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

PRESENT: KERN, CYNTHIA S. **PART** 55

Justice

FRAZIER, GABRIEL

INDEX NO. 150305/2015

MOTION DATE 03/02/2017

- v -

650 MADISON OWNER LLC

MOTION SEQ. NO. 004

The following papers, numbered 1 to _____, were read on this application to/for _____

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits ..... No(s) _____

Answering Affidavits - Exhibits ..... No(s) _____

Replying ..... No(s) _____

Upon the foregoing papers, it is

DATE : ~~3/10/2017~~ 5/2/17

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

KERN, CYNTHIA S. , JSC

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

Third party defendant Adecco USA Inc. ("Adecco") has brought the present motion to dismiss the third party complaint and cross-claims for common law indemnification and contribution for failure to state a cause of action. In the alternative, Adecco seeks summary judgment dismissing the third party claim and cross-claims. Third party defendant The Millenium Group of Delaware Inc. ("Millenium") has brought a cross-motion to amend its answer to assert additional contractual claims against Adecco. As will be explained more fully below, the motion to dismiss the third party complaint and cross-claims is granted and the cross-motion to amend is denied.

The relevant facts are as follows. It is undisputed that the plaintiff in the first party action, Gabriel Frazier, is an employee of Adecco. Adecco is a staffing agency that had placed the plaintiff as a mail clerk with two other Adecco employees at the building located at 650 Madison Avenue owned by defendant 650 Madison Owner LLC and leased by the Ralph Lauren Corporation. Adecco had entered into a client service agreement with Millenium, whereby Adecco assigned certain of its employees to work at various locations under the supervision of Millenium.

Plaintiff's accident occurred when he was delivering mail at 650 Madison Avenue and a portion of the ceiling allegedly collapsed on him. Plaintiff testified at his deposition that he filed for and received worker's compensation benefits after his accident and that Adecco was his employer at the time of the accident. Plaintiff also testified that he returned to work after the accident but that he stopped after several months due to pain. He further testified that he plans to go back soon to Adecco to see if they can place him in a position but he is waiting to resolve some of the legal issues he is having with worker's compensation before he returns to Adecco. He testified that he still has an open worker's compensation case and that he is negotiating with worker's compensation to resolve the case. Moreover, none of the doctors who have examined or treated plaintiff have opined that he is no longer employable in any capacity.

In February of 2009, Adecco and Millenium entered into a written client service agreement for staffing services. The agreement contained an indemnification agreement which provided that Adecco would indemnify Millenium from all losses "arising out of or caused by Adecco's negligent actions or omission in the performance of its Staffing service obligations under this Agreement...." The agreement also contained

an insurance procurement provision, which provided that "Adecco will give Client certificates of this insurance coverage or, with the insurer's concurrence make client an additional Insured for Adecco's services, excluding client's negligence...."

The court first turns to Adecco's motion for summary judgment dismissing the third-party complaint and cross-claims asserted against it for common law indemnification and contribution. As an initial matter, Adecco's motion for summary judgment dismissing the third-party complaint and cross-claims for contribution and common law indemnification is granted. 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 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.

The Court of Appeals has specifically held that a "brain injury results in 'permanent total disability' under section 11 when the evidence establishes that the injured worker is no longer employable in any capacity." *Rubeis v. Aqua Club Inc.*, 3 N.Y.3d 408, 413 (2004). *See also Aramburu v. Midtown W.B., LLC*, 126 A.D.3d 498, 501 (1st Dept 2015) (employer entitled to summary judgment dismissing common law indemnification and contribution claims based on lack of a grave injury— "Although experts who examined plaintiff averred that the accident had caused various brain conditions including seizures, persistent headaches and depression, defendants have not shown that plaintiff 'is no longer employable in any capacity'").

In *Maxwell v. Rockland County Community Coll.*, 78 A.D.3d 793, 794 (2d Dept 2010), the court held that the employer made a prima facie showing that its employee did not suffer a grave injury based on the deposition testimony of the plaintiff and the bill of particulars which established that plaintiff did not suffer a grave injury.

In the instant case, the third-party complaint and cross-claims for contribution and common law indemnification must be dismissed on the ground that plaintiff's alleged injuries do not amount to a "grave injury" under the Workers' Compensation Law. Initially, the third party employer Adecco has made a prima facie showing that plaintiff did not sustain a grave injury based on plaintiff's own deposition testimony that he considered himself employable in some capacity. Although plaintiff did testify that he went back to work after the accident as a file clerk but that he was not able to fulfill his duties because of the pain he was in from the accident, he never indicated that he did not plan to return to work. To the contrary, he specifically testified in his deposition that he plans to go back soon to Adecco to see if they can place him in a position but he is waiting to resolve some of the legal issues he is having with workers' compensation before he returns to Adecco. He testified that he still has an open workers' compensation case and that he is negotiating with workers' compensation to resolve the case. Moreover, none of the doctors who have examined or treated plaintiff have opined that he is no longer employable in any capacity.

In opposition to Adecco's prima facie showing that there is no evidence that plaintiff suffered a brain injury that made him unemployable in any capacity, third party plaintiff and Millenium have failed to raise any disputed issue of fact as to whether plaintiff has suffered a brain injury that made him no longer employable in any capacity. There has been no opinion from any doctor in this case that plaintiff is not employable in any capacity and plaintiff has not even alleged that he is unemployable.

The argument by third party plaintiff Ralph Lauren that Adecco is not entitled to summary judgment because it has not tendered proof in admissible form that it obtained workers' compensation insurance for the plaintiff for the incident in question is without merit. The plaintiff extensively testified in his deposition, which is attached to Adecco's moving papers, that he did receive workers' compensation benefits for the accident, including medical expenses and some of his lost earnings, and was currently in the process of negotiating a settlement with workers' compensation, which was the only thing that was delaying him from returning to work. Under these circumstances, Adecco has made a prima facie showing that it did in fact have worker's compensation insurance for the plaintiff for the accident and Ralph Lauren has failed to raise an issue of fact as to the absence of this insurance.

To the extent Millenium contends that summary judgment should be denied pursuant to CPLR § 3212(f) because discovery remains outstanding, such argument is unavailing. It is well settled that "a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment." *Hariri v. Amper*, 51 A.D.3d 146, 152 (1st Dept 2008). Millenium has failed to identify any discovery which would lead to relevant evidence in opposition to Adecco's motion to dismiss the current cross-claims it has asserted against Adecco. To determine whether or not plaintiff suffered a grave injury pursuant to workers' compensation law section 11, it is not relevant who plaintiff's supervisors were at his work site; whether plaintiff received training regarding the stacking of paper; what plaintiff's supervision, training and overall employment with Adecco was; what the cause of plaintiff's accident was; and what the condition of the ceiling was at the site of the accident. The only relevant issue to be determined is whether plaintiff is employable in some capacity.

The court will next address the cross-motion by Millenium to amend its complaint to assert a contractual indemnification claim against Adecco and to assert a claim for failure to procure insurance based on the Client Service Agreement between the parties. Pursuant to CPLR § 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). Moreover, on a motion for leave to amend, the movant is not required to establish the merit of the proposed new allegations "but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *Id.*

In the present case, the cross-motion to amend the pleadings to assert a claim for contractual indemnification and failure to procure insurance is denied as such amendments are devoid of merit as a matter of law. The proposed claim by Millenium for contractual indemnification against Adecco pursuant to the Agreement is without merit as a matter of law because the agreement does not provide for indemnification under the circumstances of this case as a matter of law. Millenium is only entitled to indemnification under the agreement when the incident arises out of or is caused "by Adecco's negligent action or omission in the performance of its Staffing service obligations." It is undisputed that the cause of plaintiff's injury was the

collapse of the ceiling at Ralph Lauren's office, which does not arise out and is not caused by Adecco's negligent action or omission in the performance of its staffing service obligations.

Similarly, the proposed cross-claim for failure to procure insurance is insufficient as a matter of law as Adecco has established in opposition to the motion to amend that it did procure insurance which provides for additional insured coverage whenever it is required by contract, which it is in this case. The argument by Millenium that the existence of the policy is insufficient because Adecco never states that its insurance carrier is providing coverage to Millenium is without merit. All that Adecco is required to do under the agreement is procure additional insured insurance. It is not required to ensure that the insurance company provides coverage or a defense. *See Castro v. New York City Transit Authority,* 52 A.D.3d 213, 214 (1st Dept 2008); *Perez v. Morse Diesel Intern., Inc.*, 10 A.D.3d 497 (1st Dept 2004).

Based on the foregoing, the motion by Adecco for summary judgment dismissing the third party complaint and cross-claims for common law indemnification and contribution is granted and these claims are hereby dismissed. The cross-motion by Millenium to amend its answer to assert additional contractual claims against Adecco is denied. The foregoing constitutes the decision and order of the court.

DATE : 5/2/17

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KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
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