

Karwowski v Wavecrest Mgt. Team Ltd.

2022 NY Slip Op 31949(U)

June 9, 2022

Supreme Court, Kings County

Docket Number: Index No. 4976/13

Judge: Karen B. Rothenberg

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This opinion is uncorrected and not selected for official publication.

In this action to recover damages for personal injuries, plaintiff moves [seq. no. 18] for an order pursuant to CPLR 3212 for partial summary judgment against defendants Superior Scaffold Services, Inc. [Superior] and Steven G. Howard [Howard] on the issue of liability. Plaintiff further moves for summary judgment on the issue of “serious injury” under Insurance Law §5102(d). Defendant Superior Scaffold Services, Inc., cross-moves [seq. no. 23], belatedly, for an order pursuant to CPLR 3212 for summary judgment dismissing the plaintiff’s complaint and all claims asserted against it both on the issue of liability and “serious injury” under Insurance Law §5102(d). It is noted that while the cross-motion was filed after the date by which all dispositive motions were required to be filed, the cross-motion is made on nearly identical grounds as the plaintiff’s motion, and will be considered by the court (*see Grande v Peteroy*, 39 AD3d 590 [2d Dept 2007]).

Third-party defendant C & D Restoration, Inc. [C & D] moves [seq. no. 19] for an order pursuant to CPLR 3212 for summary judgment dismissing the third-party action and all counterclaims and cross-claims for indemnification, contribution and breach of contract.

Third-party defendant Smith Restoration, Inc. [Smith Restoration] moves [seq. no. 20] for an order pursuant to CPLR 3212 for summary judgment dismissing the plaintiff’s complaint insofar as asserted against defendants/third-party plaintiffs The Wavecrest Management Team LTD. [Wavecrest], Grand Street Guild East Housing Development Fund Company, Inc. [Grand Street Guild], and MDG Design & Construction, LLC [MDG]. Smith further moves for summary judgment dismissing the third-party complaint and any and all cross-claims insofar as asserted against it.

On January 21, 2012, plaintiff allegedly was injured as a result of a motor vehicle accident involving a flatbed truck owned by Superior and operated by Howard. At the time of the accident, plaintiff was a bricklayer employed by C & D, a masonry subcontractor, for a construction project in Manhattan. Howard was a truck driver employed by Superior a scaffolding subcontractor for the project. Plaintiff’s testimony indicates that at the time of the accident he was on his lunch-break, sitting on a wooden barricade located on the street adjacent to the construction site, when the flatbed truck driven by Howard struck the barricade causing him to sustain injuries.

Plaintiff establishes his prima facie entitlement to partial summary judgment as a matter of law on the issue of liability as against defendant Superior and Howard by demonstrating that Howard was negligent by virtue of coming into contact with the stationary wood barricade and that such negligence was a proximate cause of his injuries. In opposition, Superior and Howard fail to raise a triable issue of fact. Although defendants argue that the collision was caused by brake failure, the affidavit of Franklin Bonilla, an employee of Skyway Road Services Corp., the road service center that

responded to the scene following the accident, together with Skyway's business records, refutes any claim of brake failure. In the affidavit and accompanying service invoice, it is indicated that Skyway was contacted for a road service repair for the subject vehicle on the date of this accident, and that after an inspection of the vehicle, the brakes were determined to be in good working order. Moreover, Howard's deposition testimony reflects that he had performed an inspection of the truck on the morning of his accident and that there were no issues with the brakes or the gauges which indicate a brake malfunction. Thus, Superior fail to submit adequate evidence of brake failure and, in any event, fails to rebut the inference of negligence (*see generally Ballatore v Hub Truck Rental Corp.*, 83 AD3d 978 [2d Dept 2011]). Furthermore, in light of the above, Superior also fails to demonstrate, prima facie, the applicability of the emergency doctrine (*see Fergile v Payne*, 202 AD3d 928 [2d Dept 2022]).

Plaintiff, however, fails to make a prima facie showing on that portion of his motion for summary judgment that he sustained a serious injury under the fracture category of Insurance Law §5102(d) as a result of the subject accident. Although a fracture constitutes a serious injury within the meaning of the statute (*see Insurance Law 5102 [d]*), the MRI of the plaintiff's right wrist dated April 15, 2013, merely indicates a possible nondisplaced fracture at the lunate region. None of the plaintiff's earlier x-rays or MRIs of his right wrist note a fracture, and no explanation is provided to explain this discrepancy (*see Agha v Alamo Rent A Car*, 35 AD3d 639 [2d Dept 2006]). Since plaintiff failed to meet his prima facie burden, it is unnecessary to determine whether the defendants' submissions in opposition are sufficient to raise a triable issue of fact (*see Lancia v Good Samaritan Hospital*, 201 AD3d 913 [2d Dept 2022]).

Superior also fails to meet its prima facie burden in its cross-motion that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the subject accident. Superior's papers fail to adequately address the plaintiff's claim, set forth in the bill of particulars, that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d) (*see Hwang v Lim*, 184 AD3d 812 [2d Dept 2020]). Since Superior failed to meet its prima facie burden, it is unnecessary to determine whether plaintiff's submissions in opposition are sufficient to raise a triable issue of fact (*id.*).

C & D establishes its entitlement to summary judgment as a matter of law dismissing the third-party action and all cross-claims. With respect to the claim for contractual indemnification, C & D establishes that the injuries alleged as a result of this motor vehicle accident did not "arise from, relate to or may be attributable to...either directly or indirectly...any wrongful act, error, omission, misconduct or negligence of [C & D] or its... employees.. or ... a breach or claimed breach of any obligation...of [C & D] under, arising out of or relating to, [its] Contract [with MDG], the Work, the Project, or otherwise..." (*cf. Robles v Taconic Management Co., LLC*, 173 AD3d 1089 [2d Dept 2019]). As such, the third-party claim for contractual indemnification must be dismissed.

Moreover, as there is no evidence in the record that indicates this accident was attributable to any negligence of C & D or its employees, the claims and cross-claims for common-law indemnification and contribution must also be dismissed (*see George v Marshalls of MA, Inc.*, 61 AD3d 925 [2d Dept 2009]). Contrary to the contentions made by the parties in opposition, even assuming C & D owned or placed the barricade or parked the vehicles that were in the street, there is no testimony or evidence showing that the placement of the cars or barricade blocked Howard's view of the plaintiff or otherwise created a dangerous condition that was a proximate cause of this accident.

For the same reasons set forth above, Smith Restoration, the other masonry subcontractor on the project, also establishes its entitlement to summary judgment as a matter of law dismissing the third-party action and any and all cross-claims asserted against it in this matter.

Finally, although Smith Restoration also seeks dismissal of the plaintiff's action as against non-moving defendants Wavecrest, Grand Street Guild, and MDG, the papers fail to address the merits of the plaintiff's causes of action against these non-moving defendants under Labor Law §§200, 240(1), and 241(6). Further, since the merits of the plaintiff's Labor Law causes of action are not before the court on any motion or cross-motion, the court cannot search the record and award the non-moving defendants summary judgment dismissing these claims (*Zhigue v Lexington Landmark Properties, LLC*, 183 AD3d 854 [2d Dept 2020]).

In view of the foregoing, it is

Ordered, that plaintiff's motion for an order pursuant to CPLR 3212 for partial summary judgment on the issue of defendants Superior and Howard's liability is granted. However that portion of plaintiff's motion for summary judgment on the issue of "serious injury" under Insurance Law §5102(d) is denied, and it is further

Ordered, that Superior's cross-motion for an order pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint and all claims asserted against it is denied in its entirety, and it is further

Ordered, that C & D's motion for an order pursuant to CPLR 3212 for summary judgment dismissing the third-party action and all counterclaims and cross-claims is granted, and it is further

Ordered, that Smith Restoration's motion for an order pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint and any and all cross-claims insofar as asserted against it is granted. However, that portion of Smith Restoration's motion for summary judgment dismissing the plaintiff's complaint insofar as asserted

against defendants/third-party plaintiffs Wavecrest, Grand Street Guild, and MDG is denied.

This constitutes the decision/order of the Court

Dated: June 9, 2022

Enter,



Karen B. Rothenberg, J.S.C.