Molinary v Aarco Envtl. Servs. Corp.
2018 NY Slip Op 31833(U)
July 30, 2018
Supreme Court, Suffolk County
Docket Number: 15-09699
Judge: David T. Reilly
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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, J.S.C.

INDEX NO.: 15-09699

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ANTONIO MOLINARY and NAZARIO MOLINA, THOMAS A. MOLINARY, JR. and JEANNINE MOLINARY,

Plaintiffs,

-against-

AARCO ENVIRONMENTAL SERVICES CORP., AARCO ENVIRONMENTAL, LLC, AARCO RESTORATION AND CONSTRUCTION SERVICES, INC., 190 VANTAGE REALTY LLC; LOUHAL PROPERTIES, INC.; SENTURK CORP., CPG DISTRIBUTORS, INC., and CPG DISTRIBUTION CORP.,

Defendants.

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LOUHAL PROPERTIES, INC.,

Third-Party Plaintiff,

-against-

SERVICE STATION INSTALLATION OF NY, INC., d/b/a SERVICE STATION INSTALLATION,

Third-Party Defendant.

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THIRD PARTY INDEX NO.: 791070-2017

See Addendum Attached

MOTION DATE:		04/11/18
SUBMITTED:		05/02/18
MOTION SEQ. NO.:		5 & 6
MOTION:	005	MotD
	006	MotD

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (#005) by Third Party Defendant dated March 19, 2018 and supporting papers; and (2) Notice of Cross-Motion (#006) by Third Party Plaintiff dated April 13, 2018 and supporting papers; (3) Third Party Defendant's Affirmation in Opposition dated April 18, 2018 and supporting papers; (4) Third Party Defendant's unsigned Reply Affirmation dated April 24, 2018 and supporting

papers; and (5) Third Party Plaintiff's Affirmation in Reply dated April 27, 2018 and supporting papers ~~(and after hearing counsel in support and in opposition to the motion~~) it is,

ORDERED that third party defendant's application for an Order granting it summary judgment and dismissing the third party complaint, pursuant to Civil Practice Law and Rules (CPLR) 3212, awarding it costs and financial sanctions pursuant to 22 NYCRR 130-1, and/or in the alternative granting it leave to serve an amended answer to amended third party complaint is determined as set forth below; and it is

ORDERED that third party plaintiff's cross-motion for an Order denying third party plaintiff's motion and compelling third party plaintiff to provide responses to outstanding discovery demands pursuant to CPLR 3124, 3126 is determined as set forth below.

By third party summons and complaint dated April 6, 2017 third party plaintiff Louhal Properties, Inc. (Louhal) commenced this action against Service Station Installation of NY, Inc. d/b/a Service Station Installation (SSI) seeking, among other things, contribution and indemnification for any damages recovered by plaintiffs on the causes of action alleged in the complaint.[1] This is an action for personal injuries allegedly sustained by the plaintiffs on or about May 5, 2015, when working as employees of SSI, they were involved in an explosion at a closed gas station located at 190 Sunrise Highway, Freeport, NY. According to the amended complaint, the plaintiffs were engaged in demolition work at the gas station when gasoline vapors or another flammable substance were ignited causing an explosion, which resulted in plaintiffs suffering severe burns and life threatening injuries.

Third party plaintiff commenced this action seeing contribution and indemnification from the plaintiffs' employer SSI which now moves for, *inter alia*, summary judgment dismissing the complaint. SSI maintains that the plaintiffs were acting within the scope of their employment at the time of the accident, that SSI had in place a Workers Compensation and Employers Policy of Insurance and a two-page written " Estimate and Agreement" for the work between Louhal and SSI that did not include a clause providing for contribution and indemnification. Therefore, SSI argues, it may not be held responsible for plaintiff's injuries inasmuch as Workers Compensation provides the sole basis for liability against it, barring the plaintiffs sustaining a "grave injury."

Section 11 of the Workers Compensation Law states that an employer will not be liable for contribution or indemnity to any third party for injuries allegedly sustained by an employee acting within the scope of their employment unless that employee has sustained a "grave injury." The Workers Compensation Law defines "grave injury" as:

> "Death, permanent and total loss of use or amputation of an arm, 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

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[1]By "So-ordered" stipulation dated June 7, 2017 three separate actions were consolidated into the instant action, together with the third party action.

injury to the brain caused by an external physical force resulting in permanent total disability."

In referencing the plaintiffs' bills of particulars, SSI contends that none of the plaintiff's injuries could be considered "grave" as defined by the statute.

Louhal, for its part, states that plaintiff Thomas Molinary, Jr. (TM) sustained, among other injuries, burns to his face, ears, forearms, hands and feet with loss of pincer movement and grip. It is further claimed that TM suffered range of movement deficits in his hands and wrists and his daily activities have been permanently and substantially impaired. As for plaintiff Anthony Molinary (AM), Louhal argues that he suffered burns to 35% percent of his body with severe scarring in his upper extremities with altered sensation and function. By his bill of particulars, AM claims to have a resulting disability "from substantially all of plaintiff's pre-accident activities." With respect to plaintiff Nazario Molina (NM), it is also alleged he suffered severe scarring with altered sensation, pigmentation and function of the upper extremities with severe painful and restricted range of motion to the upper and lower extremities. It is further alleged that NM suffered "disability from substantially all of [his] pre-accident activities."

Louhal additionally claims that AM and NM suffered "grave injuries" as defined in the Worker's Compensation Law in that they were totally incapacitated from the date of the accident until the present and, as such, SSI's motion for summary judgment must be denied.

It is well settled that the proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment, as a matter of law, in his or her favor by offering admissible evidence sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition thereto (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the movant has made the requisite showing, the burden then shifts to the opposing party, requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). On such a motion, the Court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party; the Court is not responsible for resolving issues of fact or determining matters of credibility (*see* ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v Bolivar***, *supra*; ***Benetatos v Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

Under the 1996 amendments to Workers Compensation Law §11, am employer may only be liable for contribution and indemnification if the employee has sustained a grave injury (***Blackburn v. Wysong & Miles Co.***, 11 AD3d 421, 783 NYS2d 609 [2d Dept 2004]). Grave injury is a statutorily-defined threshold for catastrophic injuries, and as noted above, includes only those

injuries which are listed in the statute and determined to be permanent (*see* ***Ibarra v. Equipment Control, Inc.***, 268 AD2d 13, 707 NYS2d 208 [2d Dept 2000]). A proponent of a motion for summary judgment dismissing a third-party complaint because a plaintiff did not sustain a grave injury is required to make a *prima facie* showing of entitlement to judgment as a matter of law, much the same as a defendant seeking summary judgment dismissing a claim for non-economic damages for lack of serious injury under the No-Fault Insurance Law (***Fitzpatrick v. Chase Manhattan Bank***, 285 AD2d 487, 728 NYS2d 484 [2d Dept 2001]). Here, the Court finds that SSI has not sustained this burden and the motion for summary judgment must be denied.

Plaintiffs have all asserted injuries involving severe facial scarring and permanent and total loss of use of arms or legs. Therefore, it was incumbent on SSI to refute these injuries by competent medical evidence. In their moving papers SSI maintains that the plaintiff have failed to demonstrate "permanent and severe facial disfigurement" as is required by statute. SSI has submitted a series of photographs, purportedly of the plaintiffs, which show each of their faces. SSI maintains these photographs demonstrate that none of the plaintiffs' facial injuries constitute "permanent and severe facial disfigurement."

The problem, however, as Louhal properly indicates, is that the photographs are not properly authenticated and are, therefore, inadmissible. Counsel for SSI states in his affirmation that the photographs were provided by plaintiffs' attorneys within the preceding thirty days. There is no affidavit attesting to who took the pictures, when the pictures were taken, nor under what circumstances they were taken. In short, the photographs lack the proper foundation (***People v. Price***, 29 NY3d 472 [2017]). In addition, SSI does not address the plaintiffs' contention that they suffered permanent and total loss of use of arms or legs.

Considered cumulatively, the Court finds that SSI has failed to offer admissible evidence sufficient to eliminate all material issues of fact. Accordingly, that branch of the motion seeking summary judgment, as well as that branch seeking costs and sanctions against Louhal must be denied.

As to the remaining branch of SSI's motion, that application is granted and the amended answer is deemed served as of the date of this decision and Order pursuant to CPLR 3025 which permits a party to amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court. "Leave shall be freely given upon such terms as may be just including the granting of costs and continuances" (*see* CPLR 3025(b)). As a general rule, leave to amend a pleading should be granted where there is no significant prejudice or surprise to the opposing party, provided the defense is meritorious (*see* ***Hickey v. Hutton***, 182 AD2d 801 [2d Dept 1992]). Here, the Court can discern no appreciable prejudice on the part of Louhal, discovery is still proceeding and there have been no depositions taken in the third party action.

Finally, with respect to Louhal's cross-motion, parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]). This provision has been liberally construed to require disclosure "of any facts bearing on the controversy which will assist [the parties'] preparation

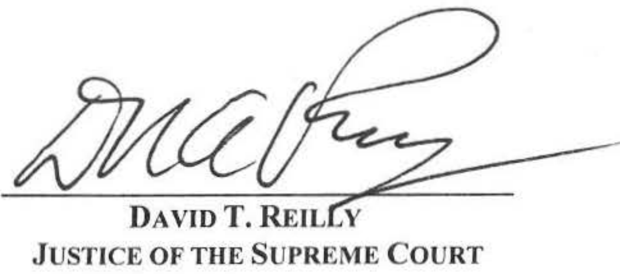
for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403 [1968]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered 'evidence material . . . in the prosecution or defense'" (***Id.*** at 407, *quoting* CPLR 3101). Nonetheless, litigants do not have *carte blanche* to demand production of any documents or other tangible items that they speculate might contain useful information (*see* ***Geffner v Mercy Med. Ctr.***, 83 AD3d 998 [2011]; ***Foster v Herbert Slepoy Corp.,*** 74 AD3d 1139 [2d Dept 2010]. Thus, a party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see e.g.* ***Geffner v Mercy Med. Ctr.***, *supra*; ***Gilman & Ciocia, Inc. v Walsh***, 45 AD3d 531 [2d Dept 2007].

Striking a pleading or dismissing an action for failure to provide discovery is a drastic remedy which will only be invoked where the respondent's conduct was willful, deliberate or contumacious (***Tinkleman v. Hudson Valley Winery***, 80 AD2d 894 [1981]). When a party fails to comply with a Court Order and frustrates the disclosure scheme set forth in the CPLR, it is well within the trial judge's discretion to dismiss the pleadings (***Kihl v. Pfeffer***, 94 NY2d 118 [1999]). It is always preferable, however, to have actions decided on their merits (***Sieden v. Copen***, 170 AD2d 262 1991]).

Here, in order to ensure that discovery proceeds in a reasonable manner, the Court hereby directs SSI to respond to Louhal's outstanding proper demands within thirty (30) days of service of a copy of this decision and Order with notice of entry.

This shall constitute the decision and Order of the Court.

Dated: July 30, 2018
Riverhead, New York



DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION   __X__ NON-FINAL DISPOSITION

ADDENDUM

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