

Wilson v Otis El. Co.

2019 NY Slip Op 35046(U)

October 22, 2019

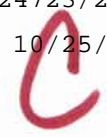
Supreme Court, Bronx County

Docket Number: Index No. 24723/2019E

Judge: Rubén Franco

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This opinion is uncorrected and not selected for official publication.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

GREGORY WILSON

Index No. 24723/2019E

Plaintiff,

-against-

**MEMORANDUM
DECISION/ORDER**

OTIS ELEVATOR COMPANY and
ST. BARNABAS HOSPITAL

Defendants.

Rubén Franco, J.

This is an action to recover for personal injuries. Defendant St. Barnabas Hospital (St. Barnabas) moves, without opposition by plaintiff, to dismiss the Complaint based on documentary evidence (CPLR 3211 [a] [1]) and for failure to state a cause of action (CPLR 3211 [a] [7]).

The facts, as culled from the pleadings and the affidavits and exhibits submitted with the instant motion, are as follows: On June 3, 2018, plaintiff, an employee of St. Barnabas Hospital, was injured on the premises when the elevator he was riding in malfunctioned, causing it to plunge downward without warning. On June 18, 2018, the Workers' Compensation Board received plaintiff's "First Report of Injury," detailing the accident and claiming an injury to his right knee and lower back pain. Plaintiff also submitted an "Employee Claim" form to the Workers' Compensation Board. Following a Workers' Compensation hearing, plaintiff was awarded the amount of \$7,759.96.

St. Barnabas moves to dismiss on the ground that plaintiff was its employee at the time of the alleged injury and because he has already been compensated for this incident following the determination of the Workers' Compensation Board, which was his exclusive remedy pursuant to Workers' Compensation Law (WCL) §§ 10-11.

WCL § 10 provides:

1. Every employer subject to this chapter shall in accordance with this chapter, except as otherwise provided in section twenty-five-a hereof, secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury ...

WCL § 11 limits an employer's liability:

The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, 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 ...

The statute defines the scope of indemnity and contribution:

For purposes of this section the terms "indemnity" and "contribution" *shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence* by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered. (emphasis added)

A motion to dismiss a Complaint under CPLR 3211 (a) (1), will be granted only if the documentary evidence conclusively disposes of plaintiff's claim and resolves all factual issues (*see Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]; *Foster v Kovner*, 44 AD3d 23, 28 [1st Dept. 2007]). The documentary evidence needed to support such a motion must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2nd Dept 2010]; *see Attias v Costiera*, 120 AD3d 1281, 1282-1283 [2nd Dept 2014]). The proponent for dismissal under CPLR 3211 (a) (1) submits the documents that it alleges will definitively defeat the cause of action (*see AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]; *Amsterdam Hospitality Group, LLC v. Marshall Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]). The documents that St. Barnabas relies upon include plaintiff's First Notice of Injury report to the Workers' Compensation Board; the Board's

determination; and, a St. Barnabas Employee Injury Claim form regarding the accident submitted by plaintiff.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the Complaint must be liberally construed, the factual allegations set forth must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342 [2013]; *Lee v. Dow Jones & Co., Inc.*, 121 AD3d 548 [1st Dept 2014]).

St. Barnabas has met its burden for dismissal under the provisions of CPLR 3211 by demonstrating through admissible evidence that plaintiff was its employee at the time of the injury; that plaintiff was injured during the course of that employment; and, that plaintiff has been compensated by the Workers' Compensation Board, his exclusive remedy.

Defendant Otis Elevator Company (Otis), opposes the motion only to the extent that it seeks that the court preserve its cross-claims for common law contribution, common law indemnification, and contractual indemnification as against St. Barnabas. Otis contends that its cross-claims fall within an exception to WCL § 11 permitting third-party claims for indemnification against an employer, based on the existence of a prior written contract containing an indemnification provision. In support of its position, Otis provides a 2016 contract that it executed with St. Barnabas for maintenance of equipment, which Otis asserts includes the subject elevator. The relevant portion of the contract provides:

We agree that we shall be liable for accidents and injuries to person or property when adjudged to have been caused by the sole negligence or willful misconduct of Otis or our employees. In all other instances, Customer shall indemnify, defend, and hold us harmless against all claims, damages, losses, costs, and expenses (including attorney's fees and other litigation costs) arising out of or connected with the use, repair, maintenance, operation or condition of the Equipment.

“[A] third party may recover against an employer pursuant to contract (*Majewski v. Broadalbin–Perth Cent. School Dist.*, 91 NY2d 577, 582 [1998]).” (*Rodrigues v N & S Bldg. Contractors, Inc.*, 5 NY3d 427, 431-32 [2005]). In *Rodrigues* (5 NY3d at 432), the Court stated that determining whether such an agreement exists requires a two-part inquiry in which the court considers “whether the parties entered into a written contract containing an indemnity provision applicable to the site or job where the injury giving rise to the indemnity claim took place” and “whether the indemnity provision was sufficiently particular to meet the requirements of section 11.” In assessing whether an indemnity provision is sufficiently particular, the Court elaborated:

[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.

(*id.* at 433, quoting *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491-92 [1989]).

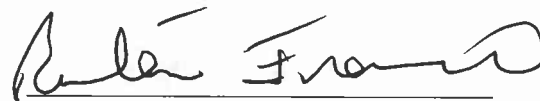
Here, defendants entered into a contract, with an indemnity provision, prior to the occurrence of the accident, which St. Barnabas does not dispute in any of its submissions.

Accordingly, St. Barnabas’ motion to dismiss is granted to the extent that the Complaint is dismissed as against St. Barnabas.

Otis’ cross claim for common law contribution, common law indemnification, and contractual indemnification is severed and shall continue as against St. Barnabas.

This constitutes the Decision and Order of the court.

Dated: October 22, 2019



Rubén Franco, J.S.C.

HON. RUBÉN FRANCO