

**Ibrahim v City of New York**

2022 NY Slip Op 34227(U)

December 8, 2022

Supreme Court, New York County

Docket Number: Index No. 159381/2021

Judge: Leslie A. Stroth

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. LESLIE A. STROTH PART 52**

*Justice*

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YUSUF IBRAHIM, INDEX NO. 159381/2021  
MOTION DATE 05/13/2022  
MOTION SEQ. NO. 001  
Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF PARKS AND RECREATIONS, STEVEN  
DUBNER LANDSCAPING INC, ANCHORMEN  
CONSTRUCTION LLC, LIRO PROGRAM AND  
CONSTRUCTION MANAGEMENT PE P.C. D/B/A THE  
LIRO GROUP, ABC CORPORATION 1-10, JOHN DOE 1-10

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 82, 83

were read on this motion to/for DISMISSAL

This action seeks to recover damages for alleged injuries sustained by plaintiff Yusuf Ibrahim (plaintiff) on July 16, 2020, when he allegedly tripped and fell on debris while working at a construction site located at 2 Edgar Street, New York, N.Y.

In its answer, defendant Liro Program and Construction Management PE P.C. d/b/a The Liro Group (Liro) alleges that plaintiff filed a workers' compensation claim, received medical care and benefits from a policy issued to Liro, and was an employee of Liro on the date of the alleged accident. Liro now moves for an order pursuant to CPLR 3211(a) (1) and (7) dismissing plaintiff's amended complaint and any cross-claims and counterclaims against it, and the City cross-moves pursuant to CPLR 3212 for summary judgment.

## I. Liro's Motion to Dismiss

Pursuant to CPLR 3211 (a) (7), a party may move to dismiss a claim on the ground that the pleading fails to state a cause of action. Upon such a motion, the Court must accept the facts alleged as true and determine simply whether plaintiff's facts fit within any cognizable legal theory. *See* CPLR 3026; *Morone v Morone*, 50 NY2d 481 (1980). The complaint shall be liberally construed, and the allegations are given the benefit of every possible favorable inference. *See Leon v Martinez*, 84 NY2d 83, 87 (1994).

Liro argues that because plaintiff was an employee of Liro, which exclusively directed and supervised his work, plaintiff's claims are barred by Workers' Compensation Law (WCL) §§ 11 and 29 (6), and all cross-claims and counterclaims against Liro must be dismissed.

Plaintiff opposes Liro's motion in its entirety. Plaintiff argues that pursuant to WCL § 11, he must include Liro, his employer, in the action in order to receive contribution from Liro, should the Court find that he has sustained a "grave injury" and is entitled to monetary compensation. Plaintiff maintains that he has been incapacitated since the accident and that whether such incapacity resulted from the brain injury is an issue of fact to be determined during discovery. Therefore, plaintiff claims that Liro's motion to dismiss must be denied, because the complaint is not barred by WCL § 11.

Defendant Anchormen Construction LLC (Anchormen) does not oppose dismissal of plaintiff's direct claims as against Liro. However, Anchormen does oppose Liro's motion to the extent that it seeks dismissal of Anchormen's cross-claims asserted as against Liro.<sup>1</sup> Anchormen argues that if its direct claims against Liro are dismissed its cross-claims should be converted to

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<sup>1</sup> In the alternative, if the plaintiff's direct claims are dismissed as against Liro, Anchormen seeks to have the cross-claims converted to third-party claims. Liro's affirmation in support seems to consent to such alternative relief. *See* Defendant Liro's Affirmation in Support, NYSCEF doc. no. 17 at 6.

third-party claims, reiterating Liro may be found liable for contribution and indemnity if it is determined that plaintiff suffered a “grave injury” pursuant to WCL § 11. Anchormen asserts that plaintiff’s alleged brain injury qualifies as a “grave injury” under this statute, for which it is entitled to contribution and indemnity. Anchormen adds that plaintiff’s bill of particulars alleges he suffered a brain injury and that he has been incapacitated since the subject accident. According to Anchormen, whether the brain injury is the cause of the plaintiff’s inability to work and whether he is rendered unable to work in any capacity are issues that must be borne out in discovery.

Plaintiff correctly argues that if his brain injury constitutes a “grave injury” under WCL § 11, and said injury caused “permanent total disability” under same, Liro may be held liable for contribution or indemnity to third parties pursuant to WCL § 11. Liberally construing the allegations and affording them the benefit of every possible favorable inference, the complaint sets forth a cognizable legal theory. Therefore, Liro’s motion for an order dismissing plaintiff’s amended complaint, as well as any cross-claims and counterclaims against it, is denied. As the Court declines to dismiss plaintiff’s claims against Anchormen, Anchormen’s cross-claims and counterclaims need not be converted to third party claims.

## II. The City’s Cross-Motion

The City also opposes Liro’s motion and cross-moves for an order granting the City summary judgment as to its claims against Liro for contractual defense and indemnification.

It is a well-established principle that the “function of summary judgment is issue finding, not issue determination.” *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989), quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *See Alvarez v*

*Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman*, 3 NY2d at 404. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf*, 153 AD2d at 521.

The City asserts that the subject construction project involves a New York City Parks and Recreation (Parks) Capital Project, wherein Parks entered into contracts with Liro and Steven Dubner Landscaping (Dubner) for work to be performed at the subject construction site. In support of its cross-motion, the City provides the affidavit of Andrew Berk, a public records officer employed by Parks who conducted a search for Capital Projects records for the subject location. *See* NYSCEF doc. no. 45. Mr. Berk attests that his search reveals that Liro was hired to provide consultant services and construction management at the subject location, and the controlling contracts require Liro to defend and indemnify the City for any and all claims or judgments for damages on account of any personal injuries sustained at the subject construction site.

The City also submits the affidavit of Joe Ibarra, an associate project manager at Parks, who monitored the progress of the project and avers that he reviewed the documents provided by Mr. Berk's record search. Specifically, Mr. Ibarra states in his affidavit that he reviewed an "Order to Work" letter dated June 25, 2019 (*see* NYSCEF doc. no. 55) and a "Substantial Completion Use Inspection Report" dated February 3, 2021 (*see* NYSCEF doc. no. 56). Mr. Ibarra's affidavit addresses Liro's extensive involvement in the project, stating that work commenced August 19, 2019 and was substantially completed on January 9, 2021 (*see* NYSCEF doc. no. 50). Mr. Ibarra asserts that said work was ongoing at the time of the alleged incident.

The City also notes that Liro's motion fails to address its contractual relationship with Parks or that said relationship requires Liro to defend and indemnify the City. In fact, the contract between Parks and Liro states that:

The Contractor *shall defend, indemnify and hold the City*, its officers and employees harmless from **any** and all claims ... to which [it] may be subjected or which it may *suffer or incur allegedly arising out of or in connection with any operations of the Contractor and/or its subcontractors to the extent resulting from any negligent act of commission or omission, any intentional tortious act, or failure to comply* with the provisions of this Agreement or of the Laws...NYSCEF doc. no. 53 (emphasis added).

Despite Liro's claims that it is entitled to dismissal because plaintiff's claims are barred by the WCL, the City maintains that Liro's motion must be denied based on its duty to defend and indemnify the City.

The City's cross-motion for summary judgment is granted, as the contracts annexed to its papers establish that Liro is obligated to indemnify the City in this matter. Parks entered into contracts with both Liro and Dubner for work to be completed at the subject construction site, and Liro entered into a contract with Parks to provide consultant services and construction management for said location. The affidavits of both Mr. Berk and Mr. Ibarra, in addition to the annexed contracts themselves, demonstrate that the subject construction project was ongoing at the time of the alleged incident and that Liro performed construction supervision services for work performed on the project. The City has tendered sufficient evidence to show the absence of any material issue of fact in regard to Liro's duty to indemnify the City.

Liro does not discuss said contracts in its motion to dismiss but does assert that it was the plaintiff's employer during the time of the incident at the subject location and cites to case law which states that WCL § 11 "prohibits third-party indemnification claims against employers *except where the employee sustained a 'grave injury,' or the claim is based upon a written agreement by which the employer had expressly agreed to such indemnification.*" *Rodriguez v N & S Bldg. Contrs., Inc.*, 5 NY 3d 427 (2005) (emphasis added). The Court of Appeals has held that a third

party may recover against an employer pursuant to contract under WCL, which is expressly permitted in the statute. *See Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY 2d 577, 582 (1998). Workers' Compensation Law § 11 requires that "the indemnification claim arise from an indemnification provision in a written contract entered into before the injury." *Id.*

Here, there is a written contract with a clear indemnification provision. The contract was entered into on January 26, 2016, over three years before the alleged incident. The Court is constrained to apply the terms of the contract when "the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." *45-02 Food Corp. v 45-02 43<sup>rd</sup> Realty LLC*, 37 AD3d 522 (2d Dept 2007), quoting *Greenfield v Philles Records*, 98 NY2d 562, 569-570 (2002). While Liro may be shielded from direct liability pursuant to WCL § 11, it can be held liable for contribution and indemnification against the City. Additionally, plaintiff's brain injury may constitute a "grave injury," which may make Liro liable for contribution and indemnification to other third parties.

Accordingly, it is hereby

ORDERED that defendant Liro Program and Construction Management PE P.C. d/b/a The Liro Group's motion for an Order pursuant to CPLR 3211(a) (1) and (7), dismissing plaintiff's amended complaint is denied; and it is further

ORDERED that defendant the City of New York's cross-motion for summary judgment in its favor is granted.

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and remove the City of New York and the New York City Department of Parks and Recreation; and that all future papers filed with the court bear the amended caption; and it is further

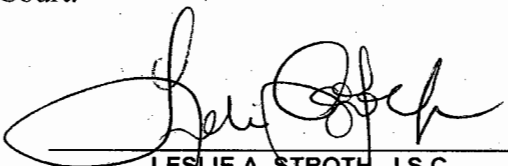
ORDERED that this action, including any pending motions, is transferred to a general IAS Part, as corporation counsel no longer represents any parties to this action; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (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 change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court 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](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.

12/8/2022  
DATE

  
LESLIE A. STROTH, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION  OTHER

APPLICATION:  GRANTED  SUBMIT ORDER  FIDUCIARY APPOINTMENT

CHECK IF APPROPRIATE:  SETTLE ORDER  INCLUDES TRANSFER/REASSIGN  REFERENCE