

**Cruz v Grand Living, LLC**

2022 NY Slip Op 32775(U)

August 10, 2022

Supreme Court, Kings County

Docket Number: Index No. 18844/2013

Judge: Devin P. Cohen

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Supreme Court of the State of New York  
County of Kings

Index Number 18844/2013  
Seq. 025; 024<sup>k</sup>

Part 91

**DECISION/ORDER**

\_\_\_\_\_  
JESUS CRUZ,

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

Plaintiff,

**Papers Numbered**

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

against

GRAND LIVING, LLC, ATWEEK INC., ANCOR  
CONSTRUCTION SERVICES, INC., VELOCITY FRAMERS  
NY INC., AND VELOCITY FRAMERS USA INC.,

Defendants.

\_\_\_\_\_  
VELOCITY FRAMERS NY INC AND VELOCITY FRAMERS  
USA INC.,

Plaintiff,

against

VARANO’S GROUP INC,

Defendants.

Upon the foregoing papers, third-party defendant Varano Group Inc (“Varano”)’s motion to dismiss the third-party complaint (seq. 024) and third-party plaintiff Velocity Framers NY Inc and Velocity Framers USA Inc (collectively “Velocity”)’s cross-motion to amend its complaint (seq. 025) are decided as follows:

**Introduction**

Plaintiff commenced this action against defendants Grand Living, LLC (“Grand”), Velocity, Atweek Inc., and Ancor Construction Services, Inc. for injuries he claims to have sustained as a result of an accident on October 15, 2013, caused by defendants’ negligence and

violations of New York Labor Law §§ 200, 240(1) 240(2), 240(3) and 241(6). Grand and Velocity each asserted cross-claims against one another. In an order dated March 24, 2021, in relevant part, I denied the plaintiff's motion for partial summary judgment and Velocity's cross-motion for summary judgment. I also dismissed Velocity's cross-claims for contribution, common-law and contractual indemnification, and breach of contract against Grand. Finally, I granted Grand's cross-claims against Velocity for common-law indemnification and contribution.

Finally, Velocity filed a third-party complaint against Varano on August 1, 2017. Varano has not filed an answer to that complaint, instead filing the instant motion for summary judgment.

### **Factual Background**

A lengthy factual recitation is unnecessary here as these motions concern third-party indemnification claims on procedural and statutory grounds, and do not address liability as it pertains to the causation of the underlying accident. Briefly, the plaintiff testified that he was an employee of Varano (Cruz EBT at 25). On the date of the alleged accident, Varano had been sub-contracted by Velocity (a carpentry contractor) to perform certain framing, insulating, drywall, trimming, and painting work at the site (Avrohom Getter, Velocity project manager, EBT at 16–17, 17–20). The plaintiff testified that he was working on a scaffold installing the metal framing for a drop ceiling when he fell (Cruz EBT at 35, 55). Velocity now seeks indemnification from Varano.

### **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]).

Varano seeks dismissal of Velocity's third-party complaint on three grounds. First, Varano argues that the complaint should be dismissed for failure to enter a default within one year of service of the third-party complaint or, in the alternative, failure to complete service of the third-party complaint within 120 days of filing. Notably, CPLR 3215(c) does not apply to third-party actions for indemnification, as these do not accrue until after a judgment is entered in the primary action (*IMP Plumbing & Heating Corp. v 317 E. 34th St., LLC*, 89 AD3d 593, 594 [1st Dept 2011]). Additionally, Velocity provides a copy of the affidavit of service showing service of the third-party complaint on Varano, which was filed eighty-six days after the expiration of the 120-day deadline.

Velocity cross-moves in part to cure the late service of the complaint *nunc pro tunc*. "A plaintiff's delay in filing proof of service is a mere procedural irregularity which may be corrected by an order of the court permitting late filing of proof of service" (*Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 752–753 [2d Dept 2014]). Varano admits in its moving papers that it was unsure whether the third-party complaint had ever been served, indicating that accepting late service would not prejudice Varano as it would be in no different position than if it had been timely served. Therefore, the affidavit of service is accepted *nunc pro tunc*, and this prong of Varano's motion is denied.

Varano's second argument is that the complaint is barred by the anti-subrogation doctrine as Varano's general liability carrier has assumed Velocity's defense and indemnity up to \$1 million. The policy of preventing subrogation in circumstances where both parties are insured

by the same carrier is to prevent “sanction[ing] an indirect breach of the insured’s obligation to defend its insured” (*Pennsylvania General Ins. Co. v Austin Powder Co.*, 68 NY 465, 472 [1986]). “The rule applies to bar indemnification up to the policy limits of the comprehensive general liability policy at issue” (*Blanco v CVS Corp.*, 18 AD3d 685, 686 [2d Dept 2005]). In light of the mutually recognized tender of Velocity’s defense and indemnity, Velocity’s claims against Varano for up to \$1,000,000 are barred by the anti-subrogation doctrine (*Lodovichetta v Baez*, 31 AD3d 718, 719 [2d Dept 2006]). However, claims beyond the policy limits of the common insurance policy are not barred (*ELRAC, Inc. v Ward*, 96 AD2d 58, 78 [2001]).

Velocity cross-moves for leave to serve an amended third-party complaint, pursuant to CPLR 3025 (b). Velocity argues that the requested amendment is to acknowledge Varano’s tender. Paragraph twenty and twenty-one of the Velocity’s proposed amended complaint acknowledge Varano’s tender and clarify that Velocity’s complaint is seeking indemnification from Varano only if Velocity is ultimately obligated to pay either damages or a settlement in excess of Varano’s primary insurance policy.

Leave to amend is ordinarily granted freely in the absence of prejudice to the defendant (*McCaskey, Davies and Associates, Inc. v New York City Healthy & Hospitals Corporation*, 59 NY2d 755, 757 [1983]). Here, Varano has not demonstrated that it would be prejudiced by the amendment. Conversely, the amended complaint explicitly shields Varano from \$1,000,000 in putative liability by acknowledging the tender to Velocity. Therefore, Velocity’s motion to amend is granted, which will render Varano’s anti-subrogation argument moot upon service.<sup>1</sup>

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<sup>1</sup> Varano raises additional substantive arguments about Velocity’s third-party claims in its opposition. However, new arguments cannot be raised for the first time on reply, and these arguments were not made in Varano’s initial moving papers (*see Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 826–827 [2d Dept 2008]). Accordingly, those arguments are not considered here.

Finally, Varano argues that common-law indemnity and contribution claims must be dismissed because the plaintiff has not suffered a grave injury as defined by New York State Workers' Compensation Law § 11. This statute bars negligence actions against a plaintiff's employer, including claims for common-law indemnification, unless the plaintiff has suffered a "grave injury" (*McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1097 [2d Dept 2018]). The statute includes within the definition of grave injury "an acquired injury to the brain caused by an external physical force resulting in permanent total disability." "Permanent total disability" has been found to exist "when the evidence establishes that the injured worker is no longer employable in any capacity" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 413 [2004]).

The third-party defendant points to the expert affirmation of David Erlanger, Ph.D., who was hired by third-party plaintiff Velocity to perform an independent medical examination. Dr. Erlanger opined that the plaintiff's "self-report of affective, neurologic, cognitive and memory symptoms appeared to have been exaggerated" (Erlanger report at 9). The third-party defendants argue that the extent of the plaintiff's disability was feigned in the plaintiff's self-report and that he did not suffer a "grave injury" as defined by the statute. In rebuttal, Velocity points to the expert report of Daniel Kuhn, M.D., who performed a neuro-psychiatric examination of Mr. Cruz. Dr. Kuhn found "a total psychiatric disability," predicated on findings of severe depression, a traumatic brain injury, and post-traumatic stress disorder at the time of evaluation, and notes that the permanency was undetermined. Determining the credibility of medical expert testimony is a question of fact for a jury (*Cicola v County of Suffolk*, 120 AD3d 1379, 1382 [2d Dept 2014]). Therefore, summary judgment on this issue must be denied.


### **Conclusion**

Third-party defendant Varano's motion (seq. 024) is denied.

Third-party plaintiff Velocity's cross-motion (seq. 025) is granted to the extent that Velocity may amend its complaint to acknowledge Varano's carrier's tender of Velocity's indemnity and defense. The amended complaint shall be served upon all parties within twenty-one days of the filing of this order.

This constitutes the decision and order of the court.

August 10, 2022  
**DATE**

  
**DEVIN P. COHEN**  
Justice of the Supreme Court

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KINGS COUNTY CLERK  
FILED