Bonaviso v Morris Park Nursing Home
2007 NY Slip Op 34487(U)
November 27, 2007
Sup Ct, Bronx County
Docket Number: 13427/04
Judge: John A. Barone
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[* 1]

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 12

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

X

BONAVISO,WILLIAM

Index Nº. 0013427/2004

-against-

Hon. JOHN A. BARONE

MORRIS PARK NURSING HOME

Justice.

X

The following papers numbered 1 to 12 Read on this motion, DISMISSAL
Noticed on August 21 2007 and duly submitted as No. 33 on the Motion Calendar of 8/21/07

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	6
Answering Affidavit and Exhibits	7	10
Replying Affidavit and Exhibits	11	12
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance with the annexed memorandum decision.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 11/27/07

Hon. JOHN A. BARONE, J.S.C.

Filed On - 12/12/07 11:14:09 AM Bronx County Clerk

Filed On - 1/3/2008 10:06:45 AM Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-12

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William Bonaviso,

Plaintiff(s),

- against -

INDEX. NO.: 13427/04

Morris Park Nursing Home,

Defendant(s).

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Morris Park Nursing Home,

Third-Party Plaintiff(s),

- against -

Citywide Mobile Response Corp.,

Third-Party Defendant(s).

----------x

HON. JOHN A. BARONE:

The motion by the third-party defendant City Wide Mobile Response Corporation for an order pursuant to CPLR§ 3211(a)(7) and CPLR§ 3211(a)(3) granting dismissal against third-party plaintiff Morris Park Nursing Home on the grounds that third-party plaintiff cannot hold third-party defendant liable for contribution or indemnity to plaintiff employee, William Bonaviso, because third-party plaintiff cannot prove that plaintiff employee suffered a "grave injury" under §11 of New York Workers Compensation Law, and on the grounds that there was no express contract of indemnification and contribution that existed between third-party plaintiff and third-party defendant is granted.

When deciding a motion to dismiss a plaintiff's complaint pursuant to CPLR §3211, the

Court must take all the allegations within the complaint as true. Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409 (2001); Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362 (1998). The Court must determine whether the facts as alleged fit within any cognizable legal theory. Id. In fact, the law mandates that the Court's inquiry not be limited to deciding whether plaintiff has pled the cause of action intended. Leon v. Maritnez, 84 N.Y.2d 83 (1994). Instead, the Court must determine whether the plaintiff has pled any cognizable cause of action. Id. If it appears that the plaintiff has no cognizable cause of action either because plaintiff has failed to articulate facts amounting to a cause of action or because the law bars such an action based on the factual circumstances wherein the cause of action arose, the Court must dismiss the cause of action.

The case at bar, involves an accident that occurred on April 19, 2002, when William Bonaviso, an Emergency Medical Technician, employed by City Wide Mobile Response Corporation, was lawfully transporting a violent and abusive patient of defendant, Morris Park Nursing Home, in the course of his employment and was caused to suffer allegedly severe and permanent personal injuries. The New York Workers Compensation Law §11 provides that an employer is not liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through medical evidence that such employee has sustained a 'grave injury.' For the purposes of this provision, a 'grave injury' means only one or more 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.

Here, plaintiff William Bonaviso alleged the following injuries in his bill of particulars: right ulnar neuropathy at the elbow; herniated disc at L4-L5; bilateral L4-L5 radiculopathy;

bilateral L5-S1 radiculopathy; Bilateral C5-C6 radiculopathy; peripheral neuropathy; cervicogenic headaches; bilateral greater and lesser occipital neuralgia; right shoulder impingement syndrome; partial rotator cuff tear of right shoulder; and aggravation and/or exacerbation of degenerative disc disease in the lumbosacral spine. Plaintiff also claims that he underwent surgery for the torn rotator cuff and thereafter, received physical therapy. Plaintiff's claimed injuries are all soft tissue injuries, which even if taken at their face value and deemed proven arguendo, do not amount to a 'grave injury' as a matter of law. Courts have consistently held that grave injuries are narrowly defined in the statute and that the statutory list is intended to be exhaustive not merely interpretative. Castro v. United Container Machinery Group, Inc., 96 N.Y.2d 398, 736 N.Y.S.2d 287 (2001); Rubeis v. Acqua Club Inc., 3 N.Y.3d 408, 788 N.Y.S.2d 292 (2004).

Accordingly, dismissal of third-party plaintiff's common law/negligence claim for contribution and indemnity against third-party defendant should be granted.

Next, pursuant to §11 of New York Workers Compensation Law, the absence of a 'grave injury' does not bar a third party action against the employer for contribution or indemnity where the employer had a written contract with the third person, prior to the accident, in which it agreed to indemnify, or contribute to payment, for the employee's loss. Third-party defendant, Citywide Mobile Response Corporation, states that third-party plaintiff, Morris Parking Nursing Home, cannot rely on this provision because the contract that they seek to rely on was made after this accident, and thus, does not apply to this particular incident. Guijarro v. V.R.H. Const. Corp., 290 A.D.2d 484 (2002). Chief Executive Officer Henry Halpert, for the third-party defendant, submitted an affidavit that stated that there was no contract for indemnification or contribution in existence on the date of the loss. Rather an agreement on this kind between third-party defendant and third-party plaintiff was entered into on November 10, 2003, which was more than a year after the accident complained of, on April 19, 2002.

In response, third-party plaintiff contends that summary judgment should be denied as premature when the facts essential to justify opposition to a motion for summary judgment are exclusively within the movant's knowledge and control and the opposing party has not had the reasonable opportunity for disclosure prior to the motion. Global Minerals and Metal Corp. v. Holme, 35 A.D.3d 93, 824 N.Y.S.2d 210 (1st Dept. 2006). This denial should apply equally to a C.P.L.R. §3211(a)(7) motion to dismiss. Young v. Nationwide Mutual Insurance Company, 21 A.D.2d 1099, 801 N.Y.S.2d 827 (2d Dept. 2005). Thus, third-party plaintiff upholds the view that it would be axiomatic for the court to hold a motion to dismiss in abeyance pending further discovery. In particular, third-party plaintiff claims that third-party defendant failed to respond to the Notice for Discovery and Inspection, dated June 25, 2007, in which third-party plaintiff sought copies of any contracts, agreements and other work orders in effect on the date of the incident. Further, despite the affidavit of Officer Halpert that articulated the absence of a contract, third-party plaintiff asserts that a right should be granted to depose Mr. Halpert or any employee of third-party defendant with knowledge of third-party plaintiff's contractual relationship with third-party defendant. Moreover, in the affidavit of Morris Berkowitz, Morris Park Nursing Home's Administrator, Mr. Berkowitz stated his belief that a written contract was in existence on April 19, 2002, which contained an indemnification provision similar to the one included in the November 10, 2003 contract. Mr. Berkowitz substantiated this view by indicating that third-party plaintiff would not have retained third-party defendant to perform ambulance services without a written contract in effect. Due to the foregoing reasons, third-party plaintiff urges that third-party defendant's motion was premature and thus, should be denied until further discovery.

Nevertheless, third-party defendant points to the procedural history of this action to illustrate that third-party plaintiff has had ample time and has not come forward with any admissible proof that such a contract exists. The accident complained of happened on April 19, 2002, but the original complaint was not filed until March 29, 2004. Three years later, on

February 13, 2007, third-party plaintiff brought this third-party action. Therefore, five years after the accident and three years after the action was filed, third-party plaintiff has not been able to locate a contract upon which this third party action can be based nor can third-party plaintiff state with certainty that such a contract even exists. In addition, a finding that the motion to dismiss should be denied as premature is based on the movant having exclusive knowledge and control of the facts essential to justify opposition to the motion, which does not apply to the facts of this case. Third-party plaintiff cannot be said to be in exclusive possession of a service contract between the parties. Conversely, it is much more likely that third-party plaintiff, who is a party signatory to the contract, would have exclusive possession of the contract.

Accordingly, dismissal of third-party plaintiff's contractual claim for contribution and indemnity against third-party defendant should be granted.

The motion to dismiss as to third-party plaintiff is granted.

So ordered.

This constitutes the decision and order of this Court.

Date: 11/27/07

John A. Barone, JSC

13427/04