 FILED Nov 25 2015 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

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MARCO CURILLO,

Plaintiff,

-against-

INDEX № 308612/2012
DECISION/ORDER

TIAGO HOLDINGS, LLC; BH & B CONSTRUCTION, INC.; FC EAST RIVER ASSOCIATES, LLC; DWD ASSOCIATES, LLC; CASTLE CONSTRUCTION & INTERIORS CORP. and APPLE-METRO, INC.,

Defendants.

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TIAGO HOLDINGS, LLC; FC EAST RIVER ASSOCIATES, LLC; DWD ASSOCIATES, LLC and APPLE-METRO, LLC

Third-Party Plaintiffs,

-against-

BH & B CONSTRUCTION, INC.; CASTLE CONSTRUCTION & INTERIORS CORP. and CAPITAL INTERIORS CONSTRUCTION CORP.,

Third-Party Defendants.

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HON. BETTY OWEN STINSON:

This motion by third-party defendant Capital Interiors Construction Corp. ("Capital"), for summary judgment dismissing all claims, third-party claims and any cross-claims against it, is granted.

On October 3, 2012, plaintiff Marco Curillo ("Curillo") was allegedly injured when he tripped and fell while carrying a sheet of plywood at work on a project at 509 East 117th Street, New York, New York for his employer Capital. Capital had been retained by the general contractor on the site, defendant and third-party defendant Castle Construction & Interiors Corp.

("Castle"). Curillo sued Castle and the other defendants. The other defendants then commenced a third-party action naming Castle, Capital, and one other third-party defendant.

After all issue was joined, Capital made this motion for summary judgment dismissing all claims and cross-claims against it arguing that those claims are barred by Workers Compensation Law §11 and that Capital never agreed to contractually defend, indemnify or hold harmless any other party to this lawsuit.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing a motion for summary judgment must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

A party moving for summary judgment has the initial burden of establishing *prima facie* that it is entitled to judgment as a matter of law by submitting sufficient admissible evidence to demonstrate that there are no triable issues of fact (*Bush v St. Clare's Hospital*, 82 NY2d 738 [1993]). Only if that burden is met does the burden shift to the non-moving party to present evidence of an issue of fact for trial (*Winegard v NYU Medical Center*, 64 NY2d 851 [1985]). If the moving party fails to meet its burden, the motion must be denied regardless of the sufficiency of the non-moving party's opposition (*id.*).

Workers Compensation Law ("WCL") §11 provides that "[t]he liability of an employer [under this statute] . . . shall be exclusive and in place of any other liability whatsoever, to such employee . . . on account of such injury". In other words, an employee who collects workers compensation benefits provided by the employer may not then sue his employer in tort. On the

other hand, if the same employee sues a landowner or general contractor, the latter may bring a *third party* claim against the worker's employer where the worker suffered a "grave injury" as defined by statute, or where the employer entered into a written contract to indemnify the owner or general contractor (*Flores v Lower East Side Service Center, Inc.*, 4 NY3d 363 [2005]).

A grave injury is defined as "only" one 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" (WCL §11). The list is "narrowly defined" and intended to be exhaustive, not illustrative (*Castro v United Container*, 96 NY2d 398 [2001]; *Vincenty v Cincinnati, Inc.*, 14 AD3d 392 [1st Dept 2005][accidental amputation of two fingers, surgically re-attached shortly thereafter regaining partial use, did not constitute grave injury]).

A landowner or general contractor may not bring a third party action against an employer for negligence or common law indemnification if the worker's injuries are not grave as defined by statute (*Cifone v Andros Broadway, Inc.*, 40 AD3d 549 [1st Dept 2007]; *Martelle v City of New York*, 31 AD3d 400 [2nd Dept 2006]).

In support of its motion, Capital offered copies of all the pleadings; the bill of particulars; Workers Compensation Records showing payments made to Curillo; Curillo's earnings records for the period from September 19, 2012 to October 24, 2012, with disability payments starting on October 3, 2012; the contract between Capital and Castle; and an affidavit by Ashley Del-Aquino. The bill of particulars alleges Curillo suffered a dislocated left shoulder, a torn tendon in that

shoulder, and a bulging cervical disc at C5-6. The bill of particulars also states that plaintiff was an employee of Capital at the relevant time.

Ashley Del-Aquino stated in her affidavit dated February 3, 2015 that she is the President of Capital. She reviewed the contract between Capital and Castle and all records maintained by Capital in connection with this lawsuit. Del-Aquino stated that Capital was retained by general contractor Castle to perform carpentry work at the subject location. At the time of the accident, Curillo was an employee of Capital working at the subject location in the course of his employment. Del-Aquino understood that Curillo filed for and received workers compensation benefits following this accident.

Del-Aquino stated that the contract offered in evidence is the only agreement by which Capital was performing work at the subject location. She stated that there is no other agreement whereby Capital agreed to defend, indemnify or hold harmless any of the parties to this lawsuit.

The contract documents attached to the moving papers contain no language on the part of Capital agreeing to defend, indemnify or hold harmless anyone.

In opposition to the motion, third-party plaintiffs argued only that the motion is premature because no one from Capital has been deposed to answer questions about the records and the contract at issue.

Capital has nevertheless demonstrated its *prima facie* entitlement to summary judgment which third-party plaintiffs have not refuted with admissible evidence. Capital offered evidence that Curillo collected workers compensation benefits, his exclusive remedy against Capital according to WCL §11, and no doubt the reason Curillo did not sue Capital directly. Third-party plaintiffs are also barred from recovery against Capital unless Curillo's alleged injuries qualify as

grave injuries. None of Curillo's alleged injuries, however, appear on the exclusive list of grave injuries listed by WCL §11, leaving third-party plaintiffs without recourse against Capital.

Third-party plaintiffs offered no admissible evidence to raise an issue of fact and have not demonstrated that the motion is premature. Although a note of issue has yet to be filed, third-party plaintiffs failed to show the need for any item of discovery exclusively within the knowledge and control of Capital.

The third-party complaint as against Capital and all cross-claims against it, therefore, are dismissed. The Clerk of Court is directed to delete the name of Capital Interiors Construction Corp. as a third-party defendant from the third-party caption.

This constitutes the decision and order of the court.

Dated: November 19, 2015
Bronx, New York

Betty Owen Stinson

BETTY OWEN STINSON, J. S.C..