

**Maresca v Ma**

2019 NY Slip Op 31359(U)

May 9, 2019

Supreme Court, New York County

Docket Number: 163022/2015

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM**

*Justice*

-----X

ROBERT MARESCA,  
Plaintiff,

- v -

KEYAN MA, DR. MA'S MANHATTAN MEDICAL  
REHABILITATION, P.C., MA & TANG GRAND PARK  
MANAGEMENT, LLC,

Defendant.

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INDEX NO. 163022/2015  
MOTION DATE 05/02/2019  
MOTION SEQ. NO. 002

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 65, 66

were read on this motion to/for DISMISS

Plaintiff Robert Maresca, as administrator of the estate of Robert Lyons Maresca, brings this negligence action to recover for injuries suffered by Robert Lyons Maresca on July 2, 2013, when he was punctured by an acupuncture needle while in the course of his employment as a superintendent at 110 East 40<sup>th</sup> Street, New York, New York (the "Premises"), where defendant Keyan Ma, M.D. maintained an office and performed acupuncture services for patients. Affirmation of Deborah Del Sordo, Exh. A. Thereafter, defendants Keyan Ma, M.D. and Dr. Ma's Manhattan Medical Rehabilitation, P.C. commenced a third-party action against third-party defendants The Grand Park Condominium, which is the owner of the Premises, and The Board of Managers of The Grand Park Condominium and Philips International Holding Corp. d/b/a Philips International, who are charged with maintenance and management of the Premises, for common law contribution and indemnification. Del Sordo Aff., Exh. D. In response, third-party defendants The Board of Managers of The Grand Park Condominium and Philips International Holding Corp. d/b/a Philips International asserted cross-claims against third-party defendant The

Grand Park Condominium for common law and contractual indemnification and contribution. Del Sordo Aff., Exh. E. Third-party defendant The Grand Park Condominium now moves pursuant to CPLR 3212 for an order dismissing the third-party complaint and the cross-claims for contribution and indemnification, arguing that these claims are barred by Workers' Compensation Law § 11.

It is well-established that “[w]here an employee is injured in the course of employment, his exclusive remedy against his employer is ordinarily a claim for workers’ compensation benefits.” *Valenziano v. Niki Trading Corp.*, 21 A.D.3d 818, 820 (1st Dep’t 2005) (citing Workers’ Compensation Law § 11). Similarly, the employer cannot be held liable for common law indemnification and contribution claims asserted by third-parties unless the employee sustained a “grave injury” as defined by Workers’ Compensation Law § 11. *Clavin v. CAP Equipment Leasing Corp.*, 156 A.D.3d 404, 404 (1st Dep’t 2017) (citing Workers’ Compensation Law § 11). Injuries qualifying as grave are narrowly defined in Workers’ Compensation Law § 11. *Castro v. United Container Machinery Group, Inc.*, 96 N.Y.2d 398, 401 (2001). Further, the statute does not bar third-party claims against an employer if the employer had a contract with the third party, prior to the accident, in which it agreed to indemnify, or contribute to payment, for a loss by the employee. *Fiorentino v. Atlas Park LLC*, 95 A.D.3d 424, 428 (1st Dep’t 2012).

In order to be entitled to dismissal of the contribution and indemnification claims, third-party defendant The Grand Park Condominium, as the movant on summary judgment, has the burden of showing that Robert Lyons Maresca was its employee at the time of the accident and that he did not suffer a “grave injury” as defined by Workers’ Compensation Law § 11. *Altonen v. Toyota Motor Credit Corp.*, 32 A.D.3d 342, 343 (1st Dep’t 2006). Here, third-party defendant

The Grand Park Condominium has failed to meet this burden. As an initial matter, third-party defendant The Grand Park Condominium has failed to submit an affidavit from someone with personal knowledge stating that Robert Lyons Maresca was employed by The Grand Park Condominium at the time of the accident. Instead, movant has submitted a "Notice to Admit to All Parties" in which it asks the responding party to admit the authenticity of the employer's and the employee's reports of Robert Lyons Maresca's accident to the Workers' Compensation Board. Del Sordo Aff., Exh. F. However, this is insufficient to show the authenticity of the employer reports. Del Sordo Aff., Exh. F at Exhs. A and C. If The Grand Park Condominium was in fact the employer, it is unclear how defendants/third-party plaintiffs and the other third-party defendants would have knowledge of the authenticity of these documents. CPLR 3123 ("a party may serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents . . . as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry."). Moreover, the other third-party defendants responded to the notice to admit and denied the authenticity of the documents. Del Sordo Aff., Exh. F. Thus, the notice to admit is insufficient to demonstrate the authenticity of the employer's reports.

The Grand Park Condominium argues that pursuant to the recently enacted provision of the CPLR 4540-A, the authenticity of these documents is presumed because it produced them during the course of discovery in this case. However, this provision is inapplicable here because it only applies when a party introduces into evidence documents produced by an adverse party in the litigation. CPLR 4540-A. Here, The Grand Park Condominium seeks to introduce into

evidence documents that it itself produced in this action and thus the authenticity of these documents cannot be presumed under CPLR 4540-A.

With respect to the employee's report, it is unclear based on the papers whether The Grand Park Condominium in fact sent the notice to admit to plaintiff and whether plaintiff responded. Even assuming plaintiff received the request and failed to respond, thereby admitting the genuineness of the employee's report (*New Image Const. Inc. v. TDR Enterprises Inc.*, 74 A.D.3d 680, 681 [1st Dep't 2010]), this is insufficient to show that plaintiff was an employee of The Grand Park Condominium. The statement in the employee's report regarding his employer constitutes inadmissible hearsay evidence and The Grand Park Condominium has failed to demonstrate that any exception to the hearsay rule is applicable. *Del Sordo Aff.*, Exh. F at Exh. B; *c.f. Buckley v. J.A. Jones/GMO*, 38 A.D.3d 461, 463 (1st Dep't 2007) (statement in incident report admissible under CPLR 4518 as business record where it was given by foreman on the job who had a business duty to furnish this information).

Although it is not raised by the parties, in addition to the notice to admit, The Grand Park Condominium has submitted the plaintiff's bill of particulars in which he states that at the time of the occurrence, he was employed by "Grand Park Condominiums c/o Philips International, LLP, 295 Madison Avenue, 2<sup>nd</sup> Floor, New York, New York 10017." *Del Sordo Aff.*, Exh. C, Plaintiff's Verified Bill of Particulars, ¶ 23. As a general matter, statement in a pleading, including a bill of particulars, constitute formal judicial admissions and are conclusive of the facts admitted. *Kimso Apartments, LLC v. Gandhi*, 24 N.Y.3d 403, 412 (2014). However, plaintiff's statement in the bill of particulars regarding his employer is ambiguous as to whether it was the owner of the Premises, The Grand Park Condominium, or the managers of the Premises, third-party defendants The Board of Managers of The Grand Park Condominium and

Philips International Holding Corp. d/b/a Philips International, who were plaintiff's employers. Thus, The Grand Park Condominium has failed to meet its burden on summary judgment of showing that plaintiff was its employee at the time of the accident.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the parties shall appear for a conference on June 6, 2019.

5/9/19  
DATE

  
PAUL A. GOETZ, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN				

APPLICATION:

CHECK IF APPROPRIATE: