

Kanyuch v 11 W. 19th Assoc. LLC

2020 NY Slip Op 30004(U)

January 2, 2020

Supreme Court, New York County

Docket Number: 153529/2016

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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PAUL KANYUCH,

Plaintiff,

- v -

11 WEST 19TH ASSOCIATES LLC C/O BLOCK BUILDINGS LLC, MAIA MP CONSTRUCTION INC, TALISEN CONSTRUCTION CORP, TONY BIRCH,

Defendants.

-----X

11 WEST 19TH ASSOCIATES LLC C/O BLOCK BUILDINGS LLC, TALISEN CONSTRUCTION CORP, TORY BURCH i/s/h/a TONY BIRCH,

Plaintiffs,

-against-

ECLIPSE CONTRACTING CORP.,

Defendant.

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INDEX NO. 153529/2016
MOTION DATE 09/19/2019, 09/19/2019
MOTION SEQ. NO. 003 & 004

DECISION + ORDER ON MOTION

Third-Party
Index No. 595070/2017

The following e-filed documents, listed by NYSCEF document number (Motion 003) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 128, 132, 133, 134, 135, 136, 137, 139, 140, 142 were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 129, 138, 143, 144, 145, 146, 147 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Plaintiff Paul Kanyuch commenced this Labor Law action after he fell from a scaffold while performing work at a construction site on July 24, 2015. Defendants/third-party plaintiffs 11 West 19th Associates LLC (11 West 19th) c/o Block Buildings LLC, Talisen Construction Corp. (Talisen), and Tory Burch i/s/h/a Tony Birch (Burch) commenced a third-party action against plaintiff's employer, third-party defendant Eclipse Contracting Corp. (Eclipse), for

common-law indemnification and contribution, contractual indemnification, and breach of contract based on Eclipse's failure to procure insurance. In motion sequence 003, third-party defendant Eclipse moves for summary judgment seeking dismissal of the first and third causes of action in the third-party complaint for common-law contribution and indemnification, and for breach of contract based on Eclipse's failure to procure insurance. In motion sequence 004, defendants/third-party plaintiffs seek summary judgment on the second cause of action in the third-party complaint for contractual indemnification against third-party defendant Eclipse. Both motions are consolidated for purposes of this decision.

This action arises from an incident during which plaintiff allegedly fell from a scaffold that collapsed under him while he was performing renovation work on the 10th floor of 11 West 19th Street, New York, New York. Defendant/third-party plaintiff 11 West 19th owns the building where the incident took place. Affirmation of Lorin Donnelly dated October 24, 2017, Exh. J (S. Robustelli Dep. Tr. 15:16-20). Defendant/third-party plaintiff Burch, a tenant of the building, hired defendant/third-party plaintiff Talisen as the general contractor for the construction of an office space and showroom. Donnelly Aff., Exh. K (H. Simmons-Foley Dep. Tr. 13:17-21). Talisen in turn hired third-party defendant Eclipse as the carpentry subcontractor for the renovation project. *Id.* at 15:21-24.

Plaintiff was allegedly injured on July 24, 2015 when he fell from a scaffold that collapsed under him while applying ceiling tiles at the jobsite. Donnelly Aff., Exh. I, (P. Kanyuch Dep. Tr. 17:2-3). Plaintiff testified at his deposition that he was employed by Eclipse as a carpenter. *Id.* at 16: 2-14. Eclipse gave plaintiff instructions for his work. *Id.* at 20:23-25. Plaintiff testified that he never received instructions from anyone else. *Id.* at 21:2-4. According to plaintiff's deposition testimony, on the date of the accident, plaintiff borrowed a scaffold that

belonged to second-party defendant MAIA MP Constructions, Inc. (“MAIA”) in order to perform the work. *Id.* at 26:8-16. Plaintiff testified that Eclipse’s foreman did not tell him to borrow MAIA’s scaffold and he did not request a scaffold from Eclipse prior to using the MAIA scaffold. *Id.* at 27:17-19, 94:15-18. According to the bill of particulars, plaintiff sustained multiple fractures, torn ligaments, joint effusions, and sprains as a result of the accident. Donnelly Aff., Exh. D, ¶¶ 10-11.

Motion Sequence 003

As mentioned above, in motion sequence 003, Eclipse moves for summary judgment seeking dismissal of the first cause of action in the third-party complaint for common-law contribution and indemnification and of the third cause of action in the third-party complaint for breach of contract due to Eclipse’s failure to procure insurance.

With respect to common law contribution and indemnification, it is well-established that “[w]here an employee is injured in the course of employment, his exclusive remedy against his employer is ordinarily a claim for workers’ compensation benefits.” *Valenziano v. Niki Trading Corp.*, 21 A.D.3d 818, 820 (1st Dep’t 2005) (citing Workers’ Compensation Law §11). The employer cannot be held liable for common law indemnification and contribution claims asserted by third-parties unless the employee sustained a “grave injury” as defined by Workers’ Compensation Law § 11. *Clavin v. CAP Equipment Leasing Corp.*, 156 A.D.3d 404, 404 (1st Dep’t 2017) (citing Workers’ Compensation Law § 11). Injuries qualifying as grave are narrowly defined in Workers’ Compensation Law § 11. *Castro v. United Container Machinery Group, Inc.*, 96 N.Y.2d 398, 401 (2001).

In order to be entitled to dismissal of the contribution and indemnification claims, Eclipse, must show that plaintiff was its employee at the time of the accident and that he did not

suffer a “grave injury” as defined by the Workers’ Compensation Law § 11. *Altonen v. Toyota Motor Credit Corp.*, 32 A.D.3d 342, 343 (1st Dep’t 2006). Here, Eclipse met this burden. First, it is undisputed that plaintiff was employed by Eclipse on the date of the accident and that he was injured during the course of his work for Eclipse. Donnelly Aff., Exh. I at 16:6-8. Second, plaintiff did not suffer a “grave injury” as defined by the Workers’ Compensation Law § 11. According to plaintiff’s verified bill of particulars, plaintiff sustained multiple fractures, torn ligaments, joint effusions, and sprains as a result of the accident. Donnelly Aff., Exh. D. Such injuries do not qualify as a “grave injury” under the Workers’ Compensation Law, which narrowly defines such injuries to be “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. Accordingly, the first cause of action in the third-party complaint for common law contribution and indemnification against Eclipse must be dismissed.

With respect to the second cause of action for breach of contract based on failure to procure insurance, Eclipse argues that this claim must be dismissed because it did procure insurance coverage on behalf of the third-party plaintiffs. However, Eclipse failed to submit the general liability insurance contract in its moving papers to support this contention and only cites to its responses to the third-party plaintiffs’ combined demands. Affirmation of Marcin J. Kurzatkowski dated February 22, 2019, ¶ 22 and Exh. H. Thus, Eclipse has failed to meet its *prima facie* burden on summary judgment and its attempt to remedy this defect in its reply papers is insufficient. *Tingling v. C.I.N.H.R., Inc.*, 74 A.D.3d 954, 956 (2d Dep’t 2010) (“[a]

prima facie burden cannot be met by evidence submitted for the first time in [the movant's] reply papers." (citing *Yeum v. Clove Lakes Health Care & Rehabilitation Ctr., Inc.*, 71 A.D.3d 739, 739 (2d Dep't 2010)). Accordingly, the third cause of action for breach of contract in the third-party complaint will not be dismissed.

Motion Sequence #004

In motion sequence #004, defendants/third-party plaintiffs seek summary judgment on the second cause of action in the third-party complaint for contractual indemnification against Eclipse.

Defendants/third-party plaintiffs refer to the agreements between 11 West 19th and Eclipse exhibit "R" to defendants/third-party plaintiffs' attorney affirmation, and between Talisen and Eclipse, exhibit "T" to the attorney affirmation. However, neither agreement is authenticated. Because the agreements were not authenticated as required by CPLR § 4518 (a), they are inadmissible and may not form the basis to grant summary judgment in defendants/third-party plaintiffs' favor on their contractual indemnification claims against Eclipse (*Clarke v American Truck & Trailer, Inc.*, 171 AD3d 405, 406 [1st Dept 2019] [holding agreement between parties, annexed to an attorney affirmation, was not authenticated and therefore, was not admissible and not an appropriate basis on which to grant summary judgment]). Moreover, defendant/third-party plaintiff Tory Burch did not submit a contract in support of the contractual indemnification claim against Eclipse and does not appear to be named in the contracts between Talisen, 11 West 19th and Eclipse.

Accordingly, defendants/third-party plaintiffs' summary judgment motion on their contractual indemnification claims against Eclipse must be denied.

Based on the foregoing, it is hereby:

ORDERED that the defendant/third-party defendant Eclipse Contracting Corp.'s motion (motion sequence 003) for summary judgment is granted to the extent that the first cause of action in the third-party complaint for common-law contribution and indemnification is dismissed, and is otherwise denied; and it is further

ORDERED that defendants/third-party plaintiffs' motion (motion sequence 004) for summary judgment in their favor on the second cause of action in the third-party complaint for contractual indemnification against third-party defendant Eclipse is DENIED.

1/2/20
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE