

<b>Emerson v 4TS II LLC</b>
2022 NY Slip Op 34099(U)
December 6, 2022
Supreme Court, New York County
Docket Number: Index No. 151310/2019
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

*Justice*

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JOSEPH EMERSON, LORI EMERSON,  
Plaintiff,

- v -

4TS II LLC, SKANSKA USA BUILDING INC.,  
Defendant.

-----X

4TS II LLC, SKANSKA USA BUILDING INC.  
Plaintiff,

-against-

METROPOLITAN WALTERS, LLC  
Defendant.

-----X

INDEX NO. 151310/2019  
MOTION DATE 12/02/2022  
MOTION SEQ. NO. 004

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595999/2019

The following e-filed documents, listed by NYSCEF document number (Motion 004) 102, 103, 104  
were read on this motion to/for REARGUMENT/RECONSIDERATION.

**BACKGROUND**

Metropolitan Walters LLC, (MW) moves for reargument of that portion of this Court’s  
October 4, 2022, decision and order which denied its motion for summary judgment dismissing  
Third-Party Plaintiffs, 4TS II LLC (4TS) and SKANSKA USA BUILDING, INC.’s (Skanska)  
claims for common law indemnity and contribution without making a specific finding as to  
whether plaintiff suffered a grave injury as defined in the Workers Compensation Law.

Reargument is granted, but upon reargument the court adheres to its original decision denying the motion.<sup>1</sup>

### **DISCUSSION**

“Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision.” *Carrillo v. PM Realty Grp.*, 16 A.D.3d 611, 611 (2d Dept. 2005); *Long v. Long*, 251 A.D.2d 631, 631 (2d Dept. 1998).

This Court mistakenly thought that the common law indemnity and contribution claims were moot as the Court granted contractual indemnity to defendants as against MW. However, the contractual indemnity claims are covered by MW’s commercial general liability carrier in this case. The common law indemnity and contribution claims are covered by the State Insurance Fund’s Workers’ Compensation policy issued to MW.

The Court failed to address the parties’ arguments as to whether plaintiff has suffered a grave injury, and reargument is granted for the Court to address this claim.

#### ***Questions Of Fact Remain as To Whether the Plaintiff Sustained A Grave Injury Under Workers’ Compensation Law § 11***

MW is not entitled to dismissal of the claims asserted against it for common law indemnity and contribution because questions of fact remain as to whether the plaintiff sustained a grave injury under Workers’ Compensation Law § 11. The evidence presented by MW is insufficient to establish its entitlement to judgment as a matter of law on this issue.

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<sup>1</sup> While movant failed to comply with this Court’s Part Rules and bring the motion by Order to Show Cause, the Court will excuse this error in this case and address the motion on the merits but asks in future applications that counsel be mindful of the Part Rules.

Workers' Compensation Law § 11 precludes claims against an employer for contribution and indemnity to any third person for injuries sustained by an employee acting within the scope of their employment unless there is competent medical evidence that the employee sustained a "grave injury" as defined in the statute. "Injuries qualifying as grave are narrowly defined" in § 11, and the words in the statute should "be given their plain meaning without resort to forced or unnatural interpretations." *Castro v. United Container Mach. Group*, 96 N.Y.2d 398, 401 (2001).

Although the neuropsychologist, Dr. Erlanger, opined that plaintiff did not sustain a grave injury, contrary evidence exists regarding plaintiff's condition, which presents an issue of fact precluding summary judgment. *See Eddine v. Federated Dept. Stores Inc.*, 72 A.D. 3d 487, 488 (1st Dep't 2010). Specifically, there is evidence in the form of medical reports, affirmed under the penalty of perjury by Dr. Hausknecht, based on examinations conducted after the examination conducted by Dr. Erlanger, that the plaintiff suffered from traumatic brain injury (TBI), neurocognitive dysfunction, post-concussion syndrome, impairment of short-term memory, slowed information processing, mixed aphasia, and cerebral atrophy and scarring, all of which was attributed to the accident.

Moreover, the recent testimony of the plaintiff's wife, asserts that plaintiff has "no balance", "seems to be in a fog a lot", has "a hard time focusing or engaging in conversation", his "memory is shot", and the plaintiff's condition did not improve after undergoing the prescribed cognitive therapy. Plaintiff's wife also noted that "his memory was a lot better before" the accident and that "he's got a hard time focusing and he's got bad headaches . . . [s]o [ . . . ], if he tries to read, it really doesn't last too long".

Plaintiff also testified that he receives Social Security disability payments as well as a pension, for which he only became eligible after qualifying for the governmental assistance.

Indicia such as these have been held to raise a question of fact as to whether plaintiff has suffered a grave injury. *Way v. Grantling*, 289 A.D.2d 790, 793 (3d Dep't 2001).

MW has moved for summary judgment, arguing that cases falling within the TBI category require proof that plaintiff cannot work in any capacity and that the disability is caused by the brain as opposed to injuries to other parts of the body. However, the Appellate Division, First Department, recently held in *Goundan v. Pav-Lak Contracting Inc.*, 185 A.D.3d 485 (1st Dep't 2020), that questions of fact as to grave injury were raised by evidence that the plaintiff is unemployable "due at least in part to the nature of the brain injuries that he sustained." (*see also Padilla v Absolute Realty Inc* 150 NYS 3d 243).

It is axiomatic that a court's function on summary judgment is "issue finding rather than issue determination." *Lebedev v. Blavatnik*, 193 A.D.3d 175, 2021 N.Y. Slip Op. 01002 (1st Dep't 2021); *see Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957). Moreover, it is equally well settled that facts alleged by the nonmoving party, if supported by admissible evidence, must be taken as true, and that all reasonable inferences raised by that evidence must be resolved in favor of the party opposing summary judgment. *Vega v. Restani Construction Corp.*, 18 N.Y.3d 499 (2012); *see Baseball Office of Comm'r v. Marsh & McLennan Inc.*, 295 A.D.2d 73 (1st Dep't 2002).

In *Sergeant v. Murphy Family Trust*, 292 A.D.2d 761 (4th Dep't 2002), the defendant appealed from an order granting a third-party defendant employer's motion seeking summary judgment and dismissal of a third-party complaint based on a lack of a grave injury. The court reversed a lower court order and held that questions remained as to that claim based on an alleged TBI, holding that the defendant raised an issue of fact by submitting portions of the

plaintiff's deposition testimony in which the plaintiff testified that he has experienced memory loss, anxiety, vision deficits, forgetfulness and personality changes.

In *Bush v. Mechanicsville Warehouse Corp.*, 79 A.D.3d 1327 (3d Dep't 2010), the plaintiff submitted reports from his treating physician who stated that plaintiff suffered from cognitive difficulties including poor concentration and memory deficits. Likewise, a psychiatrist who examined the plaintiff opined that the plaintiff suffered an inability to concentrate for long periods, significant loss of short-term memory, fatigue, psychomotor slowing, and depression resulting from the catastrophic injuries he sustained in an accident. Both doctors concluded that those injuries to the plaintiff's brain rendered him permanently and totally disabled and unable to work full- or part-time. The court denied the third-party defendant's motion based on those material questions of fact as to whether the plaintiff suffered a grave injury.

As in *Sergeant and Bush, supra*, the medical and testimonial evidence submitted in opposition to the motion raise triable questions of fact as to whether plaintiff is unemployable in any capacity.

### **CONCLUSION**

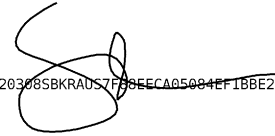
WHEREFORE it is hereby:

ORDERED that the motion of Metropolitan Walters LLC for reargument is granted but upon reargument the court adheres to its original decision and the motion for summary judgment dismissing Third-Party Plaintiffs, 4TS II LLC (4TS) and SKANSKA USA BUILDING, INC.'s (Skanska) claims for common law indemnity and contribution is denied; and it is further

ORDERED that, within 20 days from entry of this order, Metropolitan Walters LLC shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that this constitutes the decision and order of this court.



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12/6/2022

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE