

<b>Keys v City of New York</b>
2020 NY Slip Op 32215(U)
June 30, 2020
Supreme Court, New York County
Docket Number: 156867/2018
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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KEVIN KEYS,

Index No. 156867/2018

Plaintiff

- against -

DECISION AND ORDER

CITY OF NEW YORK, VOLUNTEERS OF  
AMERICA - GREATER NEW YORK, INC.,  
DEPARTMENT OF HOMELESS SERVICES, and  
RICHARDS PLUMBING AND HEATING CO.,

Defendants

-----X  
-----X

RICHARDS PLUMBING AND HEATING CO.,

Third Party Plaintiff

- against -

RVS CONSTRUCTION CORP.,

Third Party Defendant

-----X

LUCY BILLINGS, J.S.C.:

Third party defendant moves to dismiss or for summary judgment dismissing the third party complaint, claiming that New York Workers' Compensation Law §§ 11 and 29 bar the third party complaint and that a contract between third party plaintiff and third party defendant requires third party plaintiff to seek the relief sought by the third party complaint through mediation or arbitration. C.P.L.R. §§ 3211(a)(5), 3212(b). Pursuant to the

contract, third party defendant, plaintiff's employer, delivered materials to and dug trenches at a construction site at 22 East 119th Street, New York County, January 16, 2018, and employed plaintiff there to clean the site during and after construction work. He was injured when he fell into an open trench.

I. CONTRIBUTION AND IMPLIED INDEMNIFICATION BASED ON FAULT

Workers' Compensation Law §§ 11 and 29 bar the third party claims for contribution and non-contractual, implied indemnification, based on third party defendant's negligence in causing plaintiff's injury, unless plaintiff suffered a "grave injury" under § 11. New York Hosp. Med. Ctr. of Queens v. Microtech Contr. Corp., 22 N.Y.3d 501, 505 (2014); Fleming v. Graham, 10 N.Y.3d 296, 299 (2008); Netzahuall v. At Will LLC, 145 A.D.3d 492, 492 (1st Dep't 2016). The New York Workers' Compensation Board classified plaintiff's injury as a "temporary total disability." That decision does not bind third party plaintiff, however, which was not a party before the Workers' Compensation Board. Auqui v. Seven Thirty One Ltd. Partnership, 22 N.Y.3d 246, 255 (2013); Liss v. Trans Auto Sys., 68 N.Y.2d 15, 20-21 (1986).

Plaintiff's verified bill of particulars alleges that plaintiff sustained a traumatic brain injury that impedes his short term memory and ability to focus and incapacitates him from employment. These allegations also may be reconciled with the

Workers' Compensation Board decision finding a total disability, but at a point when a finding of permanency may have been premature and unnecessary to obtain immediate compensation.

Augui v. Seven Thirty One Ltd. Partnership, 22 N.Y.3d at 257.

Whether or not these allegations are consistent with the Workers' Compensation Board's decision, however, they raise an issue whether plaintiff's injury qualifies as "an acquired injury to the brain caused by an external force resulting in permanent total disability," one of the definitions of "grave injury."

N.Y. Workers' Comp Law § 11; Galindo v. Dorchester Tower Condominium, 56 A.D.3d 285, 286 (1st Dep't 2008); Mendez v. Union Theol. Seminary in City of N.Y., 26 A.D.3d 260, 261 (1st Dep't 2006).

## II. CONTRACTUAL CLAIMS

The Workers' Compensation Law does not bar the third party claim for contractual indemnification, but the parties' contract provides for third party defendant's indemnification of third party plaintiff only to the extent that third party defendant's negligence caused plaintiff's injury. By also providing that indemnification is to "the fullest extent provided by law" and thus only to the extent that third party plaintiff's negligence did not cause plaintiff's injury, the contract complies with New York General Obligations Law § 5-322.1. *Aff. of Ioannis P. Sipsas Ex. F § 4.6.1*; *Aff. of Patrick McConnell Ex. A § 4.6.1*.

See Brooks v. Judlau Contr., Inc., 11 N.Y.3d 204, 210-11 (2008); Farrugia v. 1440 Broadway Assoc., 163 A.D.3d 452, 456 (1st Dep't 2018); Radeljic v. Certified of N.Y., Inc., 161 A.D.3d 588, 590 (1st Dep't 2018); Frank v. 1100 Ave. of the Ams. Assoc., 159 A.D.3d 537, 537 (1st Dep't 2018).

Regarding third party defendant's negligence as required to trigger indemnification, plaintiff testified at his deposition that he received his instructions from his employer to work in the hallway of the main floor on the construction site and that his co-employees were digging trenches in the main floor. He and his co-employees covered the trenches with plywood so that he could push and pull wheelbarrows of dirt through the hallway. Because the hallway was too narrow to turn a wheelbarrow around, plaintiff was pulling it backward when he fell into a trench where a co-employee had removed the plywood covering.

Particularly in the absence of evidence that anyone other than third party defendant was working in the area, plaintiff's testimony raises issues whether third party defendant's negligence caused plaintiff's injury. They include whether the employer failed to direct, supervise, guide, and assist plaintiff as he pulled the wheelbarrow down the narrow hallway; provide him adequate equipment to perform the task; and keep the trench covered or barricaded.

Third party plaintiff also claims that third party defendant

failed to procure insurance as required by the contract. Third party defendant demonstrates that it did procure the required insurance, which third party plaintiff fails to rebut. Aramburu v. Midtown W.B. LLC, 126 A.D.3d 498, 501 (1st Dep't 2015); Mathews v. Bank of Am., 107 A.D.3d 495, 496 (1st Dep't 2013).

### III. CONTRACTUAL REQUIREMENTS FOR MEDIATION AND ARBITRATION

Finally, the contract requires mediation and arbitration to resolve any disputes between third party plaintiff and third party defendant. Third party plaintiff insists that an arbitration agreement is not a basis for dismissal. Allied Bldg. Inspectors Int. Union of Operating Engrs. v. Office of Labor Relations of City of N.Y., 45 N.Y.2d 735, 738 (1978); C & M 345 N. Main St., LLC v. Nikko Constr. Corp., 96 A.D.3d 794, 795 (2d Dep' 2012); Carbon Capital Mgt., LLC v. American Express Co., 88 A.D.3d 933, 940 (2d Dep't 2011). See Daniels v. Commerzbank, 79 A.D.3d 506, 507 (1st Dep't 2010). In any event, an arbitration agreement is a basis to compel arbitration, C.P.L.R. § 7503(a), and, even absent a motion to compel arbitration, to stay the third party action. Allied Bldg. Inspectors Int. Union of Operating Engrs. v. Office of Labor Relations of City of N.Y., 45 N.Y.2d at 738; Gabriel Capital, L.P. v. CAIB Investmentbank AG, 28 A.D.3d 376, 378 (1st Dep't 2006). See Carbon Capital Mgt., LLC v. American Express Co., 88 A.D.3d at 940.

Third party defendant also may waive arbitration as the

exclusive remedy by unreasonable delay in claiming that remedy and use of the judicial forum in a manner inconsistent with an intent to rely on arbitration as the remedy. Sherrill v. Grayco Bldrs., 64 N.Y.2d 261, 272-73 (1985); Allied Bldg. Inspectors Int. Union of Operating Engrs. v. Office of Labor Relations of City of N.Y., 45 N.Y.2d at 736-37; Allstate Ins. Co. v. Howell, 151 A.D.3d 461, 461 (1st Dep't 2017); Hyde v. Jewish Home Lifecare, 149 A.D.3d 674, 674 (1st Dep't 2017). Third party plaintiff points out that its insurer notified third party defendant March 14, 2018, three months before plaintiff commenced the main action here, that third party plaintiff sought indemnification from third party defendant for any claim by plaintiff. Over the two years since then, third party defendant has never demanded mediation or arbitration of the indemnification obligation.

The contract's mediation and arbitration provisions apply to: "Any claim . . . related to this Subcontract," which encompasses the extent to which third party defendant's work under the contract contributed to plaintiff's injury as well as its contractual obligations to indemnify and procure insurance for third party plaintiff. Sipsas Aff. Ex. F § 6.6.1; McConnell Aff. Ex. A § 6.6.1. Although third party defendant nowhere explains why it has not demanded mediation or arbitration under the contract once it received third party plaintiff's notice of

the indemnification claim, nor moved to compel arbitration once served with the third party complaint, neither has third party defendant invoked this court's jurisdiction until the current motion. Since third party defendant fails to establish bases for dismissing the third party complaint other than its claim for breach of a contract to procure insurance, a claim squarely subject to the mediation and arbitration provision, the court allows third party defendant a final opportunity to invoke that provision.

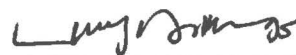
#### IV. DISPOSITION

For the reasons explained above, the court denies third party defendant's motion to dismiss or for summary judgment dismissing the third party complaint, C.P.L.R. §§ 3211(a)(5), 3212(b), but stays the third party action for 30 days after entry of this order, except for the disclosure to which third party defendant has stipulated. C.P.L.R. § 2201; Allied Bldg. Inspectors Int. Union of Operating Engrs. v. Office of Labor Relations of City of N.Y., 45 N.Y.2d at 738; Gabriel Capital, L.P. v. CAIB Investmentbank AG, 28 A.D.3d at 378. See Cusimano v. Berita Realty, LLC, 103 A.D.3d 720, 721 (2d Dep't 2013); Carbon Capital Mgt., LLC v. American Express Co., 88 A.D.3d at 940. If after 30 days third party defendant has not demanded mediation, not demanded arbitration if the third party claims are not resolved by mediation, and not moved in this action to compel



arbitration, C.P.L.R. § 7503(a), the third party action shall resume automatically. If within 30 days third party defendant has demanded mediation, demanded arbitration if the third party claims are not resolved by mediation, and moved in this action to compel arbitration, C.P.L.R. § 7503(a), the court will proceed to determine that motion.

DATED: June 30, 2020



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LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
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