

<b>Farez v Elk Home Partners, LP</b>
2016 NY Slip Op 33125(U)
September 15, 2016
Supreme Court, Westchester County
Docket Number: 71277/14
Judge: Mary H. Smith
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# DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
IAS PART, WESTCHESTER COUNTY**

**Present: HON. MARY H. SMITH  
Supreme Court Justice**

-----X  
**RICHARD FAREZ,**

Plaintiff,

**MOTION DATE: 9/9/16  
INDEX NO.: 71277/14**

-against-

**ELK HOME PARTNERS, LP AND MURPHY BROTHERS  
CONTRACTING, INC.,**

Defendants.

-----X  
**MURPHY BROTHERS CONTRACTING, INC.,**

Third-Party Plaintiff,

-against-

**ET KENNEDY COASTAL CONSTRUCTION CO., INC.,**

Third-Party Defendant.

-----X

The following papers numbered 1 to 6 were read on this motion by third-party defendant ET Kennedy Coastal Construction Co., Inc. for an Order pursuant to CPLR 3211, subdivision (a), paragraphs 1 and/or 7, dismissing the third-party complaint.

**Papers Numbered**

Notice of Motion - Affidavit (Kennedy) - Exh. - Memorandum of Law <sup>1</sup> .....	1-4
Answering Affirmation (Butterly) .....	5
Replying Memorandum of Law .....	6

Upon the foregoing papers, it is Ordered that this motion by third-party defendant ET Kennedy Coastal Construction Co., Inc. ("ET Kennedy") for an Order pursuant to CPLR 3211, subdivision (a), paragraphs 1 and/or 7, dismissing the third-party complaint is disposed of as follows:

This is a personal injury action, commenced on December 11, 2014, wherein plaintiff Farez seeks to recover for personal injuries he allegedly had sustained, on April 10, 2014, while working at a construction site in the course of his employment by third-party defendant ET Kennedy. Plaintiff alleges that both defendants ELK Home Partners, LP ("Elk Home") and Murphy Brothers Contracting, Inc. ("Murphy Bros.") had been general contractors at the work site; ET Kennedy had been hired as a subcontractor by Elk Home Partners, LP to perform certain work at the site. Plaintiff alleges that both defendants had been negligent and had violated statutes, codes and ordinances which proximately had caused plaintiff's injuries. Eighteen months after commencement of this action, defendant Murphy Bros. had filed its third-party complaint against ET Kennedy asserting causes of action for common law and contractual contribution and/or indemnification against ET Kennedy in the event that Murphy Bros. is liable to plaintiff.

Plaintiff had pursued Workers' Compensation benefits. The written Decision made following a Workers' Compensation hearing, conducted on October 22, 2014, was that plaintiff had sustained a work-related injury while in the employment of ET Kennedy;

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<sup>1</sup>Movant properly should have included copies of the pleadings on its motion.

awards had been made to plaintiff for 8.6 weeks of disability from April 11, 2014 through June 11, 2014, and an award of temporary total disability of 19.2 weeks for the period of June 11, 2014 through October 23, 2014.

Presently, third-party defendant ET Kennedy is moving to dismiss the third-party complaint, arguing that third-party plaintiff Murphy Bros. improperly is attempting to circumvent the Workers' Compensation Laws and that this matter does not fall within the ambit of exceptions to the Workers' Compensation Law because third-party plaintiff neither has alleged that plaintiff had sustained a "grave injury," and in fact plaintiff had not sustained a "grave injury,"<sup>2</sup> nor is there a written contract that had been entered into prior to the April 10, 2014, injury wherein ET Kennedy specifically had agreed to contribution for or indemnification of a third-party. Third-party defendant ET Kennedy asserts that it had entered into a written agreement with ELK Home, on February 5, 2015, ten months after plaintiff's alleged incident, wherein it had agreed to indemnify and hold ELK Home and its "consultants, and agents and employees of any of them," harmless for the negligent acts or omissions of ET Kennedy, and anyone directly or indirectly employed by it, and that the exception set forth in section 11 of the Workers' Compensation Law therefore does not apply.<sup>3</sup> Moreover, defendant ET Kennedy argues that Murphy Bros. is not a party to the subject Indemnification Agreement, that ET Kennedy had not agreed to contribute to or indemnify Murphy Bros., and thus that no viable third-party claims exists for this reason, as well.

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<sup>2</sup>That plaintiff had not sustained a statutory "grave injury" is not in dispute.

<sup>3</sup>No copy of this Indemnification Agreement is included in the record at bar.

Third-party defendant ET Kennedy's opposed motion is denied, as movant fatally has failed to include copies of all pleadings in its motion. See Aleksandrowicz v. Cantella & Co., Inc., 72 A.D.3d 1580 (4<sup>th</sup> Dept. 2010); Soule v. Lozada, 232 A.D.2d 825 (3<sup>rd</sup> Dept. 1996).

In any event, the motion would be denied on its merits. Workers' Compensation Law § 11 provides that an employer's liability is "exclusive and in place of any other liability whatsoever, to [an] employee ... or any person otherwise entitled to recover damages, contribution or indemnity, ... on account of [an] injury or death or liability arising therefrom ..." and that "the terms indemnity and contribution shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident ..." (Emphasis added). However, a term in a contract executed after a plaintiff's accident may be applied retroactively where evidence establishes as a matter of law that the agreement pertaining to the contractor's work "was made 'as of' [a pre-accident date], and that the parties intended that it apply as of that date." Pena v. Chateau Woodmere Corp., 304 A.D.2d 442, 443 (1<sup>st</sup> Dept. 2003), citing Stabile v. Viener, 291 A.D.2d 395, 396, lv. dismd. 98 N.Y.2d 727 (2002).

While a copy of the subject Indemnification Agreement is not physically before this Court, third-party plaintiff Murphy Bros. argues, with cited supporting case law, that said February 5, 2015, Agreement provides that the "Start of Work" dated is October 1, 2013, with all work having been completed, on or about July, 2014, and that it therefore may reasonably be inferred that the parties had intended at the time of execution for the Indemnification Agreement to have retroactive effect and to include past obligations; otherwise, Murphy Bros. argues the parties' Agreement would be rendered impermissibly

meaningless.

Moreover, contrary to ET Kennedy's contention, Murphy Bros. argues that the subject Indemnification Agreement provides for indemnification to the Owner ([i.e., Elk Homes] and its "consultants, agents and employees of any of them," which later terms are not defined in the Agreement. Murphy Bros. argues that it had been a consultant and/or agent of Elk Home, and therefore that it too is entitled to indemnification. This Court finds that ET Kennedy's argument that Murphy Bros. would have been specifically named in the Indemnification Agreement if in fact it had been afforded the benefit thereunder, and the fact that it had not been so named means that it is not entitled to said coverage is, by itself, insufficient to defeat Murphy Bros.' claim.

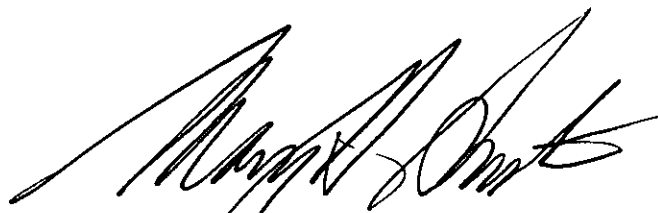
This Court is constrained to note that this action has been certified trial ready and a note of issue in fact has been filed, and yet neither party, without any explanation, has made the proper evidentiary submissions and/or, as seemingly had been necessary, annexed any deposition testimony in support of their respective positions.

In light of the Pena - Stabile body of law, supra, and upon application of the principles of law on a motion to dismiss, and specifically that the plaintiff is entitled to the benefit of every possible inference that can be implied by fair and reasonable intentment, see Urias v. Daniel P. Buttafuoco & Assoc., PLLC, 120 A.D.3d 1339, 1341-1342 (2<sup>nd</sup> Dept. 2014); Shields v. School of Law of Hofstra University, 77 A.D.2d 867, 868 (2<sup>nd</sup> Dept. 1980), this Court finds that third-party defendant ET Kennedy has not established as a matter of law, as had been its burden herein, that no third-party cause of action for indemnification and/or contribution is stated. Accordingly, ET Kennedy's motion is denied.

The parties shall appear in the Settlement Conference Part, room 1600, at 9:15

[\* 6]  
a.m., on October 4, 2016.

Dated: September 15, 2016  
White Plains, New York



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MARY H. SMITH  
J.S.C.

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Frances Schiel Doyle; Settlement Conference Part