Technology Ins. Co. v Gertz Plaza Acquisition 2, LLC
2021 NY Slip Op 33972(U)
March 31, 2021
Supreme Court, Queens County
Docket Number: Index No. 702496/19
Judge: Carmen R. Velasquez
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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TECHNOLOGY INSURANCE COMPANY AS ASSIGNEE OF DION FERNANDEZ, ASSIGNOR,

Plaintiff,

-against-

GERTZ PLAZA ACQUISITION 2, LLC,

Defendant.

AND A THIRD PARTY ACTION.
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Index No. 702496/19

Motion
Date: November 16, 2020

M# 1

The following papers numbered EF 12-37 papers were read on this motion by third-party defendant for summary judgment dismissing the third-party complaint.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	EF 12-23
Answering Affirmation	EF 25-36
Replying Affirmation	EF 37

Upon he foregoing papers it is ordered that this motion by the third party defendant for summary judgment is decided as follows:

Plaintiff, a foreign business corporation which provides Workers Compensation coverage, commenced this action "as assignee of Dion Fernandez," an employee of Electra Cleaning Contractors Corp. (Electra), a policyholder with plaintiff. Fernandez was in the course of his employment at premises known as 162-10 Jamaica Avenue/ 92-31 Union Hall Street, Jamaica, New York, owned by defendant/third-party plaintiff, Gertz Plaza Acquisition 2, LLC (GPA2), when he was caused to fall from a ladder, on October 21, 2016, causing personal injuries. Plaintiff brought this action to recover for money paid by it to Fernandez as Workers Compensation benefits resulting from that accident. Defendant, GPA2, commenced a third-party action against Electra, for breach

of contract and contractual indemnification, pursuant to its policy of insurance held by Electra.

Factually, in the mid-Nineties, then-owner of the subject premises, Gertz Plaza (GP), through its managing agent, Walter & Samuels, Inc., contracted with one ECC Industries, Inc. (ECC) for cleaning services at the property. Said contract contains a clause requiring the contractor (ECC) to indemnify the owner and manager. The evidence presented demonstrates that in September 2008, ownership of the subject property was transferred from an entity called "Gertz Plaza Acquisition" (GPA) to defendant/third-party plaintiff, GPA2. One would assume that, at some time prior, GP transferred the property to GPA, but the submissions herein fail to include such information.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). On plaintiff's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving defendants (*see Monroy v Lexington Operating Partners*, LLC, 179 AD3d 1053 [2d Dept 2020]; *Rivera v Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]: *Boulos v Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]). Credibility issues regarding the circumstances of the subject transactions require resolution by the trier of fact (*see Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]; *Martin v Cartledge*, 102 AD3d 841 [2d Dept 2013]), and the denial of summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404

[1957]; *see also, Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008].) Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Charlery v Allied Transit Corp.*, 163 AD3 914 [2d Dept 2018]; *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact (*see Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Khadka v American Home Mortg. Servicing, Inc.*, 139 AD3d 808 [2016]; *Schmitt v Medford Kidney Center*, 121 AD3d 1088; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

Third-party defendant, Electra, contends that it is entitled to summary judgment dismissing the third-party complaint because the Workers Compensation Law (WCL) § 11 prohibits third-party common law indemnification or contribution claims against employers, unless the employee has sustained a "grave injury" or if the claim is based upon a written contract provision, entered into prior to the accident, by which the employer had expressly consented to contribution to, or indemnification of, the claimant (*see Fleming v Graham*, 10 NY3d 296 [2008]; *Casses v SVJ Joralemon, LLC*, 168 AD3d 667 [2d Dept 2019]; *Grech v HRC Corp.*, 150 AD3d 829 [2d Dept 2017]). In the case at bar, the parties agree that plaintiff did not sustain a "grave injury" as defined by the statute. Further, Electra has established, prima facie, that no written agreement exists bearing its name and that of GPA2, which requires it to indemnify third-party plaintiff (*see McIntosh v Ronit Realty, LLC*, 181 AD3d 580 [2d Dept 2019]; *Chong Fu Wang v 57-63 Greene Realty, LLC*, 174 AD3d 777 [2d Dept 2019]).

However, even in the absence of a grave injury, an employer may be subject to indemnity if a written agreement to indemnify exists, *i.e.*, where there is 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" (WCL § 11; *see Cocanoski v 35 Cedar Place Asswoc., LLC*, 147 AD3d 810 [2d Dept 2017]; *Persaud v Bovis Lend Lease, Inc.*, 93 AD3d 831 [2d Dept 2012]). In opposition, GPA2 has raised several

issues of fact which remain unresolved, including, but not limited to, whether Electra and ECC are to be considered "alter egos" of each other, in part supported by the June 24, 2020 affidavit of Richard Dauber, the President of Electra, who insists he is "not familiar with ECC Industries, Inc." and is "not employed" by it, yet his own business card, several letters on the stationery of ECC, and internet corporate searches reveal that he is listed as the CEO of both entities (which have the same office address and room number, and are cross-referenced on public web sites); and further supported by the affidavit of Sam Bajtel, sworn to on August 20, 2020, stating he is the property manager for GPA at the subject premises, who also attests to the fact that ECC was "also known as Electra," and who produced a document, dated January 1, 2019, which states it is an "Amendment" to the original services contract of 1996, but also states such original contract was between "GPA" and "Electra", "as parties to that certain agreement, dated as of January 19, 2019," even though neither of those parties were signatories on the original agreement. Such questions of fact and credibility are sufficient to support GPA2's further contention that the instant motion is premature.

A motion for summary judgment may be made at any time "after issue has been joined" (CPLR 3212). To succeed in having summary judgment denied as premature, Electra would have to demonstrate that further discovery might lead to relevant evidence or that the facts necessary to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff (*see Cantor-Sanchez v Gonzalez-Socarras*, 189 AD3d 977 [2d Dept 2020]; *Johnson v New York City Hous. Auth.*, 185 AD3d 800 [2d Dept 2020]; *Pinella v Crescent St. Corp.*, 176 AD3d 985 [2d Dept 2019]). The mere hope that evidence adequate to defeat the motion may be ascertained during discovery is insufficient (*see Branach v Belvedere Vill., LLC*, 189 AD3d 1532 [2d Dept 2020]; *Sterling National Bank v Alan B. Brill, P.C.*, 186 AD3d 515 [2d Dept 2020]; *U.S. Bank N.A. v Wiener*, 171 AD3d 1241 [2d Dept 2019]).

Here, GPA2 has presented sufficient evidence to rebut movant's prima facie case, and demonstrate that the instant motion is premature, as it has shown that depositions have not yet been held, and facts essential to oppose such motion exist, but cannot be stated, as they are particularly and exclusively within the knowledge and control of the moving party, and additional discovery might lead to such relevant evidence herein (*see* CPLR 3212 [f]; *Laura Andrews, Inc. v Holub Enterprises, Inc.*, – AD3d –, 2012 NY Slip Op. 01758 [2d Dept 2021]; *TD Bank N.A. v 126 Spruce St., LLC*, 117 AD3d 716, 716-717 [2d Dept

2014]), warranting the denial of the instant motion.

Accordingly, third-party defendant, Electra's motion for summary judgment, seeking dismissal of the third-party complaint, is denied, as premature.

Dated: March 31, 2021

CARMEN R. VELASQUEZ, J.S.C.

FILED

4/6/2021
2:34 PM

COUNTY CLERK
QUEENS COUNTY