaintiff’s] falling to the surface below”

(*id.*, ¶ 18).

The evidence relied on by plaintiff is sufficient to make a prima facie showing that his injuries were proximately caused by the failure of Seventh Avenue LLC to provide proper safety devices in violation of Labor Law § 240 (1). Accordingly, the burden shifts to Seventh Avenue LLC to raise a triable issue of fact in this regard.

In opposition, Seventh Avenue LLC argues that the record shows that plaintiff was provided with proper fall protection, i.e., a harness, lanyard and a 25-foot rope, and that plaintiff could have accessed the retractable roof via a staircase in a rooftop bar provided access to the roof. With respect to the availability of the harness, lanyard, and a rope, the existence of these safety devices does not raise an issue of fact as to whether plaintiff was provided with a proper protection, since the testimonial evidence establishes that there was no place available for plaintiff to tie off. In this connection, it is well established that “the availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures” (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006], quoting *Conway v New York State Teachers’ Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]; see also *Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013] [the plaintiff was not at fault for not tying off his safety harness, where “there was no appropriate anchorage point to which the lanyard could have been tied-off”]).

Nor does Seventh Avenue LLC’s argument that staircase leading to the rooftop bar provided a sufficient safety device have merit. In support of this argument, Seventh Avenue LLC points to evidence that workers used the staircase leading to the rooftop bar to access the

retractable roof and that plaintiff and Taylor used the staircase to get the roof on the accident date. However, there is no evidence that the staircase could be used to access the scaffold which the testimonial evidence demonstrates that plaintiff and Taylor were using at the time of the accident for purpose sending materials down.

As for Seventh Avenue LLC's position that the manner in which plaintiff accessed the scaffold was the sole proximate cause of the accident, such position is unavailing in light of evidence that plaintiff was not provided with adequate safety devices to prevent his fall. Under these circumstances, any alleged negligence on plaintiff's part regarding the manner he accessed the scaffold's platform goes to the issue of comparative fault, which is not a defense to a claim under Labor Law § 240 (1) (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002] [when "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]; *Velasco v Greenwood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] ["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]; *Klein v City of New York*, 222 AD2d 351, 352 [1st Dept 1995], *affd* 89 NY2d 833 [1996])

Further, there is no evidence that plaintiff was specifically instructed to use a safety device and refused to do so (*see Durmiaki v International Bus. Machs. Corp.*, 85 AD3d 960, 961 [2d Dept 2011]; *Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]; *see also Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013] [the plaintiff was not at fault for not tying off his safety harness, where "there was no appropriate anchorage point to which the lanyard could have been tied-off"]).

As for Seventh Avenue LLC's assertion that there are issues of fact as to whether plaintiff's injuries were foreseeable, such argument is without merit, since once it is shown that a violation of the statute was a proximate cause of a plaintiff's injuries, plaintiff is not required to demonstrate the precise manner in which the accident occurred, or the extent of the injuries, was foreseeable (*Rodriguez v. Forest City Jay Street Associates*, 234 AD2d 68 [1st Dept. 1996], citing *Public Administrator of Bronx County v. Trump Village Construction Corp.*, 177 AD2d 258 [1st Dept 1991]).

As for Seventh Avenue LLC's argument that summary judgment is not warranted as plaintiff and Taylor offer differing accounts as to why they were present on the roof and conflicting descriptions regarding the amount of roof protection still in place at the time of the accident, such argument is unavailing. When, as here, there is no dispute that the lack of a proper safety device was a proximate cause of plaintiff's injuries, any conflicting facts in the record regarding the accident are insufficient to raise a triable issue of fact (*see Nerney v. 1 World Trade Center*, 140 AD2d 459 [1st Dept 2016][holding that "[i]n light of the lack of safety devices provided, plaintiff is entitled to recovery under any version of the accident"]; *Lipari v. At Spring, LLC*, 92 AD3d 502 [1st Dept 2012][plaintiff entitled to summary judgment on 240(1) claim despite different versions of how plaintiff was injured, where "the accident occurred because plaintiff was not given proper protection to prevent his fall"]; *Nascimento v. Bridgehampton Constr. Corp.*, 86 AD3d 189 [1st Dept 2011][finding that "the difference between the witnesses' factual recitations does not create a material issue of fact as to whether Labor Law § 240 (1) was violated [since] [a] violation of Labor Law § 240 (1) is stated whether plaintiff's fall was caused by an unsecured extension ladder that slipped or malfunctioned ...or whether it happened because

[plaintiff] was required to work on rafters without safety devices protecting him from a fall through the open space to the basement area below”]).

Accordingly, as Seventh Avenue LLC has provided no evidence controverting plaintiff’s showing entitling him to summary judgment, plaintiff’s motion is granted.

York’s Motion to Amend and for Summary Judgment

York moves for an order granting it leave to amend its answer to include an affirmative defense that plaintiff did not suffer a “grave injury,” pursuant to New York Workers’ Compensation Law § 11, and, upon the granting of said order, for dismissal of the third-party complaint and all cross claims against it.

“Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law. A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment. Prejudice to warrant denial of leave to amend requires some indication that the defendant has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position”

(*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks and citations omitted]). In seeking amendment, a “plaintiff need not establish the merit[s] of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [internal citation omitted]).

York argues that the delay in seeking the amendment is not a basis for its denial and that Seventh Avenue LLC cannot claim prejudice or surprise since it was aware that plaintiff was York’s employee when it brought the third party action against York. As for the merits of the

amendment, York asserts that, as plaintiff's employer, it cannot not be sued for common law negligence or contribution under Workers' Compensation Law § 11, which provides, in pertinent part, as follows:

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

York argues that record demonstrates that plaintiff did not suffer a grave injury as the accident did not result in "death, permanent and total loss of use or amputation of an arm, leg, hand or foot," or a brain injury. In support of its argument, York points to plaintiff's verified bill of particulars, which alleges, *inter alia*, that he suffered the following injuries, in pertinent part:

"RIGHT SHOULDER DISLOCATION; ROTATOR CUFF TEAR; FULL THICKNESS SUPRASPINATUS TEAR; SPRAIN; FROZEN SHOULDER; IMPINGEMENT SYNDROME; SYNOVITIS; TENDERNESS; MUSCLE SPASMS;

* * *

PLAINTIFF WILL REQUIRE A FUTURE RIGHT SHOULDER ARTHROSCOPY AND/OR REPLACEMENT;

* * *

RESTRICTION OF MOTION, RIGHT ARM;
LOSS OF MOTION, RIGHT ARM;
LOSS OF USE, RIGHT ARM"

The bill of particulars also alleges "all of the above noted injuries, their residuals and sequellae are permanent and progressive in nature and will tend to worsen over the lifetime of the plaintiff

necessitating future surgery and treatment” (*id.*) York also notes that plaintiff’s deposition testimony regarding his injuries is consistent with the allegations in the bill of particulars.

York further asserts that while Workers Compensation Law permits a third-party claim for indemnification against an injured workers’ employer where there is a “written contract” to indemnify that the record demonstrates that no such contract exists here.

In opposition, Seventh Avenue LLC argues that plaintiff “has consistently alleged he suffered ‘a grave injury’ based on the loss of use of his right arm” (Statsky Opposition Affirmation, ¶ 4), and that, at the very least, the record raises an issue of fact as to whether plaintiff suffered a grave injury. In support of its position, Seventh Avenue, LLC points to a medical report dated July 23, 2015, from plaintiff’s physician, Dr. Drew A. Stein, which states that, as a result of the accident, plaintiff suffers from “[r]ight shoulder partial RTC . . . labral tear, adhesive capsulitis s/p arthroscopy with continued adhesive capsulitis . . . [and] marked orthopedic disability” It also relies on a medical report from Dr. Gary P. Thomas which states that, as a result of the accident, plaintiff suffers from

- “1. Right shoulder injury with rotator cuff tear, frozen shoulder, impingement syndrome and labral lesion.
2. Status post right shoulder arthroscopy.
3. Right shoulder arthropathy.
4. Headaches.
5. Myofascial pain and spasms”

Seventh Avenue LLC also cites plaintiff’s deposition testimony that since the accident he “uses his left hand for everything” (Pl tr at 180). Seventh Avenue, LLC also argues that, apart from whether plaintiff suffered a grave injury, there is evidence sufficient to support its claim that York breached its obligation to procure insurance when it failed to renew a policy naming Seventh

Avenue LLC as an additional insured with respect to the job.

As for the motion to amend, the court finds that it should be granted as Seventh Avenue LLC will not suffer prejudice or surprise resulting from any delay in seeking the amendment, and as discussed below, York has established the prima facie merit of the proposed affirmative defense that plaintiff did not suffer a “grave injury,” as defined under Workers’ Compensation Law § 11.

The remaining issue is whether York is entitled to summary judgment dismissing the third-complaint against it, which asserts claims for common law contribution and indemnification, contractual indemnification and failure to procure insurance. As indicated above in connection with the motion to amend, a claim for common law contribution and/or indemnification may not be asserted against an employer unless the employee suffers a grave injury (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). Here, Seventh Avenue LLC has failed to raise a triable issue of fact in this regard as there is no evidence that plaintiff has suffered a permanent and total loss of the use of his right arm. In this connection, York notes that the medical reports relied on by Seventh Avenue LLC indicate that plaintiff has some use of his right arm. Under these circumstances, it cannot be said that plaintiff has a grave injury as defined by Workers’ Compensation Law § 11 (*see Castro v. United Container Machinery Group, Inc.*, 96 NY2d 398 [2001][noting that the grave injuries listed in the statute “are deliberately both narrowly and completely described”]; *Kraker v. Consolidated Edison, Inc.*, 23 AD3d 531, 532 [2d Dept 2005][noting that “[g]rave injury is defined in pertinent part as permanent and total loss of use or amputation of an arm or hand, loss of multiple fingers, or loss of an index finger.... Partial loss is insufficient”). Accordingly, as the injuries suffered by plaintiff do not rise to the level of a grave

injury, the third-party claims for common law contribution and indemnification must be dismissed.

As for the third-party claim for contractual indemnification, the record is devoid of evidence of any agreement between Seventh Avenue LLC and York whereby York agreed to indemnify Seventh Avenue LLC, including for any personal injuries sustained by plaintiff. Further, in his affidavit, York's President Kenneth Buettner states that when he "reviewed York's job folder which pertained to the site of the accident . . . [a]t no time did [he] discover any document whatsoever which required York to indemnify and hold [Seventh Avenue LLC] harmless for injuries sustained by any persons at [the] job location." (Buettner aff, ¶ 2). Accordingly, in the absence of any evidence of a written indemnification agreement, the third-party claim for contractual indemnification must be dismissed (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2d Dept 2007]; *see also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]).

The remaining claim for breach of an agreement to procure insurance is also without merit. In its opposition to York's motion, Seventh Avenue LLC asserts that documentary evidence establishes that York was required to name it as an additional insured on York's insurance policy, and that York breached this obligation. In support of this argument, Seventh Avenue LLC submits an undated memo generated by its managing agent for the property, CB Richard Ellis, Inc. (CB) which is attached to an ACORD Certificate of Liability Insurance Form (the Form) that identified York as a named insured and Seventh Avenue LLC as an additional insured on an insurance policy for the period October 1, 2010 to October 1, 2011. Thus, Seventh Avenue LLC argues that any insurance coverage pursuant to the Form expired twenty days prior to plaintiff's

accident on October 21, 2011.

In support of its dismissal of this claim, York notes that The Memo, which was addressed, “To Whom It May Concern,” and does not specifically identify York as its intended recipient, states that the “it [had] come to [CB’s] attention that the certificate of insurance [it had] on file is either incomplete or expired,” and that the (renewed) policy “shall name [Seventh Ave LLC] as Additional Insureds.” York also points out that York’s proposals for the subject work reveals no mention of any obligation on the part of York to name Seventh Avenue LLC as an additional insured on any of York’s insurance policies, and that the price “quotation” contained in York’s proposals refer to York’s procurement of “standard General Liability and Worker[s’] Compensation Insurance,” and not insurance naming Seventh Avenue LLC as an additional insured. In addition, York argues that no other written contracts have been identified requiring York to name Seventh Avenue LLC as an additional insured. Moreover, in his affidavit, Buettner states that after searching York’s job folder he did not find a document “which required York to make Seventh Avenue, LLC or CB additional insureds” (Buettner aff, ¶ 2).

Here, the documentary evidence is insufficient to raise an issue of fact as to whether York had an obligation to name Seventh Avenue LLC as an additional insured. Notably, the Form on which Seventh Avenue relies includes the following language:

“The below is named as an additional insured but only with respect to general liability and to the cover operations of the named insured where liability for the additional insureds is assumed by the named insured under a written contract provided that the contract is executed prior to loss”

Thus, as the record is devoid of evidence that York assumed liability for defendant as an additional insured pursuant to any written contract executed prior to the date of the accident,

York is entitled to dismissal of the third-party claim for breach of contract for failure to procure insurance.

In view of the above, it is

ORDERED that the part of third-party defendant York Scaffold Equipment Corp.'s (York) motion (motion sequence number 002) to amend its verified answer to the third-party complaint to include an affirmative defense of "grave injury," pursuant to New York Workers' Compensation Law § 11, is granted; and it is further

ORDERED that the part of York's motion, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims against it, is granted, and the third-party complaint and all cross claims are dismissed as against York, and the Clerk is directed to enter judgment in favor of York; and it is further

ORDERED that plaintiff Michael Mahony's motion (motion sequence number 003), for summary judgment as to liability of his Labor Law § 240 (1) claim against 275 Seventh Avenue Building, LLC is granted; and it is further

ORDERED that the remaining parties shall proceed forthwith to mediation.

DATED: August 23, 2016

ENTER:


HON. JOAN A. MADDEN
J.S.C.