

Aldino v City of New York

2023 NY Slip Op 30489(U)

February 15, 2023

Supreme Court, New York County

Docket Number: Index No. 159650/2018

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

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INDEX NO. 159650/2018

ALDINO, GIUSEPPE

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 003

- v -

CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAIN TRANSIT AUTHORITY, and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

DECISION AND ORDER ON MOTION

Defendant.

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Third-Party Index No. 596115/2021

Plaintiff,

-against-

JUDLAU CONTRACTING, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for DISMISSAL

Upon reading the above documents and having heard oral arguments, the motion to dismiss the third- party complaint by Third-Party Defendant, Judlau Contracting, Inc. (Judlau) is granted.

Plaintiff's complaint alleges that on February 22, 2018, he was severely injured while in the course of his employment with Judlau at 442 East 14th Street, New York, New York.

Plaintiff further alleges that Defendants were negligent and violated sections 200 and 241 (6) of the New York State Labor Law and the New York State Industrial Code 22 NYCRR 23-3.3 (b)

(2) (3) (c), 23-4, 23-4.1 (a)-(b), 23-4.2 (a) (b) (d) (e) (f), Table I (g), 23-4.4 (a)-(k) and Tables II-IV.

As a result of the accident, Plaintiff's alleged sustaining the following injuries: injuries to his head, left shoulder, right shoulder and right elbow; traumatic brain injury; cognitive defects; memory loss; concussion; post-concussion syndrome; depression; post-traumatic stress disorder; anxiety disorders; headaches; dizziness and insomnia. Plaintiff also underwent arthroscopic surgery on the right shoulder on September 24, 2018; arthroscopic surgery on the right elbow on April 20, 2019; and arthroscopic surgery on the left shoulder on November 30, 2019.

After the commencement of this action, Defendant Consolidated Edison Company of New York, Inc. (Con Ed) brought a third-party action against Judlau for contractual and common-law indemnification, contribution and negligence claims.

Judlau now moves to dismiss the third-party complaint on the grounds that Con Ed's claims are barred by Worker's Compensation Law §11 (WCL) because Plaintiff did not sustain a grave injury as a result of the accident, that there is no written agreement requiring Judlau to indemnify Con Ed, and that the pleadings fail to state a cause of action.

Prior to the accident, on April 13, 2017, Defendant New York City Transit Authority (TRANSIT), acting on behalf of Defendant Metropolitan Transportation Authority (MTA), issued a Notice of Award, awarding Contract No. P-36437 (Contract) to Judlau for "Sandy" Repair and Core Capacity Improvement Project, Canarsie Tunnel Rehabilitation and Core Capacity Improvement in the Boroughs of Manhattan and Brooklyn (Project). The Contract was in full force and effect on the day of the accident. A copy of the Contract is submitted by Judlau. Judlau contends that nowhere in this agreement is there a provision where Con Ed is to be indemnified by Judlau under any circumstance. In fact, Judlau argues that Con Ed is not a

party or a third-party beneficiary to the Contract.

Judlau submits a copy of a First Report of Injury sent to the Worker's Compensation Board (Board). The Board directed Judlau as Plaintiff's employer, through its insurance carrier, Charter Oak Fire Insurance Company, to pay Plaintiff certain monetary payments due to his work-related injuries. Thus, Plaintiff received his compensation and his employer is immune from third-party actions unless Plaintiff suffered a grave injury as defined by Worker's Compensation Law§11.

Section 11 defines grave injury as: "death, permanent and total loss 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 disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (Worker's Compensation Law§11).

Judlau claims that there is no evidence that Plaintiff suffered a grave injury. In support, Judlau submits Plaintiff's 50-h hearing testimony; the Emergency Room report from Bellevue Hospital Center, where Plaintiff was sent after his accident; and medical reports from three physicians, Dr. Daniel Feuer, a neurologist who examined Plaintiff on behalf of Defendants; Dr. Roy Kulick, an orthopedist who examined Plaintiff on behalf of Defendants; and Dr. Paul Ladopoulos, Plaintiff's own neurologist.

In opposition, Con Ed argues that its complaint is valid as it has stated a valid cause of action in indemnification, contribution and negligence. Con Ed also argues that it would be premature to dismiss this action in the absence of further discovery.

A motion to dismiss on the ground that the action is barred by documentary evidence is appropriate only where the documentary evidence utterly refutes a plaintiff's factual allegations and conclusively establishes a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 324 [2002]). On the other hand, a motion to dismiss for failure to state a cause of action, courts are concerned with whether the pleading states a cognizable action under the law rather than the ultimate determination of the facts (*see Sheila C. v Povich*, 11 AD3d 120, 121 [1st Dept 2004]).

Here, the Contract between Judlau and TRANSIT contains all the terms and conditions concerning the Project, including Chapter 6, Contractor's Liability and Insurance, of which Article 6.01 lists the "Indemnified Parties" to the Contract. These parties are "City, Authority (TRANSIT), Government, State and MTA." Con Ed is not listed as an indemnified party. Moreover, Con Ed is not mentioned anywhere in the Contract.

Regarding medical evidence, Judlau submits Plaintiff's 50-h hearing testimony. Plaintiff testifies as to his background, the events leading up to his accident on the premises, the accident, his reaction and his visit to the hospital, and his present physical conditions. His testimony indicates that he spoke in a clear and coherent manner, speaking in complete sentences. He discusses his arm, shoulder and elbow injuries as well as his mental problems, including his concussion and his consequential condition, such as depression, anxiety attacks and insomnia. He is presently on medication and not employed.

The other medical evidence are reports from Bellevue Medical Center and the aforesaid three physicians. While there are some contradictions as to the accident, the information indicates that Plaintiff did not suffer the consequences associated with the grave injury standard as defined by section 11 of WCL. For example, Dr. Feuer concluded that Plaintiff did not

sustain a significant brain injury resulting in a prolonged loss of consciousness or intracerebral injury. Dr. Ladopoulos stated that Plaintiff's cognitive functions were "grossly intact." As for Plaintiff's injuries to his body parts, the medical documentation concludes that though severe, there was no total loss of use of any part.

While Con Ed argues that it would be premature to grant Judlau's motion as this time, this Court disagrees (see *Tavarez v LIC Dev. Owner L.P.*, 205 AD3d 565, 567 [1st Dept 2022]). Further, this Court further finds that the provision in the Contract is unambiguous about the indemnified parties. In addition, while it is undisputed that Plaintiff suffered injuries as a result of this accident, the injuries do not rise to the level of grave injury, nor has there evidence showing that Plaintiff suffered a grave injury, making him employable in any capacity (see *Rubei v The Aqua Club, Inc.*, 3 NY3d 408 [2004]).

Accordingly, Judlau has demonstrated that Con Ed's third-party action should be dismissed based on the documentary evidence.

It is hereby,

ORDERED that third-party Defendant, Judlau Contracting, Inc.'s motion to dismiss is granted and the third-party complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action continues.

2/15/2023
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT		

HON. DENISE M. DOMINGUEZ
J.S.C.