

**Deschaine v Tricon Constr., LLC**

2020 NY Slip Op 30403(U)

February 10, 2020

Supreme Court, New York County

Docket Number: 161654/2014

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. CAROL R. EDMEAD

PART IAS MOTION 35EFM

*Justice*

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ROBERT DESCHAIINE,  
  
Plaintiff,

INDEX NO. 161654/2014

MOTION DATE 01/15/2020,  
01/30/2020

- v -

MOTION SEQ. NO. 012 013

TRICON CONSTRUCTION, LLC, NATIONAL REALTY &  
DEVELOPMENT CORP., MICHAEL BOYLE, DOLLAR  
TREE STORES, INC., C.P. PLAZA LIMITED  
PARTNERHSIP,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

DOLLAR TREE STORES, INC.  
  
Plaintiff,

Third-Party  
Index No. 595123/2015

-against-

AMZ CONSTRUCTION SERVICES, INC.

Defendant.

-----X

MICHAEL BOYLE  
  
Plaintiff,

Second Third-Party  
Index No. 595166/2015

-against-

AMZ CONSTRUCTION SERVICES, INC.

Defendant.

-----X

TRICON CONSTRUCTION, LLC, C.P. PLAZA LIMITED  
PARTNERHSIP

Third Third-Party  
Index No. 595184/2015

Plaintiff,

-against-

AMZ CONSTRUCTION SERVICE INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 012) 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 487, 488, 489, 490

were read on this motion to/for \_\_\_\_\_ RENEWAL \_\_\_\_\_.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 478, 479, 480, 481, 482, 483, 484, 485, 486, 494

were read on this motion to/for \_\_\_\_\_ RENEWAL \_\_\_\_\_.

Upon the foregoing documents and the memorandum decision below, it is

ORDERED that defendant/third-party plaintiff, Dollar Tree Stores, Inc.’s (Dollar Tree) motion to renew the Court’s decision and order dated April 5, 2019 (motion seq. No. 012) is granted; upon renewal, the part of the Court’s April 5, 2019 decision (NYSCEF doc No. 412) (April 2019 decision) which granted third-party defendant/second third-party defendant/third third-party defendant AMZ Construction Services, Inc. (AMZ) dismissal of Dollar Tree’s claims against it for contribution and common-law indemnity is vacated, and said claims are reinstated; it is further

ORDERED that defendant/second third-party defendant Michael Boyle’s (Boyle) cross motion to renew is granted; upon renewal, the part of the April 2019 decision which granted AMZ dismissal of Boyle’s claims against it for contribution and common-law indemnity is vacated, and said claims are reinstated; it is further

ORDERED that Boyle’s application for a stay pending resolution of motion seq. No. 012 is moot.

ORDERED that defendant/third third-party plaintiff Tricon Construction, LLC’s (Tricon) motion to renew (motion seq. No. 013) is granted; upon renewal, the part of the April 2019 decision which granted third-party AMZ dismissal of Tricon’s claims against it for contribution and common-law indemnity is vacated, and said claims are reinstated; it is further

ORDERED that counsel for Dollar Store shall serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

NON-FINAL DISPOSITION

In this Labor Law action, defendant/third-party plaintiff, Dollar Tree Stores, Inc. (Dollar Tree) moves, pursuant to CPLR 2221 (e), to renew the Court's decision and order dated April 5, 2019 (NYSCEF doc No. 412) (the April 2019 decision). Upon renewal, Dollar Tree seeks an order vacating the part of the April 2019 decision which granted third-party defendant/second third-party defendant/third third-party defendant AMZ Construction Services, Inc. (AMZ) dismissal of the claims against it for contribution and common-law indemnity, and denying AMZ's application for such relief (motion seq. No. 012). Defendant/second third-party defendant Michael Boyle (Boyle) cross-moves to renew, seeking an order denying AMZ's application for dismissal of the contribution and common-law indemnity claims against it. Boyle also seeks an order staying this matter pending a resolution of this motion. Defendant/third third-party plaintiff Tricon Construction, LLC (Tricon) moves to renew and to reinstate the contribution and common-law indemnification claims against AMZ (motion seq. No. 013). The motions are consolidated for disposition.

### BACKGROUND

Plaintiff Robert Deschaine (Plaintiff) received an electrical shock while performing work as an AMZ employee and fell off a baker scaffold. For a further discussion of the facts, see the April 2019 decision. That decision, among other things, granted Plaintiff partial summary judgment as to liability on his Labor Law § 240 (1) claims.<sup>1</sup> It also dismissed all contribution and common-law indemnification claims as against AMZ. The Court reasoned that there was no question of fact as to whether Plaintiff sustained a grave injury pursuant to Workers' Compensation Law § 11. In reaching this decision, the Court relied on medical reports,

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<sup>1</sup> The decision also granted dismissal of the complaint as against Boyle and granted him summary judgment on his contractual indemnification claim against AMZ.

submitted by the parties, from Dr. Ashok Anant, a neurosurgeon, and Dr. Rene Elkin, a neurologist.

The Court, in the April 2019 decision, noted that Anant found that “while plaintiff displayed dizziness and depression, his speech was clear, his attention span and concentration [were] intact, he understood and responded normally to questioning and his gait was normal” (NYSCEF doc No. 412 at 25). Anant, the Court noted, concluded that “while plaintiff was no longer able to perform the duties of a construction worker, he was able to perform sedentary jobs with the appropriate occupational therapy” and that “if plaintiff undergoes an epidural hematoma surgery, it is likely that he will completely recover (*id.*). Elkin, meanwhile, “found no evidence of any neurological injury preventing plaintiff from returning to his pre-accident level of functioning or preventing him from returning to his prior employment and daily activities” (*id.* at 25-26).

Based on this evidence, the Court found that there was no question of fact as to whether Plaintiff’s injuries rose to the level of “grave injury” under the Workers Compensation Law. While the Court acknowledged that Dollar Tree’s vocational rehabilitation expert, Kenneth Reagles, “opined that plaintiff is unemployable within the competitive labor market ... “ ‘the standard for permanent disability under section 11 is’” unemployability in any capacity, “ ‘which is a more objectively ascertainable test than equivalent, or competitive employment’” (*id.* at 26-27, quoting *Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004]).

The three applications for renewal are each based on medical reports exchanged by Plaintiff subsequent to the April 2019 decision. On June 20, 2019, Plaintiff served an expert witness disclosure, pursuant to CPLR 3101 (d), of Brian Greenwald (Greenwald), a doctor who is dual board certified in physical medicine and rehabilitation, as well as brain injury medicine.

On October 10, 2019, Plaintiff exchanged another expert report, this one from Harold Bialski, a life care planner rehabilitation counselor.

Greenwald opined that Plaintiff:

“sustained a life-threatening severe traumatic brain injury and right sided epidural hematoma that required urgent neurosurgical evacuation ... Although the epidural blood was evacuated, [Plaintiff] has objective evidence of the permanent effects of the brain damage he sustained [on the date of his accident]. Starting with the CT scan of the brain on 07/25/2013, radiological assessments have shown objective evidence of encephalomalacia (dead brain) in the right temporal lobe ... There was also evidence of previous blood in the substance of the left temporal lobe brain tissue ... The damage to his bilateral temporal lobes is permanent, will not improve with time and is causally related to the traumatic brain injury he sustained on [the date of the accident] ... As a result of the severe and diffuse traumatic brain injury [Plaintiff] sustained on [the date of his accident] he continues to be disabled by and suffer from headaches, cognitive impairment and balance impairment.”

(Greenwald report, NYSCEF doc No. 469).

As to future employment, Greenwald opined that “the injuries [Plaintiff] sustained on [the date of the accident] have left him totally and permanently disabled.” Bialski also opined on Plaintiff’s employability:

“[P]laintiff’s skills are not transferrable to any occupation within the local or national labor markets, due to TBI, and the sequelae thereto, as a result of the [the subject accident] ... It is unreasonable to expect that ... [Plaintiff] will be considered a qualified individual by an employer, hence rendering him incapable of gainful employment ... [R]etraining would not be feasible for [Plaintiff] and no reasonable accommodation(s) exist that would allow [Plaintiff] to be considered a qualified individual by an employer”

(Bialsky’s reprt, NYSCEF doc No. 470 at 20).

Dollar Tree, Boyle and Tricon argue that the reports of Greenwald and Bialski justify renewal, as the reports comprise new evidence that was not available at the time of the prior determination. Moreover, the moving parties argue that the reports raise an issue of fact as to grave injury such that dismissal of the contribution and common-law negligence claims against

AMZ would be inappropriate. AMZ argues in opposition that the reports do not raise an issue of fact as to grave injury, and that the Court should, therefore, adhere to the April 2019 decision.

### DISCUSSION

A motion for leave to renew is sparingly granted and is not a second opportunity given freely to a party who has not acted diligently in making the initial motion (*Henry v Peguero*, 72 AD3d 600, 602 [1<sup>st</sup> Dept 2010]). Under CPLR 2221 (e) (2) a motion to renew must “be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.” Renewal should ordinarily be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application (CPLR 2221 (e) (3); *NYCTL 1999-1 Trust v 114 Tenth Ave. Assoc., Inc.*, 44 AD3d 576, 577 (1<sup>st</sup> Dept 2007)).

Here, the application for renewal is granted, as Dollar, Boyle, and Tricon have made a showing that the evidence on which they rely, Greenwald and Bialski’s reports, were not readily available at the time of the prior motion. Upon the renewal, the Court must determine whether the reports raise an issue of fact as grave injury.

Workers' Compensation Law § 11 provides:

"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, 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."

Here, the moving parties argue that the Greenwald and Bialski reports raise a question of fact as to whether Plaintiff sustained “an acquired injury to the brain ... resulting in permanent

total disability. The Court of Appeals, interpreting this language, has held that the test “for permanent total disability under section 11 is one of unemployability *in any capacity*.”

The First Department has employed this standard in *Aramburu v Midtown W. B* (126 AD3d 498, [1st Dept 2015]), where the Court held that the party seeking indemnification from the plaintiff's employer had made a *prima facie* showing that the plaintiff was not unemployable in any capacity, and the plaintiff's employer "failed to raise an issue of fact as to whether plaintiff's brain injury constituted a grave injury" (*id.* at 501). The Court reasoned that "[a]lthough 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" (*id.* [internal quotation marks and citation omitted]). Even more recently, the First Department dismissed a claim for grave injury, holding that “evidence that a plaintiff suffered certain brain conditions, such as depression and postconcussion syndrome, does not constitute grave injury absent proof that the individual was rendered unemployable in any capacity” (*Alulema v ZEV Elec*, 168 AD3d 469, 90 N.Y.S.3d 171 [1st Dept 2019]; *see also Sotorriba v 346 W 17th St*, 2020 NY Slip Op 00545 [1st Dept 2020] [dismissing grave injury claim where “plaintiff’s own treating physicians did not find ‘unemployability in any capacity’]).

Greenwald’s report, as noted above, states: “With regards to future employment, the injuries [Plaintiff] sustained on 03/06/2013 have left him totally and permanently disabled.” AMZ argues that this is insufficient to raise an issue of fact as to grave injury, as Greenwald “does not opine that plaintiff is no longer employable in any capacity” (NYSCEF doc No. 487, ¶ 17). However, this is what is implied by Greenwald’s statement (*Yong Jung v Argus Realty*, 2020 NY Slip Op 30192 [U] [holding that while “it may have been more analytically convenient” if

the experts “had used the legally magic words regarding (the plaintiff’s) inability to work in any capacity, that is what is implied by the phrase ‘totally disabled’]). Thus, Dollar Tree, Boyle, and Tricon raise an issue of fact as to grave injury through Greewald’s report. Similarly, Bialski’s report lacks the *Aqua Club* language, but raises an issue of fact as to whether Plaintiff suffered a grave injury.

As Dollar Tree, Boyle, and Tricon raise an issue of fact as to grave injury, AMZ is not entitled summary judgment dismissing the contribution and common-law indemnification claims against it prior to a determination by a factfinder as to this issue. Thus, the branch of the April 2020 decision granting AMZ dismissal of these claims must be vacated and AMZ’s application for dismissal of these claims must be denied.

However, Boyle’s application for a stay pending resolution of his cross motion for renewal is denied as moot, as this order resolves his application for renewal.

### CONCLUSION

Accordingly, it is

ORDERED that defendant/third-party plaintiff, Dollar Tree Stores, Inc.’s (Dollar Tree) motion to renew the Court’s decision and order dated April 5, 2019 (motion seq. No. 012) is granted; upon renewal, the part of the Court’s April 5, 2019 decision (NYSCEF doc No. 412) (April 2019 decision) which granted third-party defendant/second third-party defendant/third third-party defendant AMZ Construction Services, Inc. (AMZ) dismissal of Dollar Tree’s claims against it for contribution and common-law indemnity is vacated, and said claims are reinstated; it is further

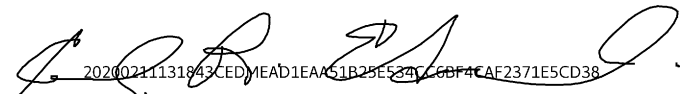
ORDERED that defendant/second third-party defendant Michael Boyle’s (Boyle) cross motion to renew is granted; upon renewal, the part of the April 2019 decision which granted

AMZ dismissal of Boyle’s claims against it for contribution and common-law indemnity is vacated, and said claims are reinstated; it is further

ORDERED that Boyle’s application for a stay pending resolution of motion seq. No. 012 is moot.

ORDERED that defendant/third third-party plaintiff Tricon Construction, LLC’s (Tricon) motion to renew (motion seq. No. 013) is granted; upon renewal, the part of the April 2019 decision which granted third-party AMZ dismissal of Tricon’s claims against it for contribution and common-law indemnity is vacated, and said claims are reinstated; it is further

ORDERED that counsel for Dollar Store shall serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.



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2/10/2020  
DATE

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CAROL R. EDMEAD, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE