Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

EARTHEL GREEN,

Plaintiff,

-against-

STAPLES, INC.,

Defendant.

STAPLES, INC.,

Third-Party Plaintiff,

-against-

VELOCITY EXPRESS, LLC,

Third-Party Defendant.

Index No. 600264/2015

Motion Submitted: 10/26/17
Motion Sequence: 001
MG

The following papers read on this motion:

Notice of Motion/Order to Show Cause..... X
Answering Papers..... X
Reply..... X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Third-party defendant Velocity Express, LLC (Velocity) moves this Court for an Order granting summary judgment in its favor, and dismissing the third-party complaint. Third-party plaintiff Staples, Inc. (Staples) opposes the requested relief.

Plaintiff has commenced the main action against Staples, and that matter appears on the Central Jury calendar on February 6, 2018. The main action arises from an

incident that occurred on September 5, 2012, while plaintiff was acting in the course of his employment by Velocity. Plaintiff was a freight handler for Velocity, and he was in the process of moving a pallet of Staples merchandise from one truck to another when some of the merchandise that he was moving with an electronic jack fell on him, causing injuries. Plaintiff has received Workers' Compensation benefits, as well as Social Security Disability benefits.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein Staples, the third-party plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

In support of its motion, Velocity submits, *inter alia*, the pleadings, the deposition testimony of the parties, proof of insurance, and the contract between the third-party litigants.

The third-party complaint alleges four causes of action sounding in common law indemnity, breach of contract, contribution, and contractual indemnity.

It is apparently undisputed that plaintiff in the main action has not sustained, nor has he pled that he has sustained, a "grave injury" within the meaning of Workers' Compensation Law (WCL) § 11; therefore, Velocity is not liable for common law indemnification and/or contribution (***Id.***; ***Fleming v. Graham***, 10 NY3d 296 [2008]). Accordingly, the Court finds that Velocity has established its *prima facie* entitlement to summary judgment as a matter of law as to those two causes of action alleged in the third-party complaint. Inasmuch as Staples' opposition papers do not controvert, or even address, Velocity's arguments in this regard, the Court finds that Velocity has established its entitlement to summary judgment dismissal of the causes of action for contribution and common law indemnity asserted in the third-party complaint.

Likewise, Velocity has established its *prima facie* entitlement to summary judgment as a matter of law as to any allegation that Velocity failed to procure insurance by submitting the affidavit of Stephen J. Hermann, Claim Director for North East Casualty Claims Division of Chubb. As with the causes of action for contribution and common law indemnity, Staples does not address or controvert Velocity's proof that it procured insurance for the relevant time period, when plaintiff's accident occurred. Thus, Velocity has established its entitlement to summary judgment dismissal of any and all allegations that it failed to procure insurance as asserted in the third-party complaint.

The Court now turns to the remaining causes of action for breach of contract and contractual indemnity. The indemnity provision of the contract between the third-party litigants reads in pertinent part as follows:

> Courier [Velocity] will indemnify and hold harmless Staples, and each of its directors, officers, employees, agents and representatives, and any subsidiary or affiliate of Staples from any and all losses, costs, expenses . . . and damages which any of them may sustain or become liable for in whole or in part as a result of or arising from any failure to comply with the terms, conditions and convenants (sic) in this Agreement, any negligence, willful misconduct or other fault, act or omission of Courier, Courier's employees . . . whether said losses, costs or damages result from injuries to the person. . . and whether said liability is premised upon contract, private action, administrative enforcement action or upon tort . . . except such claims that are a result of Staples negligence or breach of the terms and conditions of this Agreement. Courier agrees, at its expense and at Staples' option, to defend or assist in the defense of any action against Staples, whether by way of claim, counterclaim or defense for which Courier has an indemnification obligation under this paragraph. . .

Plaintiff testified that he was operating the electronic jack when the accident occurred. He was unloading Staples merchandise from one tractor trailer to another at the Garden City, New York warehouse facility used for that purpose. He had been employed by Velocity since late 2009 or early 2010, as a freight handler, up until the time of the accident on September 5, 2012. Although there was no formal course concerning the operation of the electronic jack, plaintiff operated this jack during the course of his employment with Velocity, thereby receiving what he characterized as "hands-on" training. He described the general procedure for using the jack, which is used to move pallets/skids of merchandise from one place to another. Prior to the accident, on September 5, 2012, plaintiff had already moved approximately two such pallets/skids without incident.

