

Pilacik v 6801 Jericho, LLC
2020 NY Slip Op 31199(U)
April 14, 2020
Supreme Court, Kings County
Docket Number: 509708/2015
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 509708/2015

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

ANTONI PILACIK,

Plaintiff,

against

6801 JERICO, LLC,

Defendant.

Papers	
Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u>2, 3</u>
Answering Affidavits.....	<u>4</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u> </u>
Other	<u> </u>

6801 JERICO, LLC,

Third-Party Plaintiff,

against

JASCA, LLC,

Third-Party Defendant.

Upon review of the foregoing papers, third-party defendant’s motion for summary judgment is decided as follows:

Factual Background

Plaintiff brought this action against defendant 6801 Jericho, LLC for injuries he sustained when he fell from a scaffold on May 1, 2014, while performing work on defendant’s property. Plaintiff asserted claims against 6801 Jericho, LLC for negligence, and for violations of Labor Law §§ 200, 240(1) and 241(6). 6801 Jericho, LLC brought a third-party action against JASCA, LLC asserting claims for common law indemnification, contribution, contractual indemnification, and breach of contract for failure to procure insurance.

At his deposition, plaintiff testified that, as an employee of JASCA, he was tasked with

patching work on sheetrock walls. Plaintiff testified that, on the day of the accident, he was standing on a scaffold applying patching compound. He testified that, as he walked across the scaffold, the scaffold shook, causing him to lose his balance and fall from the scaffold. Plaintiff testified that he lost consciousness as a result of the fall and, when he regained consciousness, discovered that he was bleeding from his head, left shoulder and left leg. He attempted to continue working before going home.

Plaintiff testified that he returned to work ten or twelve days after his accident, and did not seek any medical treatment during that time. He testified that he continued to work until July 22, 2014, when he found he was having trouble speaking. He testified that he sought and received treatment from Dr. Christopher Lycette. Plaintiff testified that he underwent surgery on July 22, 2014 or July 23, 2014. Plaintiff testified that he has not been “feeling well”, and so he has not attempted to find work or any vocational assistance since July 22, 2014.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant’s showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

As an initial matter, JASCA moves to dismiss 6801 Jericho, LLC’s claims for contractual indemnification and breach of contract for failure to procure insurance. 6801 Jericho, LLC does not oppose those portions of JASCA’s motion. Accordingly, those claims are dismissed.

JASCA also seeks dismissal of 6801 Jericho, LLC's claims for indemnification and contribution on the basis that plaintiff did not suffer a grave injury (Workers' Compensation Law § 11; *Cassese v SVJ Joralemon, LLC*, 168 AD3d 667, 669 [2d Dept 2019]). Workers' Compensation Law § 11 defines "grave injury", in relevant part, as "an acquired injury to the brain caused by an external physical force resulting in permanent total disability." The Court of Appeals held that a grave injury to the brain requires a showing that the injured employee is no longer employable "in any capacity" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004]).¹

In support of its motion, JASCA submits that report of Dr. Daniel Feuer, who examined plaintiff on November 28, 2018, with the aid of an interpreter. During the examination, plaintiff complained to Dr. Feuer of headaches and dizziness, as well as poor memory. Dr. Feuer measured plaintiff's range of motion in his cervical and lumbar spine, and found all ranges of motion to be normal. He also measured plaintiff's memory, and found that plaintiff "recalled three of three objects immediately and after five minutes". Dr. Feuer also measured, among other things, plaintiff's cranial nerves, motor skills and coordination and found them to be normal. Dr. Feuer opined that "[b]ased on a reasonable degree of clinical certainty, [plaintiff] is neurologically stable to engage in active employment."

JASCA also submits the report of Dr. David Erlanger, who examined plaintiff on December 11, 2018, also with the assistance of an interpreter. In the summary of his report, Dr. Erlanger states that

¹ In the fact section of its moving affirmation, JASCA also references portions of the deposition testimony of Adam Caruk, the owner of JASCA. Mr. Caruk testified that there were no employees of JASCA working the subject premises on May 1, 2014. However, nowhere in the argument section of its moving affirmation, does JASCA seek dismissal on the basis that plaintiff was not working at the subject premises that day.

Current neuropsychological evaluation revealed intellectual skills and abilities within normal limits, in the low average to average range. Executive functions were in the average range, and attention/mental flexibility was within normal limits, in the low average to average range. Language skills for confrontation naming were low average and semantic fluency was average. Visual memory was within normal limits, with average skills for learning and average retention. Verbal learning was borderline and verbal recall was low average. Construction skills visual judgment were average. Unimanual coordination was within normal limits and bimanual coordination was impaired. Mr. Pilacik reported moderate to severe symptoms of depression and psychological distress. Mental status examination was unremarkable for neurovegetative signs of depression or another mental disorder.

Dr. Erlanger found that plaintiff had recovered from a subdural hematoma, and that “[f]rom a neuropsychological perspective, he can return to work in a variety of full-time positions in the competitive labor market.”

In addition, JASCA submits the report of Dr. Jane Mattson, who performed a vocational analysis of plaintiff. Dr. Mattson reviewed plaintiff’s medical records, age, education, employment history, and transferable skills. Based on the foregoing, Dr. Mattson opined that plaintiff “is capable of returning to the workforce in sedentary positions given his strong education, employment history and transferable skills. However, at age 67 ½ years of age, he is now past the normal age of retirement in the U.S., age 67.” Dr. Mattson further opined that plaintiff’s “physical status, including his continued left knee pain and lower back pain, would place some restrictions on his future employment. Due to these subjective complaints, he would be limited to occupations classified as sedentary. Mr. Pilacik is not able to speak English. This would further limit the pool of appropriate job openings to those where proficiency of the English language is not necessary or where supervisors and co-workers are Polish speaking.”

In opposition, plaintiff submits the deposition testimony of Dr. Ragna Krishna. Dr. Krishna testified that plaintiff began treating with him on December 15th, 2014. Dr. Krishna

testified that, by that time, plaintiff had been diagnosed with a rib cage fracture, chest wall injury, and injuries to the head, neck and back. Dr. Krishna also testified that, on July 22, 2014, plaintiff had brain surgery to evacuate a subdural hematoma, which was less than three weeks old. Dr. Krishna testified that, subsequently, plaintiff continued to have “persistent complaints of headaches, dizziness, neck and low back pain radiating into the upper and lower extremities”, as well as pain in his left shoulder and left knee. Dr. Krishna testified that the pain in plaintiff’s left shoulder and left knee was causally related to the accident. Dr. Krishna testified that, as a result of the accident plaintiff “will have cognitive functions [sic], calculation functions [sic], visual spatial abnormalities and balance abnormalities.” Dr. Krishna testified that plaintiff was “atypical disability [sic] with regards to any and all employment.”

Defendant 6801 Jericho, LLC’s also opposes JASCA’s motion. It submits additional medical records of the plaintiff in order to prove grave injury. They are not authenticated, but JASCA does not object to these documents specifically as inadmissible. The documents include MRI reports, and reports from Dr. Krishna’s examinations of plaintiff. Dr. Krishna states in his report, dated December 16, 2014, and May 1, 2015, that plaintiff has less than normal range of motion in his neck and back. Dr. Krishna further notes that “[t]he prognosis is guarded due to the nature, severity, and permanency of the outlined injuries.”

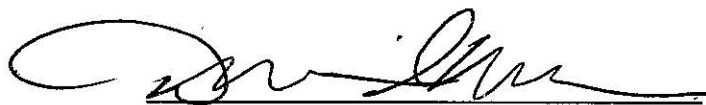
JASCA attempts to submit new documents on reply that it claims it received only two days after 6801 Jericho, LLC opposed JASCA’s motion. Nevertheless, JASCA fails to explain what steps it took to obtain these records earlier, and JASCA cannot submit new evidence on reply when plaintiff and 6801 Jericho, LLC cannot respond (*Qureshi v Vital Transportation, Inc.*, 173 AD3d 1076, 1078 [2d Dept 2019]).

Based on the conflicting assessments of the various medical providers, there are triable issues of fact about whether plaintiff suffered a “grave injury” as defined by Workers’ Compensation Law § 11 (*see, e.g., Cioffi v S.M. Foods, Inc.*, 178 AD3d 1006, 1013 [2d Dept 2019]).

For the foregoing reasons, JASCA’s motion is granted to the extent that 6801 Jericho, LLC’s third-party claims for contractual indemnification and breach of contract are dismissed. The remainder of the motion is denied.

This constitutes the decision and order of the court.

April 14, 2020
DATE


DEVIN P. COHEN
Justice of the Supreme Court