SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46
Justice

Index Number : 113483/2010
GALLO, ANTHONY
vs.
ALBERT, STEVEN
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 2, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants third party defendants' motion for summary judgment and for sanctions to the extent set forth in the accompanying decision. C.P.L.R. § 3212(b) and (e); 22 N.Y.C.R.R. § 130-1.1.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/6/14

Lucy Billings, J.S.C.
LUCY BILLINGS J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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ANTHONY GALLO, Index No. 113483/2010

Plaintiff

- against -

STEVEN ALBERT, ASHOK MEHRA, SIXTH AVENUE WEST ASSOCIATES, L.P., MANHATTAN WHOLESALERS INC., and CFD 27, INC.,

Defendants

---x

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STEVEN ALBERT, ASHOK MEHRA, and SIXTH AVENUE WEST ASSOCIATES, L.P., Index No. 590348/2012

Third Party Plaintiffs

- against -

DAVIS ALARMS INC., D & W CENTRAL STATION FIRE ALARM CO., INC., and D & W CENTRAL STATION ALARM CO., INC.,

Third Party Defendants

---x

---x

STEVEN ALBERT, ASHOK MEHRA, and SIXTH AVENUE WEST ASSOCIATES, L.P., Index No. 590819/2012

Second Third Party Plaintiffs

- against -

CFD 27, INC.,

Second Third Party Defendant

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DECISION and ORDER

LUCY BILLINGS, J.:

In this action for personal injuries plaintiff sustained December 30, 2009, this decision concerns only the dispute between defendants-third party plaintiffs and third party defendants, three alarm corporations: Davis Alarms Inc., D & W Central Station Fire Alarm Co., Inc., and D & W Central Station Alarm Co., Inc. All third party defendants move for summary judgment dismissing the third party complaint and any claims by parties in the main action or second third party action against third party defendants, C.P.L.R. § 3212(b), and for sanctions against third party plaintiffs for continuing a frivolous third party action. 22 N.Y.C.R.R. § 130-1.1.

Third party defendants identify only third party plaintiff's claims against third party defendants, for contribution, implied indemnification, contractual indemnification, and breach of contract. Hence only third party plaintiffs oppose the motion.

I. THIRD PARTY DEFENDANTS' EVIDENCE

Third party defendants' admissible evidence, principally the affidavit of Henry Davis, Davis Alarms' Vice President, shows that plaintiff was working for third party defendant Davis Alarms when he was injured and received Workers' Compensation for his injuries under a Workers' Compensation insurance policy issued to Davis Alarms. Plaintiff claims his injuries were an aggravated hernia in his groin and a cyst on his knee.

Davis explains that D & W Central Station Fire Alarm Company is a name by which Davis Alarms conducts business, while D & W Central Station Alarm Company is a registered business name of

the corporation Davis Alarms. He also is the Vice President of the corporation D & W Central Station Fire Alarm Co., Inc., and was the Vice President of the currently dissolved corporation D & W Central Station Alarm Co., Inc. Neither of these corporations ever performed services at the location of plaintiff's injury or entered any contract to perform services there or any contract with a party in the main action or third party actions.

Third party defendants' witness further attests that there has never been any contract between third party plaintiffs and any of third party defendants, including Davis Alarms. Nor has any third party defendant ever contracted with any other party or nonparty to procure insurance for or indemnify third party plaintiffs.

The New York Workers' Compensation Board did not actually decide that Davis Alarms was plaintiff's employer. There is "no indication in the record that this was a disputed issue at the workers' compensation proceeding or that the WCB specifically adjudicated this issue." Vitello v. Amboy Bus Co., 83 A.D.3d 932, 933 (2d Dep't 2011). See American Home Assur. Co. v. Highrise Constr. Co., 111 A.D.3d 446, 976 N.Y.S.2d 16, 17 (1st Dep't 2013); Vera v. NYC Partnership Hous. Dev. Fund Co., Inc., 40 A.D.3d 472 (1st Dep't 2007); Sorrentino v. Ronbet Co., 244 A.D.2d 262 (1st Dep't 1997). The Board's decision simply found that plaintiff sustained work related injuries to his groin and right knee and authorized medical treatment for those body parts. See, e.g., Talcove v. Buckeye Pipe Line Co., 247 A.D.2d 464, 465

(2d Dep't 1998). The decision listed plaintiff's employer as Davis Alarms, but, as Davis attests, this listing was pursuant to his list of employees entitled to Workers' Compensation that he provided to the New York State Insurance Fund (SIF) before it issued an insurance policy to Davis Alarms and his report of plaintiff's injuries to SIF and the Board. See Vera v. NYC Partnership Hous. Dev. Fund Co., Inc., 40 A.D.3d 472; Sorrentino v. Ronbet Co., 244 A.D.2d 262; Callaghan v. Point at Saranac Lake, Inc., 83 A.D.3d 1177, 1179 (3d Dep't 2011); Vitello v. Amboy Bus Co., 83 A.D.3d at 933.

II. THE EFFECT OF THE WORKERS COMPENSATION BOARD DECISION

Third party plaintiffs seek contribution and indemnification from third party defendants for any liability to plaintiff. These third party claims may not be maintained against plaintiff's employer absent a "grave injury" to plaintiff or a written contract providing for contribution or indemnification by his employer to third party plaintiffs. N.Y. Workers' Comp. Law § 11; Flores v. Lower E. Side Serv. Ctr., 4 N.Y.2d 363, 367 (2005); Tonking v. Port Auth. of N.Y. & N.J., 3 N.Y.3d 486, 490 (2004); Hansen v. 510 Manhattan Affordable Hous., 2 A.D.3d 274 (1st Dep't 2003). See Rodrigues v. N & S Bldg. Contrs., Inc., 5 N.Y.3d 427, 431-32 (2005); Portelli v. Trump Empire State Partners, 12 A.D.3d 280, 281 (1st Dep't 2005); Petrillo v. Durr Mech. Constr., 306 A.D.2d 25, 26 (1st Dep't 2003); Pena v. Chateau Woodmere Corp., 304 A.D.2d 442, 444 (1st Dep't 2003). The parties do not dispute that the injuries plaintiff claims he

sustained are not a grave injury.

New York Workers' Compensation Law § 11 applies only to employers. While an employer may be immune from liability for contribution and indemnification only if the employer procures Workers' Compensation insurance for an employee's injuries sustained in the course of the employment, to be immune, the party must both be an employer and have procured the insurance. Boles v. Dormer Giant, Inc., 4 N.Y.3d 235, 239-40 (2005); Terry v. Maurice Pastries, 34 A.D.3d 328 (1st Dep't 2006); Sarmiento v. Klar Realty Corp., 35 A.D.3d 834, 837 (2d Dep't 2006). See Raynor v. Landmark Chrysler, 18 N.Y.3d 48, 53 (2011); Commissioners of State Ins. Fund v. Photocircuits Corp., 20 A.D.3d 173, 176 (1st Dep't 2005). Procuring the insurance is not enough if the party is not the employer of the injured worker. E.g., Clemons v. Brown, 69 A.D.3d 1197, 1200 (3d Dep't 2010). While plaintiff would not be entitled to recover twice for medical expenses or lost earnings for which the insurance compensated him, if Davis Alarms did not employ him, it would not be protected from potential liability for his other losses.

Even were the Workers' Compensation Board decision certified or considered authenticated by its recipient Davis, and the listing of Davis Alarms as plaintiff's employer considered a finding of that fact, it would not bind third party plaintiffs and preclude a contrary determination against Davis Alarms, that it was not plaintiff's employer, and in favor of third party plaintiffs. See Cordeiro v. Shalco Invs., 297 A.D.2d 486, 489

(1st Dep't 2002). Collateral estoppel bars a party from pursuing a claim necessarily decided in a previous action only where there was a full and fair opportunity to litigate the issue, and the party pursuing the claim is the same. Tydings v. Greenfield, Stein & Senior, LLP, 11 N.Y.3d 195, 199 (2008); City of New York v. Welsbach Elec. Corp., 9 N.Y.3d 124, 128 (2007); Buechel v. Bain, 97 N.Y.2d 295, 303-304 (2001); Martin v. Safeco Ins. Co. of Am., 19 A.D.3d 221 (1st Dep't 2005). For collateral estoppel to apply, the claim or issue must have been resolved against the party now seeking to raise the issue or against another party in privity with the current claimant. Buechel v. Bain, 97 N.Y.2d at 303; Green v. Santa Fe Indus., 70 N.Y.2d 244, 253 (1987); BDO Seidman LLP v. Strategic Resources Corp., 70 A.D.3d 556, 560 (1st Dep't 2010); Kinberg v. Kinberg, 59 A.D.3d 236, 237 (1st Dep't 2009). Collateral estoppel applies to prior administrative agency determinations, as long as the agency employed "procedures substantially similar to those used in a court of law." ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 226 (2011); Staatsburg Water Co. v. Staatsburg Fire Dist., 72 N.Y.2d 147, 153 (1988); Ryan v. New York Tel. Co., 62 N.Y.2d 494, 499 (1984); Metro-North Commuter R.R. Co. v. New York State Exec. Dept. Div. of Human Rights, 271 A.D.2d 256, 257 (1st Dep't 2000).

Thus, for example, assuming plaintiff filed a Workers' Compensation claim, and the Workers' Compensation Board determined that the party identified as his employer, Davis Alarms, was his employer, plaintiff would be estopped from

claiming that Davis Alarms was not his employer. E.g., Hynes v. Start El., 2 A.D.3d 178, 181 (1st Dep't 2003). As long as Davis Alarms received notice of the proceeding and was provided an opportunity to be heard, Davis Alarms, too, would be estopped from claiming it was not his employer or, had the Board determined that Davis Alarms was not his employer, from claiming that it was. Malmon v. East 84th Apt. Corp., 67 A.D.3d 566, 567 (1st Dep't 2009); Excelsior Ins. Co. v. Antretter Contr. corp., 262 A.D.2d 124, 128 (1st Dep't 1999); Vogel v. Herk El. Co., 229 A.D.2d 331, 332-33 (1st Dep't 1996).

Third party plaintiffs, however, were not parties in the Workers' Compensation Board proceeding, received no notice of the proceeding, and were provided no opportunity to be heard. Thus, while the fact that plaintiff received Workers' Compensation under Davis Alarms' Workers' Compensation insurance policy for his injuries may be persuasive evidence that he was Davis Alarms' employee, it is not dispositive. Callaghan v. Point at Saranac Lake, Inc., 83 A.D.3d at 1179-80; Vitello v. Amboy Bus Co., 83 A.D.3d at 933; Talcove v. Buckeye Pipe Line Co., 247 A.D.2d at 465. See Vera v. NYC Partnership Hous. Dev. Fund Co., Inc., 40 A.D.3d 472; Cordeiro v. Shalco Invs., 297 A.D.2d at 489.

III. THE NEED FOR DISCLOSURE

Third party plaintiffs present a letter signed by "Hank Davis, V.P.," on the letterhead of D & W Central Station Fire Alarm Company, one of the names by which Davis Alarms conducts business. Aff. in Opp'n of Scott P. Taylor Ex. A. Referring to

plaintiff, Davis advises that "the above individual worked for our company as an independent contractor. . . . He stopped working for us approximately in May, 2010." Id. Davis's affidavit attests that plaintiff "began working for Davis Alarms as a security alarm installer in 1994 or 1995," Aff. of Colleen E. Hastie Ex. U ¶ 9, and: "On December 30, 2009, I directed Anthony Gallo to install security equipment leased by Manhattan Wholesalers," defendant owner of the premises at which plaintiff was injured. Id. ¶ 10. Therefore Davis's letter raises the inference that plaintiff was working for Davis Alarms as an independent contractor, not an employee, December 30, 2009. If he was an independent contractor and not an employee, Davis Alarms would not be immune from liability for contribution and indemnification under Workers' Compensation Law § 11, even if Davis Alarms procured Workers' Compensation insurance for his injuries. See Boles v. Dormer Giant, Inc., 4 N.Y.3d at 237; Commissioners of State Ins. Fund v. Fox Run Farms, 195 A.D.2d 372, 374 (1st Dep't 1993); Sikorski v. Burroughs Dr. Apts., 306 A.D.2d 844, 846 (4th Dep't 2003).

Although this letter is neither authenticated nor sworn, it does suggest that further evidence of plaintiff's status as an employee or independent contractor for Davis Alarms may be available through both Davis and plaintiff, if third party plaintiffs are given the opportunity to depose these adverse parties. See Maldonado v. Townsend Ave. Enters., Ltd. Partnership, 294 A.D.2d 207, 208 (1st Dep't 2002); Stankowski v.

Kim, 286 A.D.2d 282, 283 (1st Dep't 2001); Levbarg v. City of New York, 282 A.D.2d 239, 241 (1st Dep't 2001). A layperson's characterization of plaintiff as an independent contractor may not be "entitled to substantial weight" or sufficient by itself to raise a factual issue that defeats summary judgment, Sikorski v. Burroughs Dr. Apts., 306 A.D.2d at 846, but is sufficient to entitle third party plaintiffs to ascertain whether that label is from a sophisticated employer knowledgeable about the meaning. Through disclosure from Davis and plaintiff, third party plaintiffs reasonably may expect also to obtain information that will either substantiate or definitively negate plaintiff's status as independent contractor rather than an employee. Insofar as third party plaintiffs have failed to rebut third party defendants' defenses to third party plaintiffs' contribution and implied indemnification claims at this stage, such disclosure carries the potential to defeat summary judgment and is warranted before granting third party defendants summary judgment on these claims. C.P.L.R. § 3212(f); Mason v. U.E.S.S. Leasing Corp., 96 N.Y.2d 875, 878 (2001); Cooke v. City of New York, 95 A.D.3d 537, 538 (1st Dep't 2012); Arbor Leasing, LLC v. BTMU Capital Corp., 68 A.D.3d 580 (1st Dep't 2009); Slemish Corp., S.A. v. Morgenthau, 63 A.D.3d 418, 419 (1st Dep't 2009). See Maldonado v. Townsend Ave. Enters., Ltd. Partnership, 294 A.D.2d at 208; Stankowski v. Kim, 286 A.D.2d at 283; Levbarg v. City of New York, 282 A.D.2d at 241.

In contrast, third party plaintiffs do not even attempt to

point to evidence they might elicit from any party that would support potential liability to plaintiff on the part of the other third party defendants, the separate corporation D & W Central Station Fire Alarm Co., Inc., and the currently dissolved corporation D & W Central Station Alarm Co., Inc. Such liability would be the only basis for a contribution or implied indemnification claim against them. Third party plaintiffs likewise ignore the total absence of evidence that any third party defendant contracted with any other party or nonparty to indemnify or procure insurance for third party plaintiffs, to support their contractual indemnification and breach of contract claims. C.P.L.R. § 3212(f); Harlem Real Estate LLC v. New York City Economic Dev. Corp., 82 A.D.3d 562, 563 (1st Dep't 2011); Kent v. 534 East 11th Street, 80 A.D.3d 106, 114 (1st Dep't 2010); Griffin v. Pennoyer, 49 A.D.3d 341 (1st Dep't 2008); Global Mins. & Metal Corp. v. Holme, 35 A.D.3d 93, 103 (1st Dep't 2006). Third party plaintiffs, "in short, have not raised the 'doubt'" that would entitle them to further disclosure to support these claims. Deutsche Bank Sec., Inc. v. Montana Bd. of Invs., 7 N.Y.3d 65, 74 n.3 (2006).

Consequently, third party plaintiffs have completely failed to show that a need for disclosure on the relationship of either D & W Central Station corporation to plaintiff, his work, or the premises at which he was injured is a reason to deny or postpone summary judgment to these third party defendants on the contribution and implied indemnification claims. C.P.L.R. §

3212(f); W & W Glass Sys., Inc. v. Admiral Ins. Co., 91 A.D.3d 530, 531 (1st Dep't 2012); Barnes-Joseph v. Smith, 73 A.D.3d 494, 495 (1st Dep't 2010); MAP Mar. Ltd. v. China Constr. Bank Corp., 70 A.D.3d 404, 405 (1st Dep't 2010); Brown v. Bauman, 42 A.D.3d 390, 393 (1st Dep't 2007). Third party plaintiffs' showing of a need for disclosure on the issue of a contract to indemnify or procure insurance for third party plaintiffs is equally lacking and thus equally fails to provide a reason to deny or postpone summary judgment to any of third party defendants on the contractual indemnification and breach of contract claims.

IV. SANCTIONS

Given that Davis Alarms' motion for summary judgment dismissing third party plaintiffs' contribution and implied indemnification claims is to be denied, these claims retain sufficient merit to withstand a finding that they are frivolous so as to warrant sanctions. 22 N.Y.C.R.R. § 130-1.1(c); Komolov v. Segal, 96 A.D.3d 513, 514 (1st Dep't 2012); Parkchester S. Condominium Inc. v. Hernandez, 71 A.D.3d 503, 504 (1st Dep't 2010); Peach Parking Corp. v. 346 W. 40th St., LLC, 52 A.D.3d 260, 261 (1st Dep't 2008); Parametric Capital Mgt., LLC v. Lacher, 26 A.D.3d 175 (1st Dep't 2006). Giving third party plaintiffs the benefit of doubt, Davis Alarms' business names similar to its co-third party defendants' names may have created confusion as to which entity retained plaintiff and performed services for the owner of the premises at which he was injured. This potential confusion dictates a similar conclusion that

sanctions are unwarranted for the contribution and implied indemnification claims against all third party defendants, even though the court dismisses those claims against two of third party defendants.

In contrast, third party plaintiffs' continuation of their contractual indemnification and breach of contract claims was frivolous and warrants sanctions against third party plaintiffs and their attorney, jointly and individually, of $2,500.00 in favor of third party defendants. 22 N.Y.C.R.R. § 130-1.1(c); Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons Intl., Inc., 94 A.D.3d 580, 582 (1st Dep't 2012); Pentalpha Enters., Ltd. v. Cooper & Dunham LLP, 91 A.D.3d 451, 452 (1st Dep't 2012). See Zysk v. Kaufman, Borgeest & Ryan, LLP, 53 A.D.3d 482, 483 (2d Dep't 2008). Although no evidence demonstrates that third party plaintiffs or their attorneys continued to pursue these claims solely to harass or maliciously injure third party defendants, 22 N.Y.C.R.R. § 130-1.1(c)(2), their persistence unduly expanded and hence prolonged the third party action after the lack of both a factual and a legal basis for the relief sought was brought to their attention and then reinforced.

The modest award is thus for attorneys' fees and expenses attributable to defending against these frivolous claims after repeated notice that they were baseless and requests to discontinue the claims. 22 N.Y.C.R.R. § 130-1.1(c)(1) and (2). The sanctions are minimal only because third party defendants do not show that their expenses in defending against the contractual

claims significantly increased their expenses in defending against third party plaintiffs' other claims.

V. CONCLUSION

For the reasons explained above, the court denies third party defendants' motion for summary judgment dismissing the third party complaint's contribution and implied indemnification claims against third party defendant Davis Alarms Inc. C.P.L.R. § 3212(b) and (e). Since third party defendants have not identified any claims by parties in the main action or second third party action against third party defendants, let alone grounds to dismiss such claims, the court also denies any such relief. Id.

The court grants third party defendants' motion for summary judgment to the extent of dismissing third party plaintiffs' contractual indemnification and breach of contract claims against Davis Alarms Inc. Id. The court also grants the motion to the extent of dismissing the third party complaint against third party defendants D & W Central Station Fire Alarm Co., Inc., and D & W Central Station Alarm Co., Inc. C.P.L.R. § 3212(b).

The court awards third party defendants $2,500.00 in attorneys' fees and expenses as sanctions against third party plaintiffs and their attorney, to be paid to third party defendants by delivery to their attorney within 30 days after service of this order with notice of entry. 22 N.Y.C.R.R. § 130-1.1. If third party plaintiffs or their attorney fails to make this payment, third party defendants may enter a judgment in

their favor for $2,500.00 against third party plaintiffs and their attorney, jointly and individually. This decision constitutes the court's order.

DATED: January 6, 2014

LUCY BILLINGS, J.S.C.