

Dominguez v Jerrico Constr., Inc.
2019 NY Slip Op 34743(U)
June 19, 2019
Supreme Court, Dutchess County
Docket Number: Index No. 50165/2016
Judge: Hal B. Greenwald
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At the term of the Supreme Court of the State of New York, held in and for the County of Dutchess, at 10 Market Street, Poughkeepsie, 12601 on June 19, 2019.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
FRANCISCO DOMINGUEZ

Plaintiff,

Index No.: 50165/2016

-against-

JERRICO CONSTRUCTION, INC.

Defendant

DECISION AND ORDER
(Motion Sequences 3&4)

-----X
JERRICO CONSTRUCTION, INC.

Third-Party Plaintiff

-against-

MEDERIA DRYWALL,

Third-Party Defendant

-----X
Greenwald, J.

The following papers numbered 1- 4 were considered by the Court in deciding Third-Party Defendant's Notice of Motion for Summary Judgment and Plaintiff's Notice of Motion for Summary Judgment:

<u>Papers</u>	<u>Numbered</u>
Third-Party Defendant Notice of Motion/ Affirmation of Dianne C. Bresee, Esq./ Exhibits A-I/ Memorandum of Law in Support of Third-Party Defendant's Motion	1
Plaintiff's Notice of Motion/Affirmation of Michael Joseph, Esq./ Exhibits 1-13/Memorandum of Law in Support of Plaintiff's Motion	2
Defendant's Opposition to Plaintiff's Motion/ Affirmation of Edward McCormack Esq. in Opposition	3
Reply Affirmation of Michael Joseph, Esq. in Support of Plaintiff's Motion/Exhibits 1-2	4

RELEVANT BACKGROUND

Plaintiff commenced a negligence action against Defendant on or about January 22, 2016, seeking compensatory damages. Defendant was hired by the owner of 8 Orchard Drive, Purchase, New York (“Orchard site”), to perform certain construction, renovation and demolition services at said location. Defendant subcontracted some of its construction duties to Madeira Drywall (“Third-Party Defendant”). *See*, Summons and Complaint as Plaintiff’s Exhibit 1.

Plaintiff was an employee of the Third-Party Defendant, who injured his right foot, lacerating toes and bone, while working as a construction worker at the referenced location. Plaintiff claims that on the day he was injured, while performing his duties at the Orchard site, he used a skill saw that was left on the floor at the location. Plaintiff alleges that the skill saw belonged to the Defendant and that the skill saw did not have a guard that retracted properly, which caused the blade to continue to rotate when Plaintiff put the skill saw back on the floor, resulting in the blade coming into contact with Plaintiff’s foot. *See*, Plaintiff’s Memorandum of Law in Support at pages 2-3.

Plaintiff previously sought summary judgment in this action, whereby the previous Court denied said motion, on the basis that the competing factual affidavits raised issues of facts, such as whether Plaintiff was permitted to use the saw, whether the saw was functional and properly guarded and whether there was any contributory negligence. *See*, Decision and Order on Two Motions (Brands, J.) dated April 20, 2017, as Plaintiff’s Exhibit 3.

Plaintiff now files a Notice of Motion, seeking to renew its previously denied argument and partial summary judgment on the issue of liability, stating there are new facts that were not offered in evidence, that being the deposition testimony of Mr. Ernesto Manzano. Plaintiff also asserts that there has been a change in the law, whereas a Plaintiff no longer has to demonstrate a freedom from comparative fault to be successful on summary judgment, citing Rodriguez v City of New York, 31 N.Y. 3d 312 (2018). *See*, Plaintiff’s Memorandum of Law in Support at pages 5-6.

Defendant opposes Plaintiff’s Motion, stating there are no new facts that warrant summary judgment in favor of Plaintiff, as the testimony of Mr. Manzano is not conclusive, as there are still triable issues of fact for the Court to determine, regarding the saw, permission to use the saw and the saw’s guard, all of which relates to Plaintiff’s injury. *See*, Affirmation of Edward McCormack,

Esq. at paragraphs 4-7.

On or about September 8, 2017, Defendant filed a third-party complaint against Third-Party Defendant seeking to be indemnified or alternatively, have the Third-Party Defendant contribute proportionately for damages, if any, to the Plaintiff. Third-Party Defendant filed a motion for summary judgment, to dismiss the third-party complaint, stating that pursuant to New York Workers' Compensation Law§11, it cannot be held liable if Plaintiff did not sustain a grave injury as defined by the statute. Third-Party Defendant contends that Plaintiff did not sustain a grave injury and as such, the complaint should be dismissed in its entirety. There was no opposition submitted to the motion.

DISCUSSION

Plaintiff's Application for Renewal and/or Summary Judgment

It is well settled law, that a motion for leave to renew must be based upon new facts, not offered on the original motion or a change in the law that would change the prior determination. The party seeking renewal must not have known of the new or additional facts or must present a reasonable justification to the Court for failing to present the new facts on the original motion. *See*, CPLR 2221(e)(2); *see also*, Armstrong v Armstrong, 162 A. D. 3d 621, 622 (2nd Dept. 2018).

The proponent of a summary judgment motion must only demonstrate that there are no material issues of fact in dispute and does not need to establish the absence of comparative fault to be successful. *See*, Alvarez v. Prospect Hospital, 68 N. Y. 2d 320 (1989); *see also*, Rodriguez v City of New York, 31 N. Y. 3d 312 (2018).

Neither the change in the law, nor the deposition testimony acquired, would change the prior determination. Despite Plaintiff's assertion, Plaintiff's proof does not conclusively establish the proximate cause of his injuries. There is little to no weight that can be given to Mr. Manzano's deposition testimony, in light of the fact that the deponent raised issues regarding translation, and it is apparent his responses may not be contextual. Nonetheless, Mr. Manzano's deposition testimony was very inconclusive about relevant facts and raised issues about the functionality of the saw and the guard. Even without considering any possible comparative fault, there remains material issues of fact in the pending matter and a grant of summary judgment would be improper

in this instance. To that extent, Plaintiff's application for renewal is **denied**, as the change in law and new facts would not change the prior determination. Plaintiff's application for summary judgment on liability is also **denied**, as there are material issues of fact that remain in the pending matter.

Third-Party Defendant Motion

An employer may be held liable for contribution or indemnification if the employee has sustained a grave injury as defined by the Workers' Compensation Law, and the loss of multiple toes is listed in the statute. *See*, New York Workers' Compensation Law §11. While the list is exhaustive, not illustrative it is not intended to be extended absent further legislative action. However, the pertinent part of a grave injury is that said injury is permanent. *See*, Mentesana v Bernard Janowitz Const. Corp., 36 A. D. 3d 769, 770 (2nd Dept. 2007); *see also*, Castro v United Container Mach. Group, Inc., 96 N.Y. 2d 398, 402 (2001). Surgical reattachment of the injured party's member(s), even if the party only regains partial use of the member(s), will not sustain as a grave injury within the meaning of Workers' Compensation Law §11. *See*, Vincenty v Cincinnati Inc., 14 A.D. 3d 392, 392 (1st Dept. 2005).

In the case at hand, although Plaintiff sustained lacerations to his toes requiring the reattachment of Plaintiff's third and fourth toe, said injury was not permanent. Plaintiff's toes were reattached, and he not only has all of his toes but he also has the use of his toes. Plaintiff has returned to work, full time as a carpenter. *See*, Affirmation of Dianne Bresee, Esq. at paragraph 12-15; *see also*, the Independent Medical Examination (Harvey Siegel, M.D.) as Third-Party Defendant's Exhibit I. Plaintiff has not sustained a grave injury pursuant to Worker's Compensation Law §11. Thus, there is no basis for the third-party complaint. The Third-Party Defendant's Motion is unopposed. Based on the law and in the absence of opposition, the Third-Party Defendant's Motion to dismiss the third-party complaint, for indemnification or contribution is **granted**.

Accordingly, it is hereby,

ORDERED, that Plaintiff's Motion for Renewal and/or Summary judgment is **denied**; and

it is further

ORDERED, that the Third-Party Defendant's Motion to dismiss Defendant/Third-Party Plaintiff complaint, is **granted**.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: June 19 2019
Poughkeepsie, New York

ENTER:



Hon. Hal B. Greenwald, J.S.C.

CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to the Honorable Hal B. Greenwald's Chambers, please do not submit any copies. Please submit only the original papers.