MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

The New York Hospital Medical Center of Queens,

Plaintiff,

-against-

Microtech Contracting Corp.,

Defendant.

Motion Sequence No.: 001; MG
Motion Date: 2/2/11
Submitted: 3/30/11

Index No.: 35567/2010

Attorney for Plaintiff:

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The defendant moves to dismiss the complaint pursuant to CPLR §3211(a)(1) and (7). Plaintiff opposes the motion.

The instant action commenced September 21, 2010 is based on claims for indemnity and contribution relating to a separate action in the Supreme Court, Queens County, for damages for personal injuries; such related action is entitled, "Gerardo Lema and Luis Lema v. The New York Hospital Medical Center of Queens" under Queens County index number 20562/2008 (hereinafter the "Queens action") and sets forth claims under the New York Labor Law. This Court was apprised in a recent conference call with counsel herein that a verdict in favor of the plaintiffs Lema in the Queens action (and adverse to plaintiff herein) was rendered recently.

Gerardo Lema and Luis Lema were injured on March 6, 2008 during the course of their employment by defendant Microtech Contracting Corp. (hereinafter "Microtech"). At the time of the occurrence, the Lemas were working - specifically, performing certain demolition and related work - at the hospital facility of plaintiff The New York Hospital Medical Center of Queens (hereinafter, "NYHMCQ") at room LL047, 56-45 Main Street, Flushing, New York.

Upon the instant motion to dismiss, the defendant claims that the claims for contribution and indemnity are barred by §11 of the Workers' Compensation Law ("WCL"), which defendant avers prohibits such claims by third parties against an employer except in a case involving "grave injury" to the employee (or where the employer agreed to indemnify such third party pursuant to a written contract). Movant Microtech asserts that there was no grave injury suffered by the Lemas and no written indemnity contract between it and NYHMCQ and that the action must be dismissed[1].

In the complaint plaintiff alleged that §11 does not apply herein. In the affirmation in opposition to the instant motion to dismiss plaintiff NYHMCQ states by counsel that, for purposes of this motion, it "will not argue that there was any written indemnity agreement between Microtech and . . . [NYHMCQ] . . ." and "will not argue that the injuries sustained by either brother rise to the level of 'grave' . . ." (affirmation of Robert Farley dated March 10, 2011, at ¶s 6 and 7). Instead, plaintiff argues, based on the fact that the Lemas were undocumented, illegal aliens working for Microtech when the accident occurred, in substance that the protection generally afforded employers under §11 against claims by landowners for contribution or indemnity (as to personal injury claims by employees of the employer against the landowner) are abrogated by the employer's alleged violation of 8 USC 1324-a (The Immigration Reform and Control Act of 1986 ("IRCA")) which makes unlawful the employment in the United States of unauthorized aliens.

Pertinent to the Court's analysis in this context are the following allegations of the instant complaint:

> "13. That on and before March 6, 2008, in Room LL047 of the premises known as 56-45 Main Street, Flushing, New York, the defendant NYH, by one or more contractors, was engaged in the demolition of one or more cement and/or cinder block oven(s)/structure(s) along with other related work thereat.
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> 14. That on and before March 6, 2008, in Room LL047 of the premises known as 56-45 Main Street, Flushing, New York, the defendant NYH, by its agents,

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[1]The apparent reason this action was brought in Suffolk instead of Queens was that a conference order in the Queens action dated January 13, 2010 (Ritholz, J.) required initiation of any third party action therein by a certain date (April 16, 2010).

servants and employees, was engaged in the alteration of one or more cement and/or cinder block oven(s)/structure(s) along with other related work thereat.

15. That on and before March 6, 2008, in Room LL047 of the premises known as 56-45 Main Street, Flushing, New York, the defendant NYH, by one or more contractors, was engaged in the alteration of certain cement and/or cinder block oven(s)/structure(s) along with other related work thereat.

16. That on and before March 6, 2008, in Room LL047 of the premises known as 56-45 Main Street, Flushing, New York, the defendant NYH, by its agents, servants and employees was engaged in the repair of certain cement and/or cinder block oven(s)/structure(s) along with other related work thereat.

17. That on and before March 6, 2008, in Room LL047 of the premises known as 56-45 Main Street, Flushing, New York, the defendant NYH, by one or more contractors, was engaged in the repair of certain cement and/or cinder block ovens/structure(s) along with other related work thereat.

18. That on or about March 6, 2008, the plaintiffs, Gerardo Lema and Luis Lema, were lawfully in Room LL047 in the course of their employment as employees of Microtech Contracting Corp."

On a motion to dismiss pursuant to CPLR §3211(a)(7), allegations of the complaint are accepted as true for purposes of the determination of the motion (see, Al-Ber, Inc. v. New York City Department of Finance, 80 AD3d 760 [2nd Dept., 2011]). In the particular context of this motion, the foregoing and the other fact allegations are accepted as true. The issue thus presented (in light of plaintiff's restriction of its opposition (referenced above)) is whether, assuming the facts to be as alleged in the complaint, that is, assuming that Microtech violated IRCA as alleged therein, the protection of WCL §11 is forfeited - by reason of such violation - as a defense to the plaintiff landowner's claims for contribution and indemnification.

Although the issue raised herein appears to involve a novel question it is not without some guidance in case law involving the issue of exclusivity of the Workers' Compensation Law (see , Matter of Sackolwitz v. Hamburg & Co., 295 NY 264 (1946); Noreen v. Vogel & Bros., 231 NY 317 [1922]; Decker v. Pouvailsmith Corp., 207 AD853 [2nd Dept., 1923]; Monteleone v. Center Storage Warehouses, 68 NYS2d 369 [Kings County Supreme Court, 1946]).

This Court finds that, in view of the standard to be applied in this context, that is, accepting the allegations of the complaint as true and reading the complaint in the light most favorable to plaintiff, the motion nonetheless must be granted. The exceptions to WCL §11's bar of claims for indemnity and contribution (against an employer providing Workers' Compensation benefits such as Microtech) do not include the circumstance accepted as true herein for purposes

of this motion - essentially, that Microtech employed unauthorized aliens who were injured on the job.

In light of the Court's determination granting the branch of defendant's motion which is to dismiss pursuant to §3211(a)(7), the branch of the defendant's motion pursuant to §3211(a)(1) is denied as academic.

So ordered.

Dated: August 15, 2011

HON. WILLIAM B. REBOLINI, J.S.C.

__X__ FINAL DISPOSITION_____ NON-FINAL DISPOSITION