

Garcia v 267 Dev., LLC

2025 NY Slip Op 30392(U)

January 28, 2025

Supreme Court, New York County

Docket Number: Index No. 160076/2016

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

-----X

PABLO GARCIA,

Plaintiff,

- v -

267 DEVELOPMENT, LLC,

Defendant.

-----X

267 DEVELOPMENT, LLC

Plaintiff,

-against-

DYNAMIC BUILDING SERVICES, INC.

Defendant.

-----X

267 DEVELOPMENT, LLC

Plaintiff,

-against-

CHUTES AND COMPACTORS OF NEW YORK INC. D/B/A
CHUTES ENTERPRISES

Defendant.

-----X

INDEX NO. 160076/2016

MOTION DATE 09/16/2024, 09/16/2024

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

Third-Party
Index No. 595735/2017

Second Third-Party
Index No. 595986/2018

The following e-filed documents, listed by NYSCEF document number (Motion 004) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 159, 160, 163, 165

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 137, 138, 139, 140, 156, 157, 158, 164, 166, 167, 168, 169

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, these motions are hereby consolidated for the courts'

consideration and disposition in this single decision and order.

This is an action for personal injuries sustained by plaintiff while he was operating a trash compactor on August 7, 2014 when a piece of glass entered his left eye.

In motion sequence 4, second third-party defendant Chutes and Compactors of New York Inc. d/b/a Chutes Enterprises (Chutes) moves for an order granting it summary judgment against defendant third-party plaintiff and second third-party plaintiff 267 Development LLC (267 Development) dismissing the second third-party complaint and third-party claims for contractual indemnification, common law indemnification and breach of contract for failure to procure insurance.

In motion sequence 5, third-party defendant Dynamic Building Services, Inc. (Dynamic), plaintiff's employer, moves for an order granting it summary judgment on the third and fourth causes of action in the third-party complaint for common law contribution and indemnification on the grounds that plaintiff has not suffered a grave injury.

Issue has been joined and both motions were timely brought after note of issue was filed and as per the parties' stipulation dated June 20, 2024. Therefore, summary judgment relief is available.

267 Development opposes both motions and plaintiff oppose Dynamic's motion. The court will first consider Dynamic's motion. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the

proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Plaintiff argues that there is a triable issue of fact as to whether he suffered a grave injury within the meaning of Workers' Compensation Law § 11, since plaintiff lost the use of his left eye. Plaintiff relies upon *Fresco v. 157 East 72nd Street Condominium* (2 AD3d 326 [2003]). However, as Dynamic points out on reply, *Fresco* is distinguishable: "...there being ample evidence that plaintiff suffered a grave injury in the form of "permanent and severe facial disfigurement". Meanwhile, Workers' Compensation Law § 11 expressly provides:

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.

(Emphasis added.)

As Dynamic correctly argues, plaintiff does not claim that he suffered total and permanent blindness, as it is undisputed that he retains vision in his right eye. As for 267 Development's arguments against Dynamic's motion, the former does not raise any argument in opposition to the relief requested by Dynamic, which only seeks partial summary judgment as to the third and fourth causes of action in the third-party complaint for common law contribution and indemnification. Accordingly, Dynamic's motion is granted in its entirety.

The court now turns to Chutes' motion. Chutes, which installed the compactor, argues that it is entitled to summary judgment because its work was completed at the subject premises approximately one year prior to the date of plaintiff's accident pursuant to an installation contract which did not have ongoing maintenance obligations. It is undisputed that Chutes did not manufacture or install the compactor with a wooden safety guard/lid which was in place at the time of plaintiff's accident. Chutes however admits that it was on premises in March 2014, approximately five months before plaintiff's accident, but asserts that the service call was unrelated to the safety guard/lid.


The court agrees with 267 Development that there is a triable issue of fact as to when the safety guard/lid was removed or became missing from the subject compactor which precludes Chutes' motion for summary judgment, and further, what Chutes' employee observed in March 2014 during the service call and whether the makeshift wooden guard/lid was then installed or the compactor was otherwise not in a reasonably safe condition. For at least these reasons, Chutes is not entitled to summary judgment.

Accordingly, it is hereby **ORDERED** that Chutes motion for summary judgment (sequence 4) is denied; and it is further

ORDERED that Dynamic’s motion for partial summary judgment (sequence 4) is granted to the extent that the third and fourth causes of action asserted in the third-party complaint for common law contribution and indemnification are severed and dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

1/28/2025
DATE


LYNN R. KOTLER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
				OTHER