With respect to the pallet/skid that was involved in the subject incident, plaintiff testified that he looked at it to ensure that the plastic wrapping surrounding the merchandise was intact. According to plaintiff, the wrapping securing the items on the skid "appeared to be intact." He testified that, "all I can do is look and see . . . not to be smart, but I'm not a machine to x-ray and see;" thus, he can only perform a visual inspection. Further according to plaintiff, he "didn't see anything wrong" with the pallet before he moved it.

When he moved the pallet/skid from the one tractor trailer, plaintiff stated that the truck from which he was removing the pallet/skid was level with the loading dock, and that he did not have any problem removing the skid/pallet from the truck. Plaintiff did not feel the items get caught on anything; plaintiff was not eating or drinking anything at

the time, and he was not on his cell phone. Plaintiff did not observe anything out of the ordinary with the jack or the skid when he was moving in reverse, turning, and proceeding onto the second truck: "[n]othing that wasn't normal." Immediately before the accident, plaintiff did not feel any jerking or catching of the skid, or any other kind of movement, nor did plaintiff see that the skid had shifted or gotten caught on anything. The accident occurred when the items stacked higher than five feet tall fell from the skid, on top of plaintiff, while plaintiff was moving on the jack. After the accident occurred, plaintiff observed that one of the larger boxes had actually been crushed, and the wrapping was torn.

Plaintiff requested that his supervisor provide him with an accident report form so he could fill it out, but he was not given the form. He only saw an accident report approximately one year later, at an attorney's office. The report he saw had not been filled out by him, and he denied that he ever told anyone that the pallet being transported got caught on a ramp, causing the contents to fall over. Moreover, plaintiff testified that he did not believe that he had never seen the report marked as an exhibit at his deposition. No witnesses to the accident, if any, or any of plaintiff's supervisors, or the author of the employer's report of work-related injury was ever deposed.

The remaining witness testimony submitted is from Staples' operations manager, and a former Velocity operations manager. None of these witnesses have personal knowledge of the accident. Their testimony establishes, without dispute, that the Staples merchandise that was shrink-wrapped in plastic would not have been so wrapped by Velocity employees, but either by Staples or by a Staples fulfillment center/an outside vendor or a Staples wholesaler.

Based upon Velocity's submissions, the Court finds that there is no evidence that the incident that occurred on September 5, 2012 happened as the result of any negligence on the part of Velocity, or its employee, plaintiff Green. Also, there is no evidence that Velocity breached any of the terms of the agreement between itself and Staples.

The Court determines that the language of the indemnification clause does not also require Velocity to prove that Staples' negligence caused the accident in order for Velocity to be relieved of an indemnification obligation. The language, "except such claims that are a result of Staples negligence" is superfluous, because once it is established that there is no negligence on the part of the courier, then the indemnification provision is not triggered. It is obvious and does not require stating that Velocity would not be required to indemnify Staples for Staples' own negligence. The Court finds that the superfluous language does not also require Velocity to prove Staples' negligence in order to avoid indemnification.

The pivotal language in the clause requires Velocity to "indemnify and hold harmless Staples, and each of its directors, officers, employees, agents and

representatives, and any subsidiary or affiliate of Staples from any and all losses, costs, expenses . . . and damages which any of them may sustain or become liable for in whole or in part *as a result of or arising from any* failure to comply with the terms, conditions and convenants (sic) in this Agreement, any *negligence*, willful misconduct or other fault, act or omission *of Courier, Courier's employees* . . ." Once it is established that there is no negligence on the part of the courier, in this case Velocity, there is no longer an obligation on Velocity's part to indemnify Staples; simply stated, the indemnification provision is not triggered. Whether Staples, or one of its outside vendors, were negligent is irrelevant to the determination of the instant motion. To require otherwise, would improperly place upon Velocity what is the injured plaintiff's burden, i.e. to prove that Staples' negligence caused injury to him.

Accordingly, Velocity has established its *prima facie* entitlement to summary judgment as a matter of law as to the causes of action for breach of contract and contractual indemnity.

In opposition, Staples offers the employer's report of work-related injury, which is not in admissible form. The report annexed to the opposition papers bears an evidence sticker, but at his deposition, plaintiff stated that he did not believe that he had ever seen that report, and he did not authenticate that report. Based upon a review of the report, it is clear that plaintiff did not author it, but that a person identifying him/herself as "Jacie Willey via internet" authored the report on September 13, 2012. There was no testimony from or about this individual during the depositions, and there is no affidavit from anyone swearing to the contents thereof. Accordingly, the report is insufficient to raise a triable issue of fact for the foregoing reasons.

Velocity's summary judgment motion is granted, and the third-party complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: December 21, 2017
Mineola, NY

Karen V. Murphy
J.S.C.

ENTERED

JAN 03 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE