

Dachuk v River Tower Owner, LLC

2023 NY Slip Op 34846(U)

January 6, 2023

Supreme Court, Kings County

Docket Number: Index No. 511851/2018

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of January 2023.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

-----X
MICHAEL DACHUK,

Index No. 511851/2018

Plaintiff,

-against-

DECISION AND ORDER

RIVER TOWER OWNER, LLC, GREENOAK REAL ESTATE ADVISORS LP and VECTOR BUILDING CORP.,

Motions Sequence #4

Defendants.

-----X
RIVER TOWER OWNER, LLC, GREENOAK REAL ESTATE ADVISORS LP and VECTOR BUILDING CORP.,

Third-Party Plaintiffs,

-against-

INSIDE SQUAD GENERAL CONTRACTING,

Third-Party Defendant,

-----X
RIVER TOWER OWNER, LLC, GREENOAK REAL ESTATE ADVISORS LP and VECTOR BUILDING CORP.,

Second Third-Party Plaintiffs,

-against-

DESIGN BUILD MANAGEMENT GROUP, LLC,

Second Third-Party Defendant.

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	100-125,
Opposing Affidavits (Affirmations).....	130-134, 135, 137, 139-144, 159-160,
Reply Affidavits (Affirmations)	145, 146-147, 149-152,

After a review of the papers and oral argument, the Court finds as follows:

Plaintiff Michael Dachuk (hereinafter the “Plaintiff”) alleges causes of action relating to violations of New York State Labor Law §§200, 240, and 241(6) and common law negligence against Defendants River Tower Owner, LLC (Defendant “River Tower”), Greenoak Real Estate Advisors, L.P. (Defendant “Greenoak”) and Vector Building Corp. (Defendant “Vector”) (hereinafter referred to collectively as the “Defendants” or “Third Party Plaintiffs”). Plaintiff alleges in his Verified Bill of Particulars that he was injured on April 25, 2018, while employed as a construction worker by Third-Party Defendant Inside Squad, Inc. (“InsideSquad”), and working at 420 East 54th Street, New York, N.Y. (hereinafter the “Premises”). Specifically, the Plaintiff alleges that he suffered personal injuries when the unsecured ladder he was using slipped and caused him to fall.

InsideSquad now moves (motion sequence #4) for an order pursuant to CPLR 3212 granting summary judgment dismissing the second and third causes of action of the Third Party Complaint. Specifically, InsideSquad argues that the claim by the Third Party Plaintiffs for common law indemnification and contribution must be dismissed because the Plaintiff did not allegedly sustain a “grave injury” as defined by the New York State Workers’ Compensation Law. Also, InsideSquad argues that the breach of contract cause of action in the third-party Complaint must be dismissed because InsideSquad obtained the required insurance coverage pursuant to its contract with Defendant River. The Third Party Plaintiffs and the Plaintiff argue that the motion should be denied as there is a question of fact as to the severity of the Plaintiff’s injury.¹

¹ The Third-Party Plaintiffs do not oppose that aspect of the motion (motion sequence #4) that seeks to dismiss the second cause of action alleging breach of contract and accordingly, that aspect of the motion is granted and the second cause of action in the Third Party Complaint is dismissed. *See Elam v. Ryder Sys., Inc.*, 176 A.D.3d 675, 675, 107 N.Y.S.3d 718 [2d Dept 2019].

“Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 131 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d320, 324, 508 N.Y.S.2d 923 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

“Workers' Compensation Law § 11 was amended in 1996 to permit an employer to be held liable for contribution or indemnity only where the third-party plaintiff proves through competent evidence that the injured party sustained a ‘grave injury.’” *Schuler v. Kings Plaza Shopping Ctr. & Marina, Inc.*, 294 AD2d 556, 559, 743 N.Y.S.2d 141, 143 [2d Dept 2002]. “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.” *Ibarra v. Equip.*

Control, Inc., 268 A.D.2d 13, 17–18, 707 N.Y.S.2d 208, 211 [2d Dept 2000], quoting *Kerr v. Black Clawson Co.*, 241 A.D.2d 686, 663 N.Y.S.2d 1010 [3d Dept 1997]. “One such enumerated injury is an ‘acquired injury to the brain caused by an external physical force resulting in permanent total disability.’” *Grech v. HRC Corp.*, 150 AD3d 829, 830, 54 N.Y.S.3d 433, 435–36 [2d Dept 2017]. “Permanent and severe facial disfigurement” is also an enumerated “grave injury under Workers’ Compensation Law § 11, however, “[w]hat constitutes “permanent and severe facial disfigurement” is unlike most of the other enumerated “grave” injuries, which are, on the whole, amenable to “objectively ascertainable” determinations as a matter of law.” *Fleming v. Graham*, 10 N.Y.3d 296, 300, 886 N.E.2d 769, 772–73 (2008)

InsideSquad argues that the Third Cause of Action for common law indemnification and contribution in the third-party Complaint must be dismissed because the Plaintiff did not allegedly sustain a “grave injury” as defined by the New York State Workers’ Compensation Law. In support of this position, InsideSquad relies on the deposition of the Plaintiff, the report of Dr. Reuben D. Burshtein, the report of Dr. William B. Head, the report of Jane Matton, PhD. and the report of Dr. Paul S. Striker.

During his deposition, when asked what his date of birth was, the Plaintiff answered “March 27, 1984.” (See InsideSquad’s Motion, Exhibit “P”, Pages 19-20). When asked when the Plaintiff came to the United States, the Plaintiff stated “2015.” When asked how he came here, the Plaintiff stated “[a] guest visa.” (See InsideSquad’s Motion, Exhibit “P”, Pages 23). When asked if he was married, he stated “I was married.” When asked when he was married, the Plaintiff stated, “[m]arried in 2008.” When asked when his marriage ended, the Plaintiff stated, “[i]t must have been 2016.” When asked the name of his former spouse, the Plaintiff stated, “Vitalia.” When asked if he had any children with Vitalia, the Plaintiff stated, “[y]es.” When asked how many children

they had, the Plaintiff stated, “[t]wo.” (See InsideSquad’s Motion, Exhibit “P”, Pages 54-55). When asked the last time he was employed, the Plaintiff stated, “April.” When asked whether the date was in April of 2018, the Plaintiff stated, “[y]es.” (See InsideSquad’s Motion, Exhibit “P”, Page 65). When asked what his employment was prior to working for InsideSquad, the Plaintiff stated, “I worked in the same thing, doing remodeling, interior remodeling.” (See InsideSquad’s Motion, Exhibit “P”, Page 68). When asked whether he remembered how high he was on the ladder when he fell, the Plaintiff stated that, “[w]ith the whole 21 ladder I think is 12 feet and I think I was on the second rung.” (See InsideSquad’s Motion, Exhibit “P”, Page 130). When asked how long he had been working at the site before his accident, the Plaintiff stated, “[w]e did one side of the street, then the other.” (See InsideSquad’s Motion, Exhibit “Q”, Page 11). When asked why he didn’t object to using the ladder instead of the lift, the Plaintiff stated, “[t]he person who gives me the work, he’s the boss, and he decides and tells me what to do.” (See InsideSquad’s Motion, Exhibit “Q”, Page 12). When asked whether he had recently experienced unconsciousness, the Plaintiff stated, “I just don’t know, but I do know it was twice in 2018.” (See InsideSquad’s Motion, Exhibit “Q”, Page 142). When asked if he has nurses that visit him at home, the Plaintiff stated, “[n]o, but they used to come.” (See InsideSquad’s Motion, Exhibit “Q”, Page 154). When asked if he can shave and bathe himself, the Plaintiff stated, “[y]es.” When asked if he ever goes food shopping, the Plaintiff stated, “[r]arely, but yes, I do.” (See InsideSquad’s Motion, Exhibit “Q”, Page 155). When asked if he had been on the subway since his accident, the Plaintiff stated, “[o]ne time I tried, maybe two.” (See InsideSquad’s Motion, Exhibit “Q”, Page 157).

Dr. Reuben D. Burshtein, a board certified neurologist, examined the Plaintiff on October 7, 2020. Dr. Burshtein found that “[t]he claimant is alert, oriented to person, place and time, and appears to have normal intellectual functions.” Dr. Burshtein also stated that the Plaintiff’s

“[c]omprehension and speech are normal.” Dr. Burshtein opined that “Mr. Mykhailo Diachuk [sic] is capable of working without restrictions.” Dr. Burshtein also opined that “[h]e is capable to perform activities of daily living.” (See InsideSquad’s Motion, Exhibit “S”, Report of Dr. Burshtein).

Dr. William B. Head, board certified in neurology and psychiatry, examined the Plaintiff on February 4, 2021. Dr. Head stated that, the “[e]xamination of cranial configuration revealed a depression in the cranium on the left side of his head.” Dr. Head also stated that, “[t]here was a 12-inch semi-circular surgical scar over the left side of his head from his surgery following the April 25, 2018 accident.” Dr. Head noted that, “Mr. Dachuk required no orthopedic devices or other appliances for movement around the room.” Dr. Head also stated that, “[o]n calculations testing, he said 9x9 equaled "72," 8x9 equaled "64," 7x9 equaled "56," 6x9 equaled "49," 5x5 equaled "30," and 3x3 equaled "6," and he said that he did not know the answers to 2x2 or 4x4.” Dr. Head further stated that “[h]is overall memory was within the normal range. There was no evidence of impairment of concentration, and his overall ability to comprehend instructions and questions was within the boundaries of normal.” As it relates to the Plaintiff’s coordination, Dr. Head stated that, “[o]n coordination testing, finger-nose-finger, and rapid alternating movements of the hands and feet tests were all normal.” Dr. Head found that the Plaintiff “does show signs of conscious exaggeration, on (1) simple calculations testing, (2) facial sensory testing, (3) general sensory testing, and (4) cervical range of motion testing.” Dr. Head’s diagnosis of the Plaintiff was that there was a “[h]istory of significant and severe head injury, with multiple skull fractures, subarachnoid hemorrhage, left temporal hemorrhagic contusion, and left subdural hematoma. However, Mr. Dachuk appears objectively to have recovered, clinically, although there remains

an area of encephalomalacia in the left temporal lobe.” (See InsideSquad’s Motion, Exhibit “T”, Report of Dr. Head).

Jane Matton, PhD. an occupational therapist, interviewed and evaluated the Plaintiff on March 4, 2020 and issued a “Vocational Analysis” of the Plaintiff as a result of this interview. Matton states that the Plaintiff “has made a remarkable recovery.” Matton also states that the Plaintiff “resides alone and is able to take his medications without assistance.” Matton further stated that the Plaintiff “is a young man and is in reasonably good physical shape.” Matton found that, “[w]ith headache relief, and short-term vocational rehabilitation for traumatic brain injury, as well as learning English, Mr. Dachuck has a brighter future with better quality of life and the ability to earn a living and to work on a full time basis.” In relation to his future ability to work, Matton stated that, “[b]ased on the review of records and considering his work history and current abilities, skills and interests, I was able to identify transferable skills in light of his vocational limitations.” Matton concluded that, “I believe that Michael Dachuck will not achieve the ability to work back in construction, yet within 18 months, with one-on-one vocational assistance, he could work in a minimum wage job, i.e., with earnings of about \$15/hour.” (See InsideSquad’s Motion, Exhibit “V”, Report of Jane Matton, PhD.).

Dr. Paul S. Striker, a board certified physician in the field of plastic surgery, examined the Plaintiff on June 21, 2021. Dr. Striker stated that the Plaintiff “has a bump on the left side of his head that he would like to have covered up, and he feels uncomfortable about one side of his face pulling down.” Dr. Striker stated that, “[t]he scalp was fully hair-bearing, revealing upon parting a scar running contiguous to the central frontal hair line, but not encroaching beyond, to run in a curvilinear orientation over the left side of the scalp terminating at the occipital hair line distal to the posterior aspect of the left ear.” Dr. Striker also stated that his “[o]bservation of the face shows

slight asymmetry enhanced by the defect at the temple on the left side contrasting with normal temporal hollowness on the contralateral side, and frontalis muscle activity on brow elevation greater on the right side than the left.” Dr. Striker opined that, “[w]ith regard to the multiple sequelae of this event, and commenting only on my specialty of plastic surgery, the claimant’s present complaints are essentially aesthetic in nature and amenable to improvement with standard surgical modalities.” Dr. Striker concluded that, “the claimant does not have a severe facial disfigurement and any minor asymmetry is not permanent and can be addressed with elective cosmetic procedures if desired.” (See InsideSquad’s Motion, Exhibit “W”, Report of Dr. Striker).

As to severe facial disfigurement, the standard is generally whether “a reasonable person viewing the plaintiff’s face in its altered state would regard the condition as abhorrently distressing, highly objectionable, shocking or extremely unsightly.” *Fleming v. Graham*, 10 N.Y.3d 296, 301, 886 N.E.2d 769, 773–74 [2008]. The report of Dr. Strike concludes that the Plaintiff’s injuries do not meet this standard. The reports of Dr. Burshtein, Dr. Head and Matton state that the while Plaintiff has suffered an injury that prevents him from resuming his prior employment, he did not suffer what could be described as a “permanent total disability” constituting a ‘grave injury’ as defined in Workers' Compensation Law § 11.” *Dunn v. Smithton Bancorp.*, 286 AD2d 701, 702, 730 N.Y.S.2d 150, 151 [2d Dept 2001].

Assuming that the movant had made a *prima facie* showing, the Court finds that the Third Party Plaintiffs and the Plaintiff have raised a material issues of fact regarding the Plaintiff’s injuries sufficient to deny the motion by InsideSquad. In opposition, the Third Party Plaintiffs and the Plaintiff rely primarily on the reports of Dr. Richard Lechtenberg, Dr. Adam Mednick and Dr. Aric Hausknecht. Dr. Richard Lechtenberg, a board certified neurologist, examined the Plaintiff on February 26, 2020. In addition to those doctors, the Plaintiff proffers the reports of Drs. Huma

Haider, Marc J. Elkowitz and Irina Domantovsky. Dr. Lechtenberg stated that the Plaintiff “spoke in short sentences and did not always seem to understand simple instructions despite repeated attempts.” Dr. Lechtenberg also stated that the Plaintiff, “did not follow my finger with his eyes.” Dr. Lechtenberg found “[t]raumatic brain injury, per records, symptomatic.” Dr. Lechtenberg also found “[s]tatus post concussion syndrome, per history, unresolved.” Dr. Lechtenberg further found that the Plaintiff “has considerable objective neurologic deficits including his dysmetria, language problems, reflex asymmetry and a seizure disorder which is substantiated on objective testing with an EEG.” Dr. Lechtenberg concluded that “[a]ccording to New York State Workers Comp Disability Guidelines he is 100% disabled.” He also stated that the Plaintiff would not benefit from “further neurological treatment.” (See Third Party Plaintiff’s Affirmation in Opposition, Exhibit “A”, Report of Dr. Lechtenberg).

Dr. Adam Mednick, a board certified neurologist, examined the Plaintiff on May 16, 2019. Dr. Mednick’s diagnosis after examination was that the Plaintiff suffered from “multiple skull fractures, intercranial and hemorrhages, seizure disorder.” Dr. Mednick stated that “[a]fter reviewing the claimant’s medical file, taking a complete history and performing a physical examination, there appears to be a cause and effect relationship between the injuries sustained and the incident reported.” Dr. Mednick opined that the Plaintiff “is presently totally disabled secondary to the injuries sustained in the work-related incident of April 25, 2018.” Dr. Mednick found that the Plaintiff “is incapable of employment in any capacity due to his severe head trauma and seizure disorder.” (See Third Party Plaintiff’s Affirmation in Opposition, Exhibit “B”, Report of Dr. Mednick).

Dr. Aric Hausknecht, a board certified neurologist, examined the Plaintiff on several occasions including June 7, 2018, September 20, 2018, November 2, 2018, December 14, 2018,

February 8, 2019, March 29, 2019, July 19, 2019 and January 29, 2021. Dr. Hausknecht diagnosed the Plaintiff as having a “[c]losed head trauma with skull fracture, intracranial hemorrhage requiring craniectomy and revision.” Dr. Hausknecht also found that the Plaintiff suffered from “[m]ild traumatic brain injury; post-concussion syndrome; posttraumatic seizure disorder” and “[p]osttraumatic stress disorder with associated anxiety and depression.” Dr. Hausknecht opined that “[w]ith a reasonable degree of medical certainty, his condition is permanent in nature.” Dr. Hausknecht also opined that “Mr. Daichuk [sic] has sustained significant limitation of function of his neurocognitive and neuropsychological faculties.” Dr. Hausknecht concluded that “[d]ue to his combination of headaches, dizziness, auditory and visual deficits as well as cognitive dysfunction and psychological symptoms, he has a permanent total disability from all forms of gainful employment.” (See Third Party Plaintiff’s Affirmation in Opposition, Exhibit “C”, Report of Dr. Hausknecht).

Dr. Marc J. Elkowitz’ report discussed procedures he planned to perform and does not speak to disfigurement. (See Plaintiff’s Affirmation in Opposition, Exhibit “C”, Report of Dr. Elkowitz). The Court notes that the reports of Dr. Huma Haider, and Dr. Domantovsky are not affirmed, and the inadmissibility of these reports is raised in reply by the movant. As a result, these reports will not be considered.

“Here, the conflicting expert opinions proffered by the parties raised a triable issue of fact as to whether the injured plaintiff suffered a grave injury within the meaning of Workers’ Compensation Law § 11.” *Cioffi v. S.M. Foods, Inc.*, 178 A.D.3d 1006, 1013, 116 N.Y.S.3d 306, 314 [2d Dept 2019]; see also *Bush v. Mechanicville Warehouse Corp.*, 79 A.D.3d 1327, 1329, 912 N.Y.S.2d 768, 770 [3d Dept 2010]; *Mendez v. Union Theological Seminary in City of New York*, 26 A.D.3d 260, 261, 809 N.Y.S.2d 77, 78 [1st Dept 2006]. The Court has recognized the imprecise

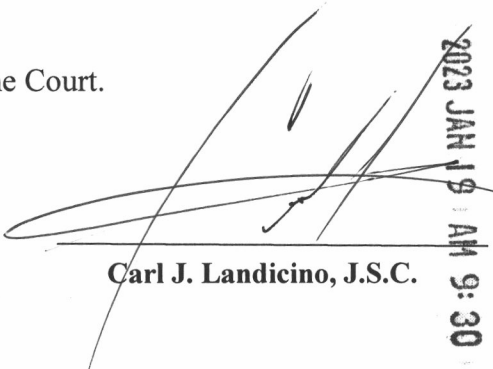
nature of this category of grave injury [traumatic brain], requiring medical evidence. *See Way v. George Grantling Chemung Contracting Corp.*, 289 AD2d 790, 791, 736 N.Y.S.2d 424 [3d Dept 2001]. The Court in *Rubeis v. Aqua Club Inc.*, 3 N.Y.3d 408, 821 N.E.2d 530 [2004] made “clear that the true test we adopt for the permanent total disability under section 11 is one of unemployability *in any capacity*.” *Rubeis v. Aqua Club Inc.*, 3 N.Y.3d 408, 417, 821 N.E.2d 530, 535 [2004]; *see also Grech v. HRC Corp.*, 150 AD3d 829, 54 N.Y.S.3d 433 [2d Dept 2017]. There is clearly a disagreement among the experts as to whether the Plaintiff has suffered a permanent and total disability pursuant to Workers' Compensation Law § 11. Any “alleged inconsistencies” between the Plaintiff’s deposition testimony and the admissible medical reports in opposition, especially in light of the fact that the malady is purportedly a traumatic brain injury, only raises an issue of fact for the jury to resolve. *See Mejia v. Kennedy*, 124 AD3d 731, 732, 2 N.Y.S.3d 176, 177 [2d Dept 2015]; *Gaither v. Saga Corp.*, 203 AD2d 239, 609 N.Y.S.2d 654 [2d Dept 1994]. Accordingly, the motion (motion sequence #4) by InsideSquad is denied.

Based upon the foregoing, it is hereby Ordered that:

The motion by Third Party Defendant InsideSquad (motion sequence #4) for summary judgment is granted solely as it relates to the second cause of action for breach of contract in the in the Third Party Complaint. That aspect of the Third Party Defendant InsideSquad’s motion seeking summary judgment dismissing the third cause of action for common law indemnification and contribution in the Third Party Complaint is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino, J.S.C.

2023 JAN 19 AM 9:30
 KINGS COUNTY CLERK
 FILED