Malerba v New York City Tr. Auth.
2020 NY Slip Op 33607(U)
October 28, 2020
Supreme Court, New York County
Docket Number: 113520/2009
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21
--X
PETER MALERBA and JANET MALERBA,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY (MTA), ANSUL INCORPORATED, E.A. TECHNOLOGIES, INC., TYCO INTERNATIONAL, LTD., E.A. TECHNOLOGIES/PETROCELLI and E.A. TECHNOLOGIES/PETROCELLI, J.V., LLC.,

Defendants.
--X

Index Number: 113520/2009

Mot. Seq. 5, 7, and 8

DECISION AND ORDER

ANSUL, INCORPORATED and TYCO INTERNATIONAL, LTD.,

Third-Party Plaintiffs,

-against-

AMERON GLOBAL, INC., d/b/a, AMERON GLOBAL PRODUCT SUPPORT,

Third-Part Defendant.
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Third-Party Index Number: 590461/2012

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

Papers	Numbered	NYSCEFS #
Notice of Motion for summary judgment and supporting papers by defendant E.A. Technologies, Inc. (Motion Sequence #5)	1	107-131
Plaintiffs' Opposition (Motion Sequence #5)	2	194-201
Plaintiffs' Supplemental Opposition (Motion Sequence #5)	3	202-205
Reply Affirmation (Motion Sequence #5)	4	206
Notice of Motion for Summary Judgment and supporting papers by defendant E.A. Technologies/Petrocelli, J.V., LLC. ("JV") (Motion Sequence #7)	5	9-37
Notice of Cross-Motion for Summary Judgment and supporting papers by Defendants New York City Transit Authority and Metropolitan Transit Authority (Motion Sequence #7)	6	60-88
Plaintiffs' Opposition to Motion (Motion Sequence #7)	7	171-193
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Third Party Defendant's Reply to Plaintiff's Opposition to Motion (Motion Sequence #5)	12	210-213
Third Party Defendant's Notice of Motion for Summary Judgment and supporting papers (Motion Sequence #8)	13	38-58
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Reply Affirmation (Motion Sequence #8)	16	209
Defendants'/Third-Party Plaintiffs' Surreply (Mot. Seq. #8)	17	214

SOKOLOFF, J.:

This action for personal injuries stems from an incident on September 25, 2008, (the "accident") in which Plaintiff Peter Malerba ("Malerba") was injured during the course of his employment with third-party defendant Ameron Global, Inc., d/b/a Ameron Global Product Support ("Ameron"), while he was servicing a 20-year-old fire suppression tank that was part of a fire suppression system installed in a subway station booth and owned by defendants New York City Transit Authority and Metropolitan Transit Authority (collectively, the "Authority") and manufactured, marketed, or serviced by defendants Ansul Incorporated ("Ansul"), Tyco International, Ltd.; E.A. Technologies, Inc. ("EA Tech"); E.A. Technologies/Petrocelli; and E.A. Technologies/Petrocelli, J.V., LLC. ("JV").

Before the court for decision are summary judgment motions by Defendant EA Tech (Motion Sequence #5); Defendant JV (Motion Sequence #7), Defendants the "Authority" (Motion Sequence #7) (cross-motion), and Third-Party Defendant Ameron (Motion Sequence #8), which are consolidated for decision and decided as follows:

BACKGROUND/FACTS

In 1995, EA Tech formed a joint venture with Petrocelli Electric Co., Inc., E.A. Technologies, Inc./Petrocelli, and they remain the only two members. In 1999, the joint venture was converted into a limited liability company, JV.

JV was awarded a contract to inspect and maintain the Authority's station booth halon fire suppression systems. The contract required JV to inspect and maintain the halon fire suppression systems in each station booth, respond to service calls, and remove or install systems when station booths were decommissioned or relocated due to station renovations. JV routinely removed and replaced the station booths' halon fire suppression tanks for servicing. JV stored tanks to be serviced at JV's warehouse. Ameron picked up tanks to be serviced from JV's warehouse and brought them to Ameron's facility where they were serviced. Ameron returned serviced tanks to JV's warehouse. Surplus tanks, including tanks from station booths that were decommissioned or

temporarily dismantled during station renovation were also stored at JV's warehouse.

On September 25, 2008, during servicing by Malerba at Ameron's facility, a tank actuated or released pressurized contents and struck Malerba in the head, causing him to suffer injuries. Malerba has no recollection of the incident and there are no witnesses. Plaintiffs seek damages for personal injury, breach of express and implied warranties, strict liability in tort, and loss of services, society, care, and consortium.

When presented with a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). If triable issues of fact exist, summary judgment is not warranted (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Id.*). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Authority*, 27 N.Y.3d 1019 [2016] [internal quotation marks omitted]). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez*, at 324). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Because summary judgment deprives a litigant of the party's day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Sherman v New York State Thruway Authority*, 27 NY3d 1019 [2016]).

EA Tech's Motion (Motion Sequence #5)

EA Tech seeks summary judgment on the ground that it has no possible individual

liability for Malerba's injuries. EA Tech contends that it cannot be liable for Malerba's injury because it is not a party to the contract between JV and the Authority to inspect and maintain the station booth fire suppression systems, it only provided project management services and it had no physical contact with the halon fire suppression tanks serviced by Malerba's employer, Ameron.

Plaintiffs submit opposition papers. Ameron submits an attorney affirmation partial opposition to EA Tech's summary judgment motion (Mot. Seq. #5) to the extent that Plaintiffs argue in opposition to EA Tech's motion that there are questions of fact as to whether the relevant work was performed by EA Tech or by JV.[1]

Plaintiffs contend that EA Tech has failed to establish entitlement to summary judgment as a matter of law. Plaintiffs contends that EA Tech is an independent party in this action, because of the extensive involvement of EA Tech personnel in JV, such as Edward Willner, Chief Executive Officer, and Stuart Lee, the EA Tech employee who served as project manager for JV's inspection and maintenance of the station booth fire suppression systems. Plaintiffs suggest that EA Tech may be held liable because as part of the project management services provided to JV, EA Tech permitted unlicensed and unqualified personnel to conduct inspection and maintenance of the station booth fire suppression systems, arranged for Ameron to service tanks, and coordinated work orders and invoicing for such services from Ameron.

Plaintiffs contend that summary judgment must be denied because, among other things, issues of fact exist as to whether the technicians who inspected and maintained the station booth fire suppression systems were employees of EA Tech or "some other entity." Ameron joins

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[1] Ameron's submission partially opposes EA Tech's motion (Motion sequence #5) and the Authority's cross-motion (motion sequence #7). Ameron states both motions contend the movants cannot be held liable for Malerba's injuries even if those injuries were caused by negligence. EA Tech contends the work done was done by JV, not EA Tech. The Authority contends it owed no duty to Malerba and cannot be held vicariously liable for the alleged negligence of independent contractors.

Ameron notes that both submissions refer to testimony concerning Ameron's purported negligence and that although such references are immaterial to the two motions, Ameron nevertheless contests the assertion that it was negligent and that such negligence caused Malerba's injuries.

Plaintiff's opposition to the summary judgment motions by EA Tech and the Authority to the extent that Plaintiffs argue in opposition to EA Tech's motion that there are questions of fact as to whether the relevant work was performed by EA Tech or by JV.

The court disagrees. There is no issue of fact as to whether or not Petrocelli and not EA Tech was the employer of the technicians who inspected and maintained the Authority's station booth halon fire suppression systems at the time of the accident. Contrary to Plaintiffs' contention otherwise, the testimony of Robert Simoniello and Santo Petrocelli do not conflict with the testimony of Edward Willner on this issue or create an issue of fact. The testimony of the chief technician handling the inspection and maintenance of the station booth fire suppression systems, Gustavo Velasquez, also confirms that he and the other technicians at the time of the accident were employed by Petrocelli Electric, Co., Inc., as part of JV.

"A member of a limited liability company 'cannot be held liable for the company's obligations by virtue of his [or her] status as a member thereof'" (*Matias v Mondo Props. LLC*, 43 AD3d 367, 367–368, *quoting Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [2005]; see also Limited Liability Company Law §§ 609, 610). However, a party may seek to hold a member of an LLC individually liable despite this statutory proscription by application of the doctrine of piercing the corporate veil (*see Matias v Mondo Props. LLC*, 43 AD3d 367; *Retropolis, Inc. v. 14th St. Dev. LLC*, 17 AD3d 209). In order to state a viable cause of action through piercing the corporate veil, the "plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation [or LLC] and 'abused the privilege of doing business in the corporate [or LLC] form to perpetrate a wrong or injustice' " *(East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776, *quoting Matter of Morris v New York State Dept. of Taxation &* Fin., 82 NY2d 135, 142). Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to LLC formalities,

inadequate capitalization, commingling of assets, and the personal use of LLC funds (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127, *affd*, 16 NY3d 775; *Millennium Constr., LLC v Loupolover*, 44 AD3d 1016). Here, Plaintiff's opposition does not sufficiently raise an issue of fact as to whether EA Tech should be held individually.

Section 4 of the original Joint Venture Agreement between EA Tech and Petrocelli Electric Co, Inc., sets forth the division of the services to be provided by each member of the JV. Petrocelli shall provide the services of workers with membership in the International Brotherhood of Electrical Workers, Local #3, as required by JV to complete the work and EA Tech shall provide the services of management, engineering, computer programming and technical electronics employees as required by JV to complete the work. The joint venture was converted to an LLC by execution of the LLC Operating Agreement, which provides that "all of the terms, conditions, and covenants" of the Joint Venture Agreement were incorporated into the Operating Agreement and "apply, where applicable, to the operation of the LLC and the activities, rights and limitations of the" members.

The LLC Operating Agreement also provides at paragraph 9 that the "members shall not have any liability for the obligations or liabilities of the Company except to the extent provided in the LLCL [New York Limited Liability Company Law]." LLCL § 609 (a) provides that no member of an LLC is liable for any… liabilities of the limited liability company…, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent… or participating (as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company."

Under LLC § 609 (b), the members may accept individual liability by the terms of the LLC's articles of incorporation. JV's LLC Operating Agreement contains no such provision. Malerba was injured while servicing a halon fire suppression tank during the course of his employment with Ameron. EA Tech's conduct while providing project management services to

JV in connection with the inspection and maintenance of the station booth fire suppression systems is participation in the conduct of the business of the limited liability company JV. Under these circumstances, EA Tech cannot be held individually liable for the events causing Malerba's accident on September 25, 2008 (*see Landa v Herman*, 9 Misc3d 1125A (Sup Ct NY County 2005).

Accordingly, EA Tech's motion for summary judgment dismissing the complaint and cross-claims against it is GRANTED.[2]

The Joint Venture's Motion and the Authority's Cross-Motion (Motion Sequence # 7)

JV seeks an order granting summary judgment in its favor and dismissing the complaint and all cross-claims against it (Motion Sequence #7).

The "Authority" cross-moves seeking an order granting summary judgment in their favor and dismissing all claims and cross-claims against them.

Plaintiffs' oppose both motions.

Ameron submits an attorney affirmation in partial opposition to the Authority's cross-motion and an attorney affirmation in reply to Plaintiffs' opposition to the Authority's cross-motion. Ameron's partial opposition to the Authority's cross -motion contends that there are issues of fact relating to the scope of the Authority's potential duty and potential vicarious liability. Ameron's reply to Plaintiff's opposition to the Authority's cross-motion addresses references to the discovery responses of Ameron's counsel and Ameron's qualification for servicing fire suppression tanks.

JV's Motion (Motion Sequence #7)

JV contends that it is entitled to summary judgment in its favor and dismissal of all claims and cross-claims against it because JV owed no duty of care to the Plaintiff. JV contends that it did not employ Malerba and, therefore, had no duty to provide him with a safe workplace

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[2] Plaintiffs' opposition withdraws the warranty and strict liability claims against EA Tech.

or training. JV also contends that it is entitled to summary judgment because there is no evidence that safety caps were missing from the tanks involved in the accident from which Malerba was injured. JV also contends that it is entitled to summary judgment in its favor and dismissal of Plaintiffs' warranty and strict liability claims against it because JV did not manufacture or sell the halon fire suppression tank that allegedly caused Malerba's injuries.

Plaintiff contends that JV's alleged violation of a New York City Fire Code provision requiring monthly inspection of fire extinguishing systems by "licensed master fire suppression piping contractor properly trained and having knowledge of the installation, operation and maintenance of the specific fire extinguishing system shall inspect, test, service and otherwise maintain such system in accordance with this section and the manufacturer's specifications and servicing manuals," constitutes evidence of JV's negligence. Plaintiff also argues that JV created a duty to Malerba by entering into a contract to perform services it was unqualified to perform and by outsourcing fire suppression tank servicing requirements of that contract to another unqualified company, Ameron.

In reply, JV contends that the NYC Fire Code provision is not applicable to JV in this case because the Authority is exempt from such laws under New York Public Authority Law. The court notes that the provision relates to "wet" fire extinguishing systems, not the Halon or gas fire suppression systems at issue in this case. Also, the provision requires monthly inspection, which is not required by the contract between JV and the Authority.

As an initial matter, Plaintiffs opposition papers do not address the portion of JV's motion seeking summary judgment as to the breach of warranty and strict liability claims. JV did not manufacture, sell, or distribute the halon fire suppression tank involved in this accident. Accordingly, summary judgment is granted in favor of JV to the extent that the breach of warranty and strict liability claims against JV are dismissed (*See Passaretti, v Aurora Pump Co.*, 201 AD2d 475 [2d Dept 1994]).

As to Plaintiffs' remaining claim against JV, the court finds that JV has not established entitlement to summary judgment as a matter of law. The court need not address the sufficiency of the opposition papers submitted by Plaintiff and Ameron. There are triable issues of fact as to whether JV and the technicians who performed the inspections and maintenance of the Authority's station booth halon fire suppression systems possessed the necessary licenses, certifications, qualifications and authorizations required under the law and the contract to perform the contracted work. Issues of fact also exist relating to whether Ameron was sufficiently licensed and qualified as required by the contract.

Accordingly, JV's motion for summary judgment on the Plaintiffs' remaining claims is DENIED.

Authority's Cross-Motion (Motion Sequence #7)

The Authority contends that it is entitled to summary judgment as a matter of law because it exercised no control over JV or any subcontractors, such as Ansul. The Authority also contends that the contract requires JV to indemnify the Authority for any damages, including the injuries sustained by Malerba.

Plaintiffs opposition contends that the Authority fails to establish a prima facie case of entitlement to summary judgment as a matter of law. Plaintiffs contend that the Authority is liable for negligently contracting with JV to perform work it was not licensed, qualified or authorized to complete and for approving the unlicensed and unqualified Ameron to service the halon fire suppression tanks. Ameron joins the Plaintiffs' opposition to the Authority's cross-motion to the extent that Plaintiff contends that there are issues of fact regarding the scope of the Authority's potential duty and potential vicarious liability.

The Authority fails to make a prima facie case of entitlement to summary judgment as a matter of law. Issues of fact exist as to whether the JV was properly licensed, qualified, and

authorized to complete the work required in the contract and whether or not the Authority approved of Ameron's servicing the halon fire suppression tanks.

Accordingly, the Authority's motion for summary judgment is DENIED.

Ameron's Motion (Motion Sequence #8)

Section 11 of the Workers' Compensation Law prescribes, in pertinent part, as follows:

> 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.
>
> 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 ... or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

"An employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412–413 [2004]). "[T]he moving party bears the burden of establishing an absence of grave injury; it is not the burden of the party moved against to show the presence of a grave injury" (*Way v Grantling*, 289 AD2d 790, 793 [3d Dept 2001]). "Conflicting expert evidence concerning the nature and extent of an alleged grave injury under Section 11 is especially likely to preclude summary judgment" (*Solorio v Asplundh Tree Expert Co.*, 402 F Supp 2d 490, 497 [SD N.Y.2005] [summary judgment denied where there existed conflicting expert opinions as to whether plaintiff suffered a grave injury]).

Third-Party Defendant Ameron contends that it is entitled to summary judgment in its

favor and dismissal of the third-party claims and cross-claims for contribution and indemnification against it, because it has established as a matter of law, that the injuries suffered by the Plaintiff do not constitute a "grave injury," as defined by the Workers' Compensation Law 11. Ameron contends, among other things, that the July 2019 affidavit of a neurologist and psychologist who conducted examinations of the Plaintiff in 2011 and 2014 and the August 2019 affidavit of a certified rehabilitation counselor and vocational evaluator who conducted a vocational rehabilitation evaluation and earning capacity assessment of the Plaintiff in August 2017 demonstrate that the Plaintiff did not suffer a "grave injury" as set forth in Workers' Compensation Law 11, "an acquired injury to the brain caused by an external physical force resulting in permanent total disability," because his brain injury did not render him "unemployable in any capacity."

Plaintiffs and Defendant/Third-Party Plaintiff Ansul submitted papers in opposition to the motion. Plaintiffs agree that for a brain injury to qualify as a "grave injury," the injured employee must be "unemployable in any capacity" and submit the expert medical opinion of a psychiatrist who, based upon his review of the Plaintiff's medical records and examinations he conducted of the defendant on August 1, 2011, August 15, 2011 and September 9, 2019, concludes that the Plaintiff, as a result of his traumatic brain injury is "unemployable in any capacity."

Defendant/Third Party Plaintiff Ansul also oppose the motion and contend that there are issues of fact as to whether the Plaintiff suffered a "grave injury" as a resulting in permanent total disability. Ansul also contends that Ameron is collaterally estopped from arguing that Plaintiff did not suffer a "grave injury" because Plaintiff was already found to suffer from a permanent and total disability as a result of the accident in separate proceedings before the Workers' Compensation Board.

There are issues of fact as to whether Plaintiff suffered a "grave injury" that rendered him

permanently and totally disabled" and "unemployable in any capacity" which preclude summary judgment on the issue of the third-party indemnification and contribution claims against Ameron.

Contrary to the arguments otherwise, Ameron is not collaterally estopped from asserting that it is shielded from liability to third party indemnification and contribution claims by Workers Compensation Law § 11 because Malerba has not suffered a "grave injury." The finding of permanent and total disability by the Workers' Compensation Board on Plaintiffs' claim before that entity is different than making such a finding in relation to the third-party claims against Ameron and Workers' Compensation Law § 11. When an employer uses the section 11 defense to avoid being impleaded into an action for personal injuries to an employee, it may not be necessary for the court to defer to the Workers' Compensation Board, as it would if the court's decision might affect the award of compensation benefits. Such deference would be required if the employer had raised the exclusive remedy defense in a suit brought directly against it by the employee.

As there is an issue of fact as to whether Malerba suffered a "grave injury" as defined in Worker's Compensation Law § 11 rendering him "unemployable in any capacity," Ameron's motion for summary judgment is DENIED.

Accordingly, based on the foregoing it is hereby

ORDERED that the motion for summary judgment by Defendant E.A. Technologies (Mot. Seq. #5) is GRANTED and all claims and cross-claims are dismissed; and it is further

ORDERED that the motion for summary judgment by Defendant JV (Mot. Seq. #7) is GRANTED only to the EXTENT that the breach of warranty and strict liability claims against JV are dismissed and is otherwise DENIED; and it is further

ORDERED that the cross-motion for summary judgment by the Authority defendants (Mot. Seq. #7) is DENIED; and it is further

ORDERED that the summary judgment motion by Third-Party defendant Ameron is DENIED, and it is further

ORDERED that counsel(s) for movant(s) shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the dismissal the case against the defendant Defendant E.A. Technologies only and that defendant shall be removed from the caption, and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh]); and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of the defendant Defendant E.A. Technologies dismissing the claims and cross-claims made against it in this action, without any costs and disbursements, and it is further

ORDERED that counsel for movant(s) shall serve a copy of this order with notice of entry upon the Trial Support Office (60 Centre Street, Room 158M) and it is further

ORDERED that upon such service the Trial Support Office shall transfer this matter back to Part 21.

Dated: October 28, 2020

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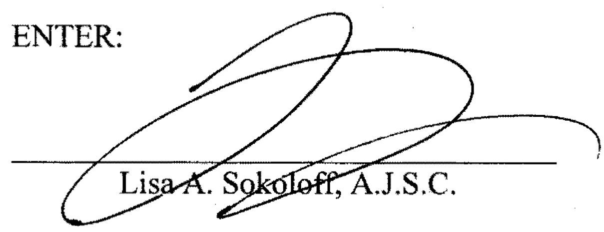

Lisa A. Sokoloff, A.J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[x] NON-FINAL DISPOSITION	
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