SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

JOHN VEGA,

Plaintiff,

-against-

ACTION ENVIRONMENTAL SERVICES,

Defendant.

X

ACTION EBVIRONMENTAL SERVICES,

Third-Party Plaintiff

-against-

BRONX LEBANON HOSPITAL CENTER,

Third-Party Defendant.

X

Index No: **32369/2018E**

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

The following papers numbered 1 to **read** on this **motion to dismiss**

No	On Calendar of **May 20, 2021**	PAPERS
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed		**motion sequence #1 NYSCEF**
Answering Affidavit and Exhibits		**motion sequence #1 NYSCEF**
Replying Affidavit and Exhibits		**motion sequence #1 NYSCEF**

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Third-party defendant, Bronx Lebanon Hospital Center, (Bronx Lebanon), moves pursuant to CPLR 3211 (a) (1) and (a) (7) and Workers' Compensation Law 11 to dismiss the third-party complaint. Third-party plaintiff, Action Environmental Services, (Services), moves pursuant to CPLR 3025 to amend its third-party complaint to include a cause of action for contractual indemnification. This action arose as a result of personal injuries sustained by plaintiff when he slipped and fell on oil, grease, or other liquid that allegedly leaked out of a Services' dumpster[1] on Bronx Lebanon's property. Plaintiff testified at his

[1] Paragraph, 4, verified bill of particulars.

deposition that he slipped on a black oily substance near a dumpster.[2] It is undisputed that plaintiff is an employee of Bronx Lebanon.

"Although on a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and accorded every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]), nevertheless, 'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration' " . *(WFB Telecom. v NYNEX Corp.*,188 A.D.2d 257, 259 [1st Dept 1992] *quoting Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, *quoting Roberts v Pollack,* 92 AD2d 440, 444).

"The exclusivity of remedy provisions set forth in Workers' Compensation Law §§ 11 and 29 (6) preclude common-law negligence claims." (*Martinez v. Canteen Vending Servs. Roux Fine Dining Chartwheel*, 18 A.D.3d 274, 275 [1st Dept 2005]). The original third-party complaint has the three causes of action all stemming from allegations of Bronx Lebanon's negligence, which are not viable causes of action pursuant to Worker's Compensation Law 11.

With respect to the cross-motion to amend the complaint the "granting of leave to amend "without passing upon the validity of the causes of action as amended ... represents a procedure which is no longer tolerable." As we stated more recently, "While leave to amend a pleading is freely granted (CPLR 3025 [b];

[2] John Vega transcript, p. 32-33.

Edenwald Contr. Co. v City of New York, 60 NY2d 957), this Court has consistently held that, in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted (Brennan v City of New York, 99 AD2d 445; East Asiatic Co. v Corash, 34 AD2d 432)" (Megaris Furs v Gimbel Bros., 172 AD2d 209)." (Non-Linear Trading Co. v. Braddis Assocs., Inc., 243 A.D.2d 107, 116 [1st Dept 1998]).

> "Workers' Compensation Law § 11 permits an owner to bring a third-party claim against an injured worker's employer in only two circumstances: where the injured worker has suffered a 'grave injury' or the employer has entered into a written contract to indemnify the owner" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 365 [2005]; *see Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430 [2005]; *Auchampaugh v Syracuse Univ.*, 67 AD3d 1164, 1164 [2009]). *(Bush v. Mechanicville Warehouse Corp.*, 79 A.D.3d 1327, 1328 [3rd Dept 2010]). In this action, plaintiff does not allege a "grave injury," and Bronx Lebanon's argument that plaintiff has not sustained a grave injury is undisputed.

With respect to the fourth cause of action in the proposed amended third-party complaint it is alleged that Bronx Lebanon is liable to Services and grounds of contractual indemnification. However, "Workers' Compensation Law § 11 permits a third-party indemnification claim against the employer *only* where such claim is "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to . . . indemnification of the claimant or person asserting the cause of action for *the type of loss suffered.*"" *(Bush v. Mechanicville Warehouse Corp.*, 79 A.D.3d 1327, 1330 [3rd Dept 2010]) (emphasis added).

The indemnification provision in the subject service agreement provides as follows:

> Action Carting shall acquire title to the acceptable Solid Waste when such waste is loaded in Action Carting trucks. Title to and liability for Unacceptable Materials and Hazardous Wastes shall remain, however, with the Customer and the Customer agrees to defend, indemnify and hold harmless Action Carting from and against any and all damages, penalties, fines and liabilities, resulting from or arising out of the delivery for collection of unacceptable materials of any nature whatsoever.

The service agreement further provides that the agreement defines dangerous materials as "including but not limited to radioactive materials, explosives, ordnance items, corrosives, oxidizing agents, hazardous wastes, etc. ("Unacceptable Waste") or "Hazardous Wastes" as those "designated by the United States Environmental Protection Agency, New York State Department of Conservation, the New York City Department of Sanitation and/or New York City Business Integrity Commission."

There is no factual allegation in the proposed amended complaint that the black oily substance or grease was a dangerous material as defined by the service agreement nor is there any evidence the substance plaintiff slipped upon was a dangerous material.

> [T]his Court has consistently held that, in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted (Brennan v City of New York, 99 AD2d 445; East Asiatic Co. v Corash, 34 AD2d 432)" (Megaris Furs v Gimbel Bros., 172 AD2d 209). Therefore, a motion for leave to amend a pleading "must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment" (Nab-Tern Constructors v City of New York, 123 AD2d 571, 572, citing Walden v Nowinski, 63 AD2d 586).

(Non-Linear Trading Co. v. Braddis Assocs., Inc., 243 A.D.2d 107, 116 [1st Dept 1998]).

Accordingly, the motion to dismiss of Bronx Lebanon Hospital Center is granted and the third-party complaint is hereby dismissed. The cross motion of Action Environmental Services to amend the complaint is denied.

The foregoing constitutes the decision and order of the Court.

Dated: 8/10/2021

KENNETH L. THOMPSON JR. J.S.C.