

Foronjy v Hewitt Sch.

2025 NY Slip Op 33196(U)

August 11, 2025

Supreme Court, New York County

Docket Number: Index No. 159931/2017

Judge: Lynn R. Kotler

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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. LYNN R. KOTLER PART 08

Justice

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WILLIAM FORONJY, DIANE FORONJY,
Plaintiffs,

INDEX NO. 159931/2017

MOTION DATE 05/30/2025

MOTION SEQ. NO. 006

- v -

THE HEWITT SCHOOL, E.W. HOWELL CO., LLC,
Defendants.

DECISION + ORDER ON MOTION

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THE HEWITT SCHOOL, E.W. HOWELL CO., LLC,
Third-Party Plaintiffs,

Third-Party
Index No. 595139/2019

-against-

D&D ELECTRICAL CONSTRUCTION COMPANY,
Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 261, 262, 270, 271, 275, 276, 280, 295

were read on this motion to/for REARGUMENT/RECONSIDERATION

By decision and order dated May 22, 2024 (the "Prior Decision"), the court, as relevant here, granted the summary judgment motion of defendants/third-party plaintiffs The Hewitt School ("Hewitt") and E.W. Howell Co., LLC d/b/a E.W. Howell Construction Group ("Howell") (MOT SEQ 002) to the extent of: dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims; dismissing plaintiff's Labor Law § 200 claim insofar as premised on a means and manner of work theory of liability; dismissing as abandoned the counterclaims of third-party defendant D&D Electrical Construction ("D&D") against Hewitt and Howell for contribution and common-law indemnity; and granting Hewitt and Howell summary judgment on their third-party claim for contractual indemnification against D&D. The court denied Hewitt's and Howell's motion, however, to the extent it sought summary judgment dismissing plaintiff's negligence and Labor Law § 200 claims premised upon an allegedly defective premises

condition. The Prior Decision also denied D&D's motion for summary judgment dismissing the third-party complaint (MOT SEQ 003).

D&D now moves to reargue these prior motions pursuant to CPLR 2221(d) and, upon reargument, to modify the Prior Decision to (i) deny summary judgment to Hewitt and Howell on their contractual indemnity claim; (ii) dismiss the third-party claims for contribution, common-law indemnity, and breach of contract for failure to procure insurance; and (iii) reinstate D&D's counterclaims for contribution and common-law indemnity. Hewitt and Howell oppose the motion.

Leave to reargue may be granted where the movant demonstrates that the court overlooked or misapprehended any facts or relevant law presented to it in the prior motion (*see* CPLR 2221[d][2]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept. 1992]). The motion is granted in part, consistent with the discussion herein, because D&D establishes that the court overlooked or misapprehended the law and the facts in the case with respect to several aspects of the Prior Decision.

The court granted Hewitt and Howell summary judgment on their third-party claim for contractual indemnification against D&D because it found that plaintiff's alleged accident arose out of his work as a D&D employee and thus triggered the broad "arising out of" indemnity clause in the underlying contract. D&D does not challenge that determination on the present motion. It nevertheless contends, correctly, that summary judgment on the contractual indemnity claim should have been denied as premature because there remains a triable issue of fact as to Hewitt's and Howell's negligence given the denial of their summary judgment motion to the extent it sought the dismissal of plaintiff's negligence and Labor Law § 200 claims premised upon an allegedly defective premises condition. Indeed, the First Department has held that even conditional summary judgment should not be granted on an owner or general contractor's contractual indemnification claim against a subcontractor where, as here, "an issue of fact exists as to whether the owner or general contractor's negligence was the sole proximate cause of the underlying claim" (*Cackett v Gladden Props., LLC*, 183 AD3d 419, 422 [1st Dept. 2020]).

The court dismissed as abandoned D&D's counterclaims for contribution and common-law indemnity because D&D failed to oppose the portion of Hewitt and Howell's motion that

sought the dismissal of those counterclaims. However, the sole basis offered for the dismissal of these counterclaims in the first instance was that Hewitt and Howell were not negligent. As just discussed, however, there remains a triable issue of fact as to Hewitt's and Howell's negligence with respect to an alleged defective premises condition. Hewitt and Howell thus necessarily failed to demonstrate their *prima facie* entitlement to summary judgment dismissing D&D's counterclaims based on their own lack of negligence. As such, the portion of their summary judgment motion seeking the dismissal of these counterclaims should have been denied without regard to the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Finally, the Prior Decision did not address D&D's summary judgment motion seeking to dismiss the third-party complaint. In doing so, the court overlooked or misapprehended the facts of this matter, which establish D&D's entitlement to summary judgment dismissing the third-party claims against it for contribution and common-law indemnity. In support of its motion, D&D submitted, as relevant here, plaintiff's verified bill of particulars and deposition testimony, in which plaintiff alleged injuries consisting of a fractured hip requiring hip replacement surgery, a right wrist contusion, a herniated disc, and several bulging discs. While "competent medical evidence" is statutorily required to prove the existence of a grave injury, the lack of a grave injury may be demonstrated, *prima facie*, via the personal injury plaintiff's verified bill of particulars and/or deposition testimony (*see Itara v Masaryk Towers Corp.*, 211 AD3d 605, 605 [1st Dept. 2022] [third-party claims for contribution and common-law indemnification properly dismissed where plaintiff's bill of particulars and deposition testimony demonstrated *prima facie* that he did not sustain a "grave injury" and defendant/third-party plaintiff failed to raise triable issue of fact]; *see also TCS Constr. Corp. v AmTrust N. Am., Inc.*, 235 AD3d 479, 481 [1st Dept. 2025]; *Granite State Ins. Co. v Moklam Enters., Inc.*, 193 AD3d 616, 616 [1st Dept. 2021]; *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. 221-223 W. 82 Owners Corp.*, 120 AD3d 1140, 1140 [1st Dept. 2014]; *Marshall v Arias*, 12 AD3d 423, 423-24 [2nd Dept. 2004]). Here, the verified bill of particulars and deposition testimony demonstrate, *prima facie*, that plaintiff did not sustain a "grave injury" within the meaning of Workers' Compensation Law § 11, as he did not suffer a "permanent and total loss of use . . . of an arm, leg, hand or foot," the only potentially applicable

category of grave injury under the statute (*see Hernandez v Seadyck Realty Co., LLC*, 161 AD3d 711, 711–12 [1st Dept. 2018]). Hewitt and Howell submitted no evidence in opposition to demonstrate that plaintiff sustained a grave injury under the statute, and thus failed to raise a triable issue of fact. As such, Hewitt and Howell may not maintain their claims against D&D for contribution or common-law indemnity with respect to plaintiff's injuries (*see Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 582 [1998]).

D&D's summary judgment motion should thus have been granted to the extent it sought dismissal of the third-party claims for contribution and common-law indemnity. The remainder of D&D's motion, however, was without merit. As already discussed, although summary judgment on the claim was premature, Hewitt and Howell are entitled to contractual indemnification from D&D barring a determination at trial that their negligence was the sole proximate cause of plaintiff's injuries. As for the third-party claim for breach of contract for failure to procure insurance, D&D failed to submit evidence in admissible form to demonstrate, *prima facie*, that it acquired the necessary insurance.

Therefore, D&D's motion for leave to reargue (MOT SEQ 006) is granted. Upon reargument, (1) Hewitt and Howell's summary judgment motion (MOT SEQ 002) is denied to the extent it seeks (i) summary judgment on the third-party claim for contractual indemnification against D&D and (ii) dismissal of D&D's counterclaims for contribution and common-law indemnity; and (2) D&D's summary judgment motion (MOT SEQ 003) is granted to the extent it seeks dismissal of the third-party claims for contribution and common-law indemnity against D&D.

Accordingly, it is

ORDERED that D&D's motion (MOT SEQ 006) for leave to reargue MOT SEQ 002 and MOT SEQ 003 is granted; and it is further

ORDERED that, upon reargument, the court vacates so much of its prior order, dated May 22, 2024, as implicitly denied MOT SEQ 003 and granted those parts of MOT SEQ 002 seeking (1) summary judgment in favor of Hewitt and Howell on their third-party cause of action

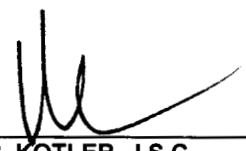
for contractual indemnification against D&D and (2) the dismissal of D&D’s counterclaims in the third-party action for contribution and common-law indemnity; and it is further

ORDERED that, upon reargument, MOT SEQ 002 is denied to the extent it seeks summary judgment on the third-party cause of action for contractual indemnification against D&D and the dismissal of D&D’s counterclaims in the third-party action for contribution and common-law indemnity, and the court otherwise adheres to its determination on the original motion; and it is further

ORDERED that, upon reargument, MOT SEQ 003 is granted to the extent it seeks summary judgment dismissing the third-party causes of action for contribution and common-law indemnity against D&D, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

<u>8/11/2025</u> DATE					 LYNN R. KOTLER, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE