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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHLOMO HAGLER J.S.C. Justice

PART 17

Index Number : 116543/2007
ROBERTS, JOHN
vs.
LOWER MANHATTAN DEVELOPMENT
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 2, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/24/13

SHLOMO HAGLER, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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JOHN ROBERTS and KIM ROBERTS,

Plaintiffs,

-against-

Index No. 116543/07

LOWER MANHATTAN DEVELOPMENT CORP. and BOVIS LEND LEASE, INC.,

Defendants.

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LOWER MANHATTAN DEVELOPMENT CORPORATION and BOVIS LEND LEASE LMB, INC.,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 590138/08

REGIONAL SCAFFOLDING/SAFEWAY ENVIRONMENTAL, NY JOINT VENTURE, LLC.,

Third-Party Defendant.

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Hon. Shlomo Hagler, J.S.C.:

Motions with sequence numbers 004, 005 and 006 are hereby consolidated for disposition.

In this case, which arises out of a construction site accident, third-party defendant Regional Scaffolding/Safeway Environmental, NY Joint Venture, LLC. ("Regional") moves, in motion sequence number 004, for summary judgment dismissing the third-party complaint and all claims asserted against it.

In motion sequence number 005, plaintiffs move for an order (1) seeking summary judgment on the issue of defendants'

liability under Labor Law § 240 (1); (2) striking defendants' fifth affirmative defense of release; or, (3) in the alternative, directing an immediate trial on the issue of the release.

Defendants/third-party plaintiffs Lower Manhattan Development Corporation ("LMDC") and Bovis Lend Lease LMB, Inc. ("Bovis") (together, "defendants") move, in motion sequence number 006, for summary judgment dismissing all claims asserted against them, and awarding LMDC contractual defense and indemnification against Regional.

BACKGROUND

On December 30, 2005, the day of the accident, John Roberts ("plaintiff"), a carpenter then in the employ of Regional, was working at the 27th floor of 130 Liberty Street in lower Manhattan. The building, which had been the Deutsche Bank Building before the events of "9/11," was owned by LMDC. Earnest-John Domingo Ignacio ("Ignacio"), a project manager for Bovis, testified that the work was divided between Phase 1 and Phase 2. Phase 1 was the erection of the hoist and scaffolding, exterior scaffolding, and cleaning of one column bay on the north and south side of the building. Phase 2 was Bovis' portion of the project (Ignacio deposition ("dep.") dated August 19, 2010, at 38, attached as Exhibit "G" to Motion Seq 005).

Regional was LMDC's Phase 1 contractor (Ignacio dep. at 37). With respect to Bovis's contractual responsibilities, at

the beginning of Phase 1, Bovis "installed a site fence, a gate, we had some security people on site and just ensure[d] that the building didn't fall down" (*id.* at 37). Before December 30, 2005, "the only work we did perform was site security and that's in the contract that we have to maintain site security, put a fence up" (*id.* at 91). Ignacio also testified that "Bovis had no responsibility whatsoever with respect to Phase 1," and that "Bovis didn't actually do anything until Phase 2 began" (*id.* at 39). Bovis' contract was "not for Phase 1" (*id.* at 68). On December 30, 2005, the date of plaintiff's accident, "[a]ll [Bovis] had there was security, just making sure that nobody wandered onto the site, making sure the structual integrity of the building was still kept, making sure nobody -- the environmental integrity of the building as still okay" (*id.* at 81). It is undisputed that Phase 2 commenced only after plaintiff's accident.

The accident occurred while plaintiff was working on a hanging rig scaffold (Greg Blinn dep. dated September 14,2010, at 131, attached as Exhibit "M" to Motion Seq. 004). While the workers were moving the scaffold from one area to another, the rig swung out from the building, and plaintiff fell "[f]eet over head. Like a back flip" (Plaintiff's dep. of July 15, 2009, at 138-139).

THE RELEASE

Regional has a long-standing company-wide policy that, if an employee is injured, and the injury is not serious and the employee would not be away from work for too long a period, Regional would agree to pay the employee's weekly salary until the employee returned to work. In return, the employee is asked to sign a release, agreeing that the employee would not sue anyone associated with the project (Blinn Aff. Dated May 25, 2012, ¶¶ 5-6).

Plaintiff's Release

Less than a month after the accident, on January 20, 2006, plaintiff signed a release by which plaintiff received the sum of $1,610 per week from January 3, 2006 to about February 3, 2006, in return for his release of Regional and LMDC, and others, from:

> "all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever in law, admiralty or equity, which against the RELEASEES [Regional and LMDC and others] the RELEASOR [plaintiff] ... ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this RELEASE"

(Attached to Zekowski Affirm. in Opp. Dated November 27, 2012, as Exhibit "D").

DISCUSSION

Summary Judgment

> "Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law. Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial [citations omitted]."

Ostrov v Rozbruch, 91 AD3d 147, 152 (1st Dept 2012). The court must determine whether that standard has been met based "on the evidence before the court and drawing all reasonable inferences in plaintiff's favor" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 137-138 [1st Dept 2012]). "The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

The Issue of the Validity of the Release

Plaintiff seeks to void the release on the ground of mutual mistake. Plaintiff alleges that neither he nor defendants knew about the injuries that first became evident after the time of the signing. In particular, plaintiff

maintains that neither he nor defendants were aware of his disc herniations and the need for a cervical herniation fusion surgery that he underwent in January 2009.

"It is well established that a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006]). "'[I]t is not a prerequisite to the enforceability of a release that the releasor be subjectively aware of the precise claim he or she is releasing'" (*Hack v United Capital Corp.*, 247 AD2d 300, 301 [1st Dept 1998], quoting *Mergler v Crystal Props. Assoc.*, 179 AD2d 177, 180 [1st Dept 1992]).

> "[A] release may [not] be treated lightly. It is a jural act of high significance without which the settlement of disputes would be rendered all but impossible. It should never be converted into a starting point for renewed litigation except under circumstances and under rules which would render any other result a grave injustice. It is for this reason that the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake, must be established or else the release stands. In the instance of mutual mistake, the burden of persuasion is on the one who would set the release aside.
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> ***
>
> "A mistaken belief as to the nonexistence of presently existing injury is a prerequisite to avoidance of a release. If the injury is known, and the mistake ... is merely as to the consequence, future course, or sequelae of a known injury, then the release will stand [internal citations omitted]"

(*Mangini v McClurg*, 24 NY2d 556, 563, 564 [1969]; *see also Gibli v Kadosh*, 279 AD2d 35, 38-39 [1st Dept 2000]). "Even where a releasor has knowledge of the causative trauma, it has been held that there must be actual knowledge of the injury. Knowledge of injury to an area of the body cannot cover injury of a different type and gravity." *Mangini* at 565.

In *Carola v NKO Contr. Corp.* 205 AD2d 931 (3rd Dept 1994), the court set aside the release where the plaintiff was aware of back pain at the time of the release, but was unaware of the existence of three herniated discs. Here, plaintiff claims that he did not suffer any back pain until after the signing of the release and was therefore unaware that he suffered from any disc herniations at the time.

Plaintiff claims that his hospital records support his claim that he did not experience back pain until after he signed the release. Defendants claim that the hospital records show that plaintiff was aware of injuries to his back at the time he was in the hospital well before he signed the release. Neither side has submitted an affidavit by a doctor explaining to the court the mostly indecipherable records. Therefore, this Court denies summary judgment on the issue of whether or not the parties intended the release to include the disc herniation injury with leave for either side to renew with medical testimony regarding the hospital records.

As a result of this finding, plaintiff's motion for summary judgment on the issue of liability against Regional pursuant to § 240(1) of the New York State Labor Law and defendants' motion to dismiss the claims on the basis of the release are both denied without prejudice as there is an issue of fact regarding the validity of the release.

The claims plaintiffs assert in their complaint are negligence, violations of Labor Law § 200, 240 (1) and 241 (6), and plaintiff's wife's claim for loss of services. Each of these claims is premised on a duty or statutory responsibility.

It cannot be said that Bovis is at all liable under any of these claims. Plaintiff was injured during Phase 1. Bovis's contractual duties during Phase 1 were limited to a few security duties, and Bovis had nothing to do with the actual work of Phase 1. Bovis' work began with the commencement of Phase 2, which the parties agree did not begin until a few months after plaintiff's accident.

Accordingly, the part of plaintiffs' motion that seeks summary judgment against Bovis is denied and Bovis' motion to dismiss all claims asserted against it is granted.

LMDC's Third-Party Complaint

Contractual Indemnification

> "[A] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement

> and the surrounding facts and circumstances. [A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor [internal quotation marks and citations omitted]"

(*Baillargeon v Kings County Waterproofing Corp.*, 91 AD3d 686, 688 [2d Dept 2012]). "'The right to contractual indemnification depends upon the specific language of the contract'" (*Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 994 [2d Dept 2009], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]), and "indemnity contracts are to be strictly construed to avoid reading into them duties which the parties did not intend to be assumed" (*Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

Article 31 of the LMDC/Regional contract (at page 33 of the General Conditions) contains the indemnification clause:

> Contractor [Regional] shall indemnify all Indemnitees [including LMDC] against all claims described ... above paid or incurred by any of the Indemnitees, and for all expense incurred by any of them in the defense, settlement or satisfaction thereof, including reasonable expenses of attorneys, *by reason of the acts, omissions, negligence and/or willful misconduct of Contractor*, except to the extent that such indemnity would be precluded by applicable law. ...

Bovis was not a party to any contract with Regional. Thus, Regional has no duty to indemnify Bovis. As such, the part of defendants' motion which seeks summary judgment on their

contractual indemnification claim against Regional is denied with respect to Bovis. The part of Regional's motion which seeks summary judgment dismissing defendants' contractual indemnification claim is granted as against Bovis.

However, during oral argument, Regional stated that it does not oppose contractual indemnification in favor of LMDC (Oral Argument, at 17). Thus, the part of defendants' motion which seeks summary judgment in favor of LMDC on defendants' contractual indemnification claim is granted. The part of Regional's motion which seeks summary judgment dismissing defendants' contractual indemnification claim as against LMDC is denied.

Breach of Contract by Failure to Procure Insurance

Regional seeks summary judgment dismissing defendants' breach of contract by failure to procure insurance claim. In support of its assertion, Regional provides a certificate of insurance dated August 24, 2005 for general liability insurance. The certificate states: "This certificate is issued as a matter of information only and confers no rights upon the certificate holder [URS Corp.]. This certificate does not amend, extend or alter the coverage afforded by the policies below." It is well settled that "a certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing

alone, that such a contract exists [internal quotation marks and citation omitted]" (*Kermanshah Oriental Rugs, Inc. v Gollender*, 47 AD3d 438, 440 [1st Dept 2008]). Since Regional has not produced evidence that it procured the required policy, that part of Regional's motion which seeks summary judgment dismissing LM's breach of contract claim is denied.

CONCLUSION

Accordingly, it is

ORDERED that the part of Regional Scaffolding/Safeway Environmental, NY Joint Venture, LLC's motion (motion sequence number 004) which seeks summary judgment dismissing the third-party complaint's claim for contractual indemnification is granted with respect to Bovis Lend Lease LMB, Inc., but is denied with respect to Lower Manhattan Development Corporation; and it is further

ORDERED that the part of Regional Scaffolding/Safeway Environmental, NY Joint Venture, LLC's motion which seeks summary judgment dismissing defendants' breach of contract claim is denied; and it is further

ORDERED that plaintiffs' motion (motion sequence number 005) is denied without prejudice with leave to renew with medical testimony regarding the hospital records; and it is further

ORDERED that the part of defendants' motion (motion sequence number 006) which seeks summary judgment dismissing the

complaint is granted with respect to Bovis and is denied without prejudice in respect to LMDC with leave to renew with medical testimony regarding the hospital records; and it is further

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

ORDERED that the remaining claims shall continue.

Dated: December 24, 2013

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.