

<b>Grigoryan v 108 Chambers St. Owner, LLC</b>
2023 NY Slip Op 30082(U)
January 9, 2023
Supreme Court, New York County
Docket Number: Index No. 158572/2017
Judge: Alexander M. Tisch
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ALEXANDER M. TISCH PART 18**

*Justice*

-----X

VITALIY GRIGORYAN, MARINA STASIVA,  
Plaintiff,

INDEX NO. 158572/2017

MOTION DATE 07/22/2021

MOTION SEQ. NO. 005

- v -

108 CHAMBERS STREET OWNER, LLC, 108 CHAMBERS  
STREET CONSTRUCTION MANAGER, LLC, ROSS &  
ASSOCIATES, LLC, RIGHTWAY PLUMBING AND  
HEATING, INC., BEST MECHANICAL SERVICES, INC.,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

108 CHAMBERS STREET OWNER, LLC, 108 CHAMBERS  
STREET CONSTRUCTION MANAGER, LLC, ROSS &  
ASSOCIATES, LLC

Third-Party  
Index No. 595470/2018

Plaintiffs,

-against-

INTEGRAL POWER & CONTROL CORP.

Defendant.

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108 CHAMBERS STREET OWNER, LLC, 108 CHAMBERS  
STREET CONSTRUCTION MANAGER, LLC, ROSS &  
ASSOCIATES, LLC

Second Third-Party  
Index No. 595569/2018

Plaintiffs,

-against-

BEST MECHANICAL SERVICES, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 168, 170, 172, 173, 174, 179 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, third-party defendant INTEGRAL POWER & CONTROL CORP. (hereinafter “Integral”) moves pursuant to CPLR 3212 for summary judgment, dismissing third-party complaint brought by 108 CHAMBERS STREET OWNER, LLC, 108 CHAMBERS STREET CONSTRUCTION MANAGER, LLC, and ROSS & ASSOCIATES, LLC (third-party plaintiffs).

### BACKGROUND

This action arises out of an incident in which plaintiff Vitaliy Grigoryan allegedly sustained personal injuries while working as an electrician for Integral while on the premises of a construction site located at 108 Chambers Street, in the City and County of New York (NYSCEF Doc. No. 135, ¶ 3). According to plaintiff, Integral was hired by Ross and Associates to do all the electrical work in the newly erected building (NYSCEF Doc. No. 142 [plaintiff’s deposition transcript] page 71, 5-15). In addition to Integral, there were other companies working on the job site, such as Best Mechanical who was also hired by Ross & Associates to handle the plumbing and sprinkler system for the building (NYSCEF Doc. No. 146 [Best Mechanical deposition transcript] page 28-29, 8-12). The plumbing and sprinkler work required Best Mechanical to install a fire pump system that would pump water in case a fire was to occur (*id.*). However, before Best Mechanical installed the fire pump, Ross & Associates requested that Best Mechanical deliver the fire pump to the job site about a month before it was installed (*id.* at 44-46, 2-7). When the fire pump was delivered to the worksite, Ross & Associates personnel directed where the fire pump should be placed, according to Moshe Mendlowitz, Best Mechanical’s CEO (*id.* at 48-51, 23-25). As a result, the fire pump was stored vertically, in an upright position with the smaller end on the floor within the basement room area of the building (NYSCEF Doc. No. 145 [Ross & Associates deposition transcript] page 144-145, 23- 12). Plaintiff’s accident occurred about a month after the

fire pump was delivered to the construction site (*id.* at 44, 2-11). On the date of the accident, plaintiff and a few of his co-workers were in the basement room, along with the fire pump, prepping for the wiring work that was to take place (NYSCEF Doc. No. 135, ¶ 12). As plaintiff and his co-workers examined the room and planned their work for the day, plaintiff felt a sudden pain and realized that the water pump fell on his right foot, causing personal injuries (*id.*).

### **PARTIES CONTENTIONS**

Integral argues that it is entitled to summary judgment because third-party plaintiffs causes of action are barred under New York Workers' Compensation law and because plaintiff did not suffer a grave injury as defined under the statute. Furthermore, Integral argues that due to their lack of negligence regarding plaintiff's accident, the third-party plaintiffs are not entitled to contractual indemnification. In opposition, the third-party plaintiffs argue that Integral failed to satisfy its prima facie burden entitling it to summary judgment. They also argue that the indemnification provision of the trade contract is applicable because plaintiff's accident occurred during the performance of his work, and that plaintiff sustained a grave injury for which Integral should be held liable and required to provide contribution and common law indemnification.

### **DISCUSSION**

Pursuant to CPLR 3212, a motion for summary judgment may be granted when the moving party demonstrates that a genuine issue of material fact does not exist. A party seeking summary judgment must make a prima facie showing that they are entitled to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To successfully oppose a motion for summary judgment, the opposing party must present “facts sufficient to require a trial of any issue of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], quoting CPLR

3212[b]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to withstand dismissal (*id.* at 562).

“Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except in the case of a ‘grave injury’ or where based upon a written contract entered into prior to the accident” (*Giblin v Pine Ridge Log Homes, Inc.*, 42 AD3d 705, 706 [3d Dept 2007]).

### **Grave Injury & Common Law Contribution and Indemnification**

“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, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability” (Workers' comp. Law § 11).

“As amended in 1996, Workers' Compensation Law § 11 permits an employer to be held liable for contribution or indemnity only where the third-party plaintiff proves through competent medical evidence that the employee sustained a ‘grave injury’. ‘The term ‘grave injury’ has been defined as a ‘statutorily defined threshold for catastrophic injuries’...and includes only those injuries which are listed in the statute and determined to be permanent” (*Curran v Auto Lab Serv. Ctr., Inc.*, 280 AD2d 636, 638 [2d Dept 2001] quoting *Ibarra v Equip. Control, Inc.*, 268 AD2d 13, 18 [2d Dept 2000]).

Integral argues that it is entitled to summary judgment because plaintiff's injuries do not meet the “grave injury” standard under Workers' Compensation Law § 11. In support of its argument, Integral references plaintiff's Verified Bill of Particulars and Supplemental Bill of Particulars in which plaintiff pleads several different injuries and conditions; however, none of which meet the permanent and catastrophic standard the Workers' Compensation Law § 11 was created to serve. Plaintiff appeared for a deposition and testified to the extent of his injuries.

According to plaintiff, he suffered a crush injury, and it is possible that he will work again, however, no time soon (NYSCEF Doc. No. 142 [plaintiff's deposition transcript] page 47-48, 6-12). Plaintiff also testified that he feels significant pain in his right leg and above his right leg, and that two of his right toes do not bend when he walks, which causes a lot of pain (id.). Integral also submits the reports from two experts that examined plaintiff: Dr. Gallina found that plaintiff regained full motor strength in his foot, that he has near complete range of motion, and is able to return to work as an electrician; and Dr. Valderrama found mild atrophy and no objective neurological deficits. Accordingly, the Court finds that Integral met its prima facie burden showing that plaintiff did not suffer a grave injury because a crush injury and the loss of feeling in multiple toes does not meet the strict requirements stated within Workers' Compensation Law § 11 (see, e.g., Dunn v Smithtown Bancorp, 286 AD2d 701, 702 [2d Dept 2001] [even a brain injury that allegedly caused “cognitive deficits, mild expressive language deficits, and impaired problem-solving ability” was not considered a grave injury, “although [it was a] clearly serious” injury]; Nunez v Park Plus, Inc., 146 AD3d 488, 489 [1st Dept 2017] [where the amputation of a toe after a parked car fell on it was not considered a grave injury]; Giblin v Pine Ridge Log Homes, Inc., 42 AD3d 705, 707 [3rd Dept 2007] [plaintiff's loss of an eye did not constitute a grave injury]).

In opposition to Integral's assertion that plaintiff does not meet the grave injury standard, third-party plaintiffs argue that plaintiff has met this standard because plaintiff has loss feeling in multiple toes which amounts to the total loss of use of a foot or loss of multiple toes. However, without submitting or pointing to any evidence to the contrary, third-party plaintiffs failed to demonstrate an issue of fact requiring denial of summary judgment.

Consequently, third-party plaintiffs failed to rebut Integral's prima facie showing entitling it to dismissal of the common law contribution or indemnification claims (see Tavarez v LIC Dev. Owner, L.P., 205 AD3d 565, 567 [1st Dept 2022]).

### **Contractual Indemnification and Contribution**

Article 18 of the Trade Contractor Agreement states that Integral "shall indemnify, defend [], and hold harmless...for personal or bodily injury...arising from, or in connection with, the performance of the Work and/or services by [Integral] under this Agreement" (NYSCEF Doc. No. 158 [Trade Contractor Agreement] page 22, 18.1). Courts have held that this type of language requires some sort of causal connection between the accident and the work and/or services Integral was contractually hired to perform (see Brown v Two Exch. Plaza Partners, 146 AD2d 129, 136 [1st Dept 1989]; see generally Urbina v 26 Ct. St. Assocs., LLC, 46 AD3d 268, 273 [1st Dept 2007] [there must be "a particular act or omission in the performance of such work [that causally relates] to the accident"], quoting Brown, 146 AD2d at 136]).

Plaintiff was an electrician hired by Integral, that was hired by Ross & Associates, to perform all the electrical work in the building. In preparation of this work, plaintiff and his coworkers were examining one of the rooms they had to work in, and while doing so, a fire pump that had no relation to the electrical work plaintiff's employer was contracted to perform, fell on his foot. Without such a connection to the electrical work Integral was hired to perform, the contractual indemnification provision is inapplicable (see Brown, 146 AD2d at 136; McCann v Battery Place Green, LLC, 2013 NY Slip Op 31374[U], 2013 WL 3342032 [Sup Ct, NY County June 25, 2013]; cf. Naughton v City of New York, 94 AD3d 1 [1st Dept 2012]).

In light of the foregoing, the Court need not address whether Integral complied with the insurance obligations contained in the trade contract.

It is hereby ORDERED that motion by third-party defendant INTEGRAL POWER & CONTROL CORP. for summary judgment dismissing third-party plaintiffs' complaint is granted and the third-party complaint (third-party index no. 595470/2018) is dismissed in its entirety, with costs and disbursements to said third-party defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said third-party defendant.

This constitutes the decision and order of the Court.

1/9/2023

DATE



ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE