Franklin v T-Mobile USA, Inc.
2018 NY Slip Op 30288(U)
January 11, 2018
Supreme Court, New York County
Docket Number: 161510/14
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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MARK FRANKLIN,

Plaintiff,

-against-

Index No. 161510/14
Motion Sequence Nos. 002 & 003

T-MOBILE USA, INC. and DYCKMAN REALTY ASSOCIATES, L.P.,

Defendants.

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T-MOBILE USA, INC. and DYCKMAN REALTY ASSOCIATES, L.P,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 595451/15

ENERGY DESIGN SERVICE SYSTEMS, LLC,

Third-Party Defendant.

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ENERGY DESIGN SERVICE SYSTEMS, LLC,

Second Third-Party Plaintiff,

-against-

Second Third-Party Index No. 595664/15

TAREC, LLP,

Second Third-Party Defendant.

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GERALD LEBOVITS, J.:

Recitation as required by CPLR 2219 (a), of the papers considered in the review of the instant motion for summary judgment, cross motion for summary judgment, motion to vacate the note of issue, and cross motion to vacate the note of issue:

Papers	**NYSCEF Documents Numbered**
Notice of Motion of Motion Sequence No. 002	49
Affirmation in Support	50 (exhibits 51-57)
Memorandum of Law in Support	58

Notice of Cross Motion	61
Affirmation in Support of Cross Motion	62 (exhibits 63-71)
Affirmation in Opposition	109
Reply to Cross Motion	129

Notice of Motion of Motion Sequence No. 003	73
Affirmation of Good Faith	74
Affirmation in Support	75 (exhibits 76-83)
Affirmation in Support	85
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Affirmation of Good Faith	89
Affirmation in Opposition	91 (exhibits 93-106)
Affidavit	92

Motion sequence numbers 002 and 003 are consolidated for disposition.

In this Labor Law action, second third-party defendant Tarec, LLP (Tarec) moves under CPLR 3212 for partial summary judgment dismissing the third and fourth causes of action in the second third-party complaint seeking common-law indemnification and contribution against it (motion sequence number 002). Third-party defendant/second third-party plaintiff Energy Design Service Systems, LLC (Energy Design) cross-moves under CPLR 3212 for summary judgment on its contractual indemnification claim against Tarec.

Defendants/third-party plaintiffs T-Mobile USA, Inc. (T-Mobile) and Dyckman Realty Associates, L.P. (Dyckman) move for an order: (1) vacating the note of issue; and (2) directing plaintiff to appear for an additional independent medical examination by an orthopedist of defendants' choosing (motion sequence number 003). Tarec cross-moves for the identical relief.

BACKGROUND

Plaintiff Mark Franklin, an electrician apprentice, was allegedly injured on September 2, 2014, at a store owned by Dyckman and operated by T-Mobile. T-Mobile hired Energy Design to install LED lights at various T-Mobile locations. Energy Design subsequently hired Tarec for the project. It is undisputed that plaintiff was an employee of Tarec on the date of his accident.

Plaintiff testified at his examination before trial (EBT) that, as he was installing light fixtures on a ladder, "[t]he ladder fell and then [he] fell" (plaintiff tr at 101). He testified that the ladder fell because it was "unstable and misaligned" (*id.*). According to plaintiff, he was using T-Mobile's 8-foot A-frame aluminum ladder at the time of the accident (*id.* at 71, 77).

Massiel Martinez, T-Mobile's store manager, testified that she gave an employee from Tarec permission to use T-Mobile's ladder (Martinez tr at 15, 42, 43). Tarec's employee retrieved the ladder and then brought it out to the sales floor (*id.* at 44). Martinez stayed in the back room (*id.*). At some point, Martinez heard a very loud noise and saw plaintiff on the floor (*id.* at 45-46). Plaintiff appeared to be hurt (*id.* at 46).

Theodore Miraldi, one of Tarec's owners, testified that Tarec was required to supervise its own work on the site (Miraldi tr at 10, 38). Miraldi stated that "they had scaffolding there and they had ladders on the truck. So they should have had sufficient equipment or material to get the job done" (*id.* at 48-49).

Luis Diaz, an electrician employed by Tarec, testified that he was the supervisor for the Tarec team on the night of September 2, 2014, that he was required to supervise Tarec's employees that night, and that no one from Energy Design was present on the site that day (Diaz tr at 7, 22, 33).

Energy Design's chief executive officer, David Ely, testified that Tarec was required to bring its own equipment to the site (Ely tr at 10, 39, 40).

Plaintiff commenced this action against Dyckman and T-Mobile, asserting five causes of action for violations of Labor Law §§ 240 (1), 241 (6), and 200, violations of the Industrial Code, and common-law negligence. Dyckman and T-Mobile subsequently brought a third-party complaint against Energy Design. Energy Design, in turn, brought a second third-party action against Tarec seeking: (1) contractual indemnification; (2) damages for failure to procure insurance; (3) common-law indemnification; and (4) contribution.

DISCUSSION

"'On a motion for summary judgment, the movant bears the burden of adducing affirmative evidence of its entitlement to summary judgment'" (*Scafe v Schindler El. Corp.*, 111 AD3d 556, 556 [1st Dept 2013], quoting *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3

NY2d 395, 404 [1957], *rearg denied* 3 NY3d 941 [1957] [internal quotation marks and citation omitted]).

I. Tarec's Motion for Partial Summary Judgment (Motion Sequence No. 002)/Energy Design's Cross Motion for Summary Judgment

a. Common-Law Indemnification and Contribution Claims

Tarec moves for summary judgment dismissing the common-law indemnification and contribution claims against it, because plaintiff did not suffer a "grave injury."

> "Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a 'grave injury,' *or the claim is 'based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered*'"

(*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430 [2005] [emphasis added]).

Workers' Compensation Law § 11 defines a "grave injury" as 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."

The injuries enumerated as grave were "deliberately both narrowly and completely described. The list is exhaustive, not illustrative: it is not intended to be extended absent further legislative action" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 416 [2004] [internal quotation marks and citation omitted]).

In opposition, Energy Design concedes that plaintiff did not suffer a "grave injury" (Maloney affirmation in support, ¶ 35). Therefore, Tarec's motion is granted, and the common-law indemnification and contribution claims against Tarec are dismissed.

b. Contractual Indemnification Claim

Energy Design moves for contractual indemnification against Tarec based on the indemnification provision in Tarec's subcontract, which provides as follows:

> "Indemnification
>
> "To the fullest extent permitted by law, Subcontractor [Tarec] shall indemnify and hold harmless T-Mobile, Contractor [Energy Design], and Contractor's agents and employees from and against claims, damages, losses and expenses, including, but not limited to, attorneys' fees, arising out of or resulting from performance of the Subcontractor's Work under the Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, *but only to the extent caused by the negligent acts or omissions of the Subcontractor [Tarec], the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder*. Such obligation shall not be construed to negate, abridge or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section"

(*id.*, exhibit C at 3-4 [emphasis supplied]).

Energy Design argues that it is entitled to indemnification because: (1) plaintiff was an employee of Tarec; (2) Tarec was responsible for on-site supervision pursuant to its contract, and actually supervised the work; and (3) Tarec supplied equipment to be used on the project. In addition, Energy Design contends that Tarec is a statutory agent under the Labor Law, and is, therefore, required to indemnify T-Mobile and Dyckman.

In response, Tarec contends that the language of the indemnification provision is ambiguous and violates General Obligations Law § 5-322.1. Additionally, Tarec maintains that there are issues of fact as to the negligence of Energy Design and T-Mobile. Tarec further asserts that Energy Design has failed to establish Tarec's negligence; Energy Design merely states in conclusory terms that Tarec and T-Mobile were negligent in allowing plaintiff to use a ladder owned by T-Mobile. Finally, Tarec argues that Energy Design is not entitled to affirmative relief against it under the Labor Law or Industrial Code because no party has asserted any cause of action under these statutes or regulations against it.[1]

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[1]Despite Energy Design's assertion in reply, Tarec did not argue that the indemnification provision should be found invalid because Miraldi's niece signed the contract on his behalf.

At the outset, the court notes that there is no direct claim against Tarec seeking recovery under the Labor Law (*see* Workers' Compensation Law § 11).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

General Obligations Law § 5-322.1 (1) voids indemnification clauses in construction contracts that "purport[] to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part . . . ."

An agreement to indemnify in connection with a construction contract is void and unenforceable to the extent that such agreement contemplates full indemnification of a party for its own negligence (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). But an indemnification clause which provides for partial indemnification to the extent that the party to be indemnified was not negligent, i.e., "to the fullest extent permitted by law," does not violate the General Obligations Law (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008] [holding that indemnification "to the fullest extent permitted by law" contemplated partial indemnification and was permissible under statute]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014] [holding that indemnification clause was enforceable by virtue of "to the fullest extent permitted by law" savings language]). Even if the clause does not contain the savings language, it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; accord *Francis v Plaza Constr. Corp.*, 121 AD3d 427, 428 [1st Dept 2014]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010]; *Lesisz v Salvation Army*, 40 AD3d 1050, 1051 [2d Dept 2007]).

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Whether an agreement is ambiguous is an issue of law for the court to decide (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). The proper inquiry in determining whether an agreement is ambiguous is whether the agreement is reasonably susceptible to more

than one interpretation (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *accord Chiusano v Chiusano*, 55 AD3d 425, 425 [1st Dept 2008]).

Contrary to Tarec's assertions, the indemnification provision is unambiguous; it provides that Tarec shall, "[t]o the fullest extent permitted by law," indemnify Energy Design and T-Mobile "but only to the extent caused by the negligent acts or omissions of [Tarec] . . . regardless of whether or not such claim . . . is caused in part by a party indemnified hereunder" (Maloney affirmation in support, exhibit C). It provides for partial indemnification to the extent caused by Tarec's negligent acts or omissions. Given that the indemnification provision contains the savings language "to the fullest extent permitted by law," it does not violate the General Obligations Law. Also, Energy Design has established its freedom from negligence (*see Correia*, 259 AD2d at 65). Energy Design's employees were not on the site on September 2, 2014 (Diaz tr at 22, 33). But the indemnification provision requires Tarec to indemnify Energy Design and T-Mobile for its negligent acts or omissions, and Energy Design has not demonstrated on this record that plaintiff's accident resulted from Tarec's negligent acts or omissions. Therefore, the court only grants conditional indemnification to Energy Design, to the extent that the accident was caused by the negligent acts or omissions of Tarec or anyone directly or indirectly employed by it (*see Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 628 [1st Dept 2015]; *DeSimone v City of New York*, 121 AD3d 420, 422-423 [1st Dept 2014]).

II. Defendants' Motion to Vacate the Note of Issue and Compel Plaintiff to Submit to an Additional Independent Medical Examination (Motion Sequence No. 003)/Tarec's Cross Motion to Strike the Note of Issue and Compel Plaintiff to Submit to an Additional Independent Medical Examination

Dyckman and T-Mobile move to vacate the note of issue. According to Dyckman and T-Mobile, plaintiff appeared for independent medical examinations with Dr. Roy Kulick, M.D., a hand specialist, and Dr. Daniel J. Feuer, M.D., a neurologist, but the examination of plaintiff by Dr. Joshua Auerbach, M.D., an orthopedist, has been a "comedy of errors." As indicated in an affidavit from Dr. Auerbach, the examination was initially scheduled for February 3, 2017, but had to be rescheduled because plaintiff arrived late due to "train issues" (Auerbach aff, ¶ 3). On April 7, 2017, plaintiff again arrived late to his appointment because of "train issues" (*id.*, ¶ 4). On June 21, 2017, Dr. Auerbach conducted the examination and took notes to use in preparing his report (*id.*, ¶ 5). Dr. Auerbach states that "[s]hortly thereafter [he] attempted to prepare [his] report and could not locate [his] notes. [He] spent an extensive amount of time attempting to find the notes but they appear to have been mistakenly destroyed or disposed of. Once [he] was sure that the notes were gone [he] immediately notified defense counsel" (*id.*, ¶ 6). Dyckman and T-

Mobile, therefore, seek an order compelling plaintiff to submit to an additional independent medical examination by an orthopedist.[2]

Tarec requests the same relief in its cross-motion. Energy Design also joins in Dyckman and T-Mobile's motion to vacate the note of issue.

Plaintiff does not dispute defendants' entitlement to conduct physical examinations in multiple medical disciplines. However, plaintiff argues that there is no reason to vacate the note of issue because it is Dr. Auerbach's fault that he lost his notes, and that "it is the utmost of bad faith" for defendants to require plaintiff to submit to a fourth examination. Additionally, plaintiff argues that defendants have not demonstrated that unusual and unanticipated circumstances developed subsequent to the filing of the note of issue. The fact that Dr. Auerbach states that he lost his notes does not mean that the certificate of readiness was incorrect. Plaintiff notes that, if the court does allow a further examination, the court should direct defendants to provide him with transportation to and from his home.

22 NYCRR 202.21 (e) provides:

> "*Vacating note of issue*. Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect."

"Where a party timely moves to vacate a note of issue, it need show only that 'a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of . . . section [202.21] in some material respect'" (*Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 [1st Dept 2006] [citation omitted]; *accord Ortiz v Arias*, 285 AD2d 390, 390 [1st Dept 2001] [holding that a note of issue should be vacated where it is based upon erroneous facts]; *Cromer v Yellen*, 268 AD2d 381, 381 [1st Dept 2000] [same]). But "[t]rial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced" (*Cabrera v Abaev*, 150 AD3d 588, 588 [1st Dept 2017] [internal quotation marks and citation omitted]).

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[2] Dyckman and T-Mobile note that defendants offered to pay reasonable compensation to plaintiff, including a car service to and from the doctor's office and reimbursement for any lost wages (Sohnen affirmation in support, ¶ 17). Defendants also offered to cancel any fees associated with the prior cancelled appointments (*id.*, ¶ 21). However, plaintiff has refused to consent to an additional examination.

22 NYCRR 202.21 (d) provides that "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings." To conduct disclosure after the filing of the note of issue, defendants must demonstrate "unusual or unanticipated circumstances" that "develop[ed] subsequent to the filing of a note of issue," which require additional disclosure to prevent "substantial prejudice" (*see Madison v Sama*, 92 AD3d 607, 607 [1st Dept 2012]; *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 483 [1st Dept 2010]; *Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005]).

Here, defendants are not required to show "unusual or unanticipated circumstances," because they timely moved to vacate the note of issue, and are, therefore, only required to show that the case is not ready for trial (*see Jacobs v Johnston*, 97 AD3d 538, 538 [2d Dept 2012]; *Schroeder*, 24 AD3d at 181). The note of issue was filed on July 19, 2017 (Sohnen affirmation in support, exhibit E). By order dated August 2, 2017, the court granted defendants an extension of time to move to vacate the note of issue until August 25, 2017 (*id.*, exhibit H). CPLR 2004 provides that "the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." Dyckman and T-Mobile e-filed their motion to vacate the note of issue on August 17, 2017. Tarec e-filed its cross-motion to vacate the note of issue on August 25, 2017.

CPLR 3121 (a) provides that, where the physical condition of the plaintiff is in controversy, "any party may serve notice on another party to submit to a physical . . . examination by a designated physician." "While there is no restriction in CPLR 3121 (a) limiting the number of medical examinations to which a plaintiff may be subjected, a defendant seeking a further examination must demonstrate the necessity for it" (*Harris v Christian Church of Canarsie, Inc.*, 147 AD3d 818, 818 [2d Dept 2017]).

Defendants have demonstrated the necessity of an additional examination by an orthopedist (*see Dantzler v 2727 Realty LLC*, 62 AD3d 412, 413 [1st Dept 2009]). Dr. Auerbach states that he cannot prepare the report of his examination because he cannot locate his notes (Auerbach aff, ¶¶ 5-6). Without an additional opportunity for an orthopedic independent medical examination, defendants would be severely prejudiced (*see Dantzler*, 62 AD3d at 413). Plaintiff alleges injuries to his neck, back, hips, and shoulder (Sohnen affirmation in support, exhibit D, ¶¶ 18-19). Therefore, the court shall permit an additional examination of plaintiff by an orthopedist of defendants' choosing, without vacating the note of issue (*see Pickering v Union 15 Rest. Corp.*, 107 AD3d 450, 451 [1st Dept 2013] ["the court could have allowed the IME without vacating the note of issue"]; *accord Torres v New York City Tr. Auth.*, 192 AD2d 400, 400 [1st Dept 1993]).

Under the circumstances, the court will direct defendants to pay plaintiff's transportation costs to and from the doctor's office, as previously agreed to by defendants and requested by plaintiff (*see Renford v Lizardo*, 104 AD2d 717, 718 [4th Dept 1984]).

Accordingly, it is

ORDERED that the motion (sequence number 002) of second third-party defendant Tarec, LLP for partial summary judgment is granted, and the third and fourth causes of action in the second third-party complaint for common-law indemnification and contribution against it are dismissed; and it is further

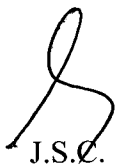
ORDERED that the cross-motion of third-party defendant/second third-party plaintiff Energy Design Service Systems, LLC for summary judgment on its contractual indemnification claim is granted to the extent of conditionally granting contractual indemnification in its favor against second third-party defendant Tarec, LLP, to the extent that plaintiff's claims are caused by the negligent acts or omissions of second third-party defendant Tarec, LLP or anyone directly or indirectly employed by it, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 003) of defendants T-Mobile USA, Inc. and Dyckman Realty Associates, L.P. to vacate the note of issue and compel plaintiff to submit to an additional independent medical examination is granted to the extent of directing plaintiff to submit to an additional examination by an orthopedist of defendants' choosing within 45 days, and is otherwise denied; and it is further

ORDERED that the cross-motion of second third-party defendant Tarec, LLP to vacate the note of issue and compel plaintiff to submit to an additional independent medical examination is granted to the extent of directing plaintiff to submit to an additional examination by an orthopedist of defendants' choosing within 45 days, and is otherwise denied; and it is further

ORDERED that defendants shall pay plaintiff's transportation costs to and from his home to the independent medical examination.

Dated: January 11, 2018



J.S.C.