

**Padilla v 3521 Dekalb Ave. Assoc., L.L.C.**

2024 NY Slip Op 34699(U)

August 22, 2024

Supreme Court, Bronx County

Docket Number: Index No. 31286/2017E

Judge: Laura G. Douglas

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 6

Bander Padilla,

Index No.

31286/2017E

-against-

Hon.

LAURA G. DOUGLAS  
Justice Supreme Court

Justice Supreme Court

3521 DeKalb Avenue Assoc., L.L.C.,  
et al

and Two Third-Party Actions

The following papers numbered 1 to 8 were read on this motion (Seq. Nos. 3<sup>v</sup>)  
for Summary Judgment noticed on July 26, 2023

Submitted

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). <u>(1), (5)</u>
Answering Affidavit and Exhibits	No(s). <u>(2), (3), (6), (7)</u>
Replying Affidavit and Exhibits	No(s). <u>(4), (8)</u>

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendants/third-party plaintiffs and motion by third-party defendant are decided in accordance with the attached memorandum Decision/Order.

Dated:

Dated: 8-22-24

Hon.

LgD  
LAURA G. DOUGLAS  
Justice Supreme Court

, J.S.C.

- HECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
- MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER
- HECK IF APPROPRIATE.....  SETTLE ORDER  SUBMIT ORDER  SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT  REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

Index No. 31286/2017E

\_\_\_\_\_  
BANDER PADILLA,

Plaintiff,

-against-

3521 DEKALB AVENUE ASSOCIATES, L.L.C., BENENSON  
FUNDING CORPORATION, and BR RESTORATION, INC.,

Defendants.

**DECISION/ORDER**

**Present:**

**Hon. Laura G. Douglas  
J. S. C.**

**Part 6**

\_\_\_\_\_  
3521 DEKALB AVENUE ASSOCIATES, L.L.C. and  
BENENSON FUNDING CORPORATION,

Third-Party Plaintiffs,

Third-Party Index No.  
43144/2019E

-against-

EDDY G CONSTRUCTION LLC,

Third-Party Defendant.

\_\_\_\_\_  
BR RESTORATION, INC.,

Second Third-Party Plaintiff,

-against-

EDDY G CONSTRUCTION LLC,

Second Third-Party Defendant.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of these motions for summary judgment (seq. nos. 3 and 4):

**Papers**

**Numbered**

**Notice of Motion by Defendants/Third-Party Plaintiffs 3521 Dekalb Avenue Associates, L,L,C. and Benenson Funding Corporation, Statement of Material Facts by Jeffrey M. Pepe, Esq. dated December 2, 2022, Affirmation of Jeffrey M. Pepe, Esq. dated December 2, 2022 in Support of Motion, and Exhibits (“A” through “O”)..... 1**

**Affirmation of Linda A. Stark, Esq. dated February 3, 2023 in Opposition to Motion..... 2**

**Affirmation of Steven Gershowitz, Esq. dated May 18, 2023 in Partial Opposition to Motion..... 3**

**Reply Affirmation of Jeffrey M. Pepe, Esq. dated February 6, 2023..... 4**

**Notice of Motion by Third-Party Defendant Eddy G Construction, LLC, Affirmation of Linda A. Stark, Esq. dated December 7, 2022 in Support of Motion, Statement of Facts in Support of Summary Judgment by Linda A. Stark, Esq. dated December 7, 2022, Memorandum of Law by Linda A. Stark, Esq. dated December 7, 2022 in Support of Motion, and Exhibits (“A” and “B”)..... 5**

**Affirmation of Jeffrey M. Pepe, Esq. dated February 1, 202 in Opposition to Motion and Response to Statement of Material Facts by Jeffrey M. Pepe, Esq. dated February 1, 2023..... 6**

**Affirmation of Steven Gershowitz, Esq. dated May 18, 2023 in Opposition to Motion..... 7**

**Reply Affirmation of Linda A. Stark, Esq. dated May 1, 2023..... 8**

*These motions are consolidated for purposes of Decision/Order and, upon the foregoing papers and after due deliberation, the Decision/Order on these motions is as follows:*

Defendants/Third-Party Plaintiffs 3521 Dekalb Avenue Associates L.L.C. and Benenson Funding Corporation (collectively, “3521 Dekalb”) seek summary judgment pursuant to CPLR 3212 dismissing the plaintiff’s causes of action pursuant to Labor Law § 200/common-law negligence and Labor Law § 240, as well as granting 3521 Dekalb summary judgment on their common-law indemnification claim against third-party defendant/second third-party defendant Eddy G Construction LLC (“Eddy”). Eddy seeks summary judgment dismissing 3521 Dekalb’s third-party complaint in its entirety on the grounds that the plaintiff (“Padilla”) did not sustain a “grave injury” as defined in New York State Workers’ Compensation § 11. The motion by 3521 Dekalb is granted. Eddy’s motion is denied.

Padilla seeks monetary damages for personal injuries sustained on August 7, 2017 while employed by Eddy as a construction worker at premises owned by 3521 Dekalb. Eddy had been hired

by 3521 Dekalb to gut renovate some 15 to 20 apartments at the premises. Padilla's work involved the use of a table saw owned by Eddy. Padilla alleges that the table saw had no guard protections or a table to secure it. As he was cutting a piece of wood, he claims that the blade pulled the wood and the machine, causing his left index finger to be amputated at the level of the distal aspect proximal phalanx with an alleged loss of the proximal interphalangeal joint.

Dismissal of Plaintiff's Labor Law § 200/Negligence and Labor Law § 240 Claims

Padilla concedes that 3521 Dekalb should have summary judgment as to his claims under Labor Law § 200/negligence and Labor Law § 240 (*see* Gershowitz Aff., ¶ 3). Therefore, that branch of 3521 Dekalb's motion is granted without opposition.

Did Padilla Sustained a "Grave Injury"

3521 Dekalb and Eddy agree that while 3521 Dekalb may not have committed any wrong, they remain statutorily liable to Padilla due to Eddy's negligence and, in turn, that Eddy remains liable to 3521 Dekalb for common law indemnification if Padilla sustained a "grave injury" as defined by New York State Workers' Compensation § 11. 3521 Dekalb and Padilla contend that he did sustain a qualifying injury, while Eddy maintains that he did not.

In pertinent part, Section 11 of New York's Workers' Compensation Law states as follows:

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.

In support of their motion 3521 Dekalb relies on the medical examination performed by Joel B. Grad, M.D. on September 23, 2020. Dr. Grad describes Padilla's injury as follows: "[t]he left index finger has sustained amputation at the level of the distal aspect proximal phalanx with loss of proximal interphalangeal joint". As a result, Padilla's left index finger measures three centimeters, while his intact right index finger measures seven centimeters. Dr. Grad notes that Padilla reports constant pain in his left hand. Finally, Dr. Grad opines that the injury has resulted in a permanent impairment and

disability of Padilla's left hand.

3521 Dekalb also submits several unchallenged photographs provided by Padilla that depict his finger as it existed post-accident (*see* Pepe Aff., Exh. "I").

3521 Dekalb contends that Padilla's injury constitutes a "loss of an index finger", which satisfies the statute. In support, they rely on *Castillo v. 711 Group, Inc.*, 10 NY3d 735 [Ct App 2008]. In *Castillo*, the plaintiff lost both interphalangeal joints of his left index finger, the amputation leaving only a "painful amputation stump". The Court of Appeals held that this was a qualifying injury under New York State Workers' Compensation § 11.

Eddy contends that Padilla's injury does not meet the statutory definition of "grave injury" because New York State Workers' Compensation § 11 requires a complete and total loss of an index finger, while some three centimeters of his index finger admittedly remains intact. In addition, Eddy notes that Dr. Grad concluded that Padilla had a permanent impairment and disability to his left hand, which Eddy maintains does not qualify as a "total loss of use" of his left index finger". Eddy argues that the statute purposely defines "grave injury" narrowly, subject to expansion only by legislation (*see* *Castro v. United Container Machinery Group, Inc.*, 96 NY2d 398 [Ct App 2001]).

In support, Eddy submits the medical report of Salvatore R. Lenzo, M.D. dated July 14, 2020 which details his own examination of Padilla on Eddy's behalf. In pertinent part, Dr. Lenzo notes that Padilla underwent a "complete partial amputation of the proximal interphalangeal joint". Dr. Lenzo's examination found Padilla to have slight proximal interphalangeal joint motion with 0-5 degrees of flexion. In addition, Dr. Lenzo states that there is a small remnant of the middle phalanx which is palpable. Finally, Dr. Lenzo opines that a finger prosthesis would give Padilla better function in his left index finger.

Eddy attempts to distinguish *Castillo* by noting that the plaintiff in *Castillo* underwent two corrective surgeries and was left with a "painful" stump. In addition, Eddy notes that the physician who examined the plaintiff in *Castillo* found that he had a 100% total loss of use of his index finger. In contrast, Padilla testified at his deposition that he did not complain of a painful stump to his treating physicians, took no pain medication after his discharge from the hospital, could not remember if he told his physicians that he felt that he could return to work, and could not remember if he was advised by his physicians that he could not return to work. In addition, Eddy highlights Padilla's admission that he

can cook two meals a day for himself, which Eddy contends demonstrates significant use of his left index finger.

Eddy also maintains that the medical reports here are materially different from what was before the court in *Castillo*. Eddy notes that Dr. Lenzo opined that Padilla does have some remaining function in his left index finger, along with a “palpable” small remnant of the middle phalanx with zero to five degrees of flexion. Finally, Eddy notes that Dr. Grad does not mention a total loss of use.

Under these circumstances, Padilla has established that he sustained a grave injury within the meaning of Workers’ Compensation Law § 11, specifically the loss of an index finger (*see Castillo v. 711 Group, Inc.*, 10 NY3d 735 [Ct App 2008] and *Shamir v. Extreme Machinery Co., Inc.*, 2016 WL 6427102 [Sup Ct, Kings County 2016]). Here, it is clear from the unchallenged photographs and Dr. Grad’s report that Padilla’s proximal interphalangeal joint in his left index finger did not survive the accident. Even Dr. Lenzo concluded that Padilla’s proximal interphalangeal joint underwent complete partial amputation. Therefore, Padilla’s amputated index finger is missing its top two joints – the distal joint and the proximal interphalangeal joint, just like the plaintiff in *Castillo* (*see Stark Aff.*, Exh. “A” and *Castro v. United Container Machinery Group, Inc.*, 96 NY2d 398 [Ct App 2001]). Under *Castillo*, this suffices to establish a loss of the index finger.

The list of grave injuries is to be given a sensible reading, “without resort to forced or unnatural interpretations” (*see Castro v. United Container Machinery Group, Inc.*, 96 NY2d 398, 401 [Ct App 2001]). 3521 Dekalb correctly maintains that the existence of a statutory grave injury in the form of a “loss of an index finger” is a function of anatomical factors, regardless of the level of ensuing pain, the nature of any sequelae, the number of required medical interventions, or the plaintiff’s remaining ability to function (*see Castro v. United Container Machinery Group, Inc.*, 96 NY2d 398 [Ct App 2001] and *Castillo v. 711 Group, Inc.*, 41 AD3d 77, 79 [2<sup>nd</sup> Dept 2007], *affd* 10 NY3d 735 [Ct App 2008] (“Whether the plaintiff suffered a “loss of use” of his index finger is not one of the statutory criteria.”)). For example, New York State Workers’ Compensation § 11 contains no requirement that a qualifying “loss of an index finger” be accompanied by any particular threshold of pain or that the injured worker have undergone multiple surgeries. In any event, Padilla did testify that he was prescribed painkillers by the hospital and that he has not had gainful employment since the accident.

While Dr. Lenzo states that there is a small remnant of the middle phalanx which is palpable, notably missing is any measurement of this “remnant” to compare to the photographs and to Dr. Grad’s

conclusions. Moreover, there is no explanation as to how this is consistent with Dr. Lenzo's other conclusion that the proximal interphalangeal joint itself was amputated. That a "stump" of unspecified size, which here, at best, appears not to span the entire joint, may have survived the amputation of an index finger does not preclude a finding that the injured worker lost his index finger. Concluding that the existence of a mere "remnant" of flesh and bone, no matter how miniscule, forecloses a finding that an injured worker lost his index finger is a forced and unnatural interpretation of the word "loss". This is especially true given the value of index fingers, as demonstrated by the distinct treatment accorded to them by the statute relative to other fingers.

In concluding that the loss of both interphalangeal joints, which left a stump, constituted the "loss of an index finger", the Court in *Castillo* expressly rejected the arguments raised here by Eddy. While Eddy relies on *Mentesana v. Bernard Janowitz Construction Corporation*, 36 AD3d 769 [2<sup>nd</sup> Dept 2007], *Blackburn v. Wysong & Miles Co.*, 11 AD3d 421 [2<sup>nd</sup> Dept 2004], and *McCoy v. Queens Hydraulic Co.*, 286 AD2d 425 [2<sup>nd</sup> Dept 2001], the Court of Appeals in *Castillo* explicitly referenced those cases and yet still found that a grave injury had been established.

Accordingly, it is hereby

ORDERED that the plaintiff's causes of action under Labor Law § 200/negligence are dismissed; and it is further

ORDERED that the plaintiff's causes of action under Labor Law § 240 are dismissed; and it is further

ORDERED that the plaintiff has sustained a grave injury as defined in New York State Workers' Compensation § 11; and it is further

ORDERED that defendants/third-party plaintiffs 3521 DeKalb Avenue Associates L.L.C. and Benenson Funding Corporation have summary judgment on their third-party claims for common law indemnification against third-party defendant Eddy G Construction L.L.C.; and it is further

ORDERED that the Clerk of the Court shall make all necessary entries to reflect the terms of this Decision/Order, including entry of a judgment in accordance with the terms of this Decision/Order.

The foregoing constitutes the Decision/Order of this Court.

DATED: August 22, 2024  
Bronx, New York

  
HON. LAURA G. DOUGLAS  
J.S.C.