

Mussumeci v RCN Cable Co.
2007 NY Slip Op 33013(U)
September 17, 2007
Supreme Court, Queens County
Docket Number: 0013729/2002
Judge: John Elliott
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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 14

FRANCESCO MUSSUMECI

X

INDEX NO. 13729/02

SEQ. NO. 3

- against -

BY: ELLIOT, J.

RCN CABLE COMPANY, et al.

DATED: September 17, 2007

X

Defendant Columbus Construction Company has moved for summary judgment dismissing the complaint and all of the cross claims against it.

On January 24, 2001, plaintiff Francesco Mussumeci, an employee of defendant Columbus Construction Company, allegedly sustained personal injury when a gas explosion occurred while he worked in or around a manhole located between Main Street and Franklin Street, College Point, Queens, New York. According to his bill of particulars, the injuries sustained include: "Scarring, numbness and partial paralysis to the face, hands, neck, and arms." The plaintiff alleges that the work site was in an unsafe condition because of the presence of odorless gas. Third-party defendant Sardoni Skanska, USA, which had subcontracted work to the plaintiff's employer, allegedly supervised conditions at the work site. Defendant RCN Telecom Services, Inc. s/h/a "RCN Cable Company" allegedly also worked at or controlled the place of injury. The plaintiff began this action on or about May 21, 2002 against Columbus and RCN, and the latter cross claimed against

Columbus and impleaded third-party defendant Sardoni. The third-party defendant then asserted claims against RCN and Columbus.

That branch of the motion by defendant Columbus which is for summary judgment dismissing the complaint against it is granted. The plaintiff has agreed to withdraw his complaint against defendant Columbus. (See stipulation dated May 27, 2004.) The court notes that with exceptions not relevant here, the only remedy available to an employee injured in the course of employment against his employer is recovery under the Workers' Compensation Law. (See, Workers' Compensation Law §§ 11, 29[6]; Billy v Consolidated Mach. Tool Corp., 51 NY2d 152; Constantine v Premier Cab Corp., 295 AD2d 303.)

That branch of the motion by defendant Columbus which is for summary judgment dismissing the cross claims based on common law contribution and indemnification asserted against it by defendant RCN is denied. Third-party claims for indemnification and contribution against employers are prohibited by Worker's Compensation Law § 11 unless a third-party plaintiff can show that the employee sustained a "grave injury" or that a written agreement provides for the right to contribution and indemnification. (See, Guijarro v V.R.H. Const. Corp., 290 AD2d 485; Potter v M.A. Bongiovanni Inc., 271 AD2d 918.) The term "grave injury" is a "statutorily defined threshold for catastrophic injuries" (Kerr v

Black Clawson Co., 241 AD2d 686) "and includes only those injuries which are listed in the statute and determined to be permanent" (Ibarra v Equipment Control, Inc., 268 AD2d 13, 17.) The term "grave injury includes "permanent and severe facial disfigurement." (Workers' Compensation Law § 11; see, Congregation Nezach Israel v ABGG Const. Inc., 38 AD3d 332.) The party seeking summary judgment has the initial burden of demonstrating by admissible evidence that the employee's injuries were not "grave." (See, Fleming v Graham, 34 AD3d 525; Altonen v Toyota Motor Credit Corp., 32 AD3d 342; Marshall v Arias, 12 AD3d 423; Fitzpatrick v Chase Manhattan Bank, 285 AD2d 487.) In the case at bar, defendant Columbus failed to carry this burden because it failed to submit sufficient evidence showing that the plaintiff's facial scarring is not "permanent and severe." The medical records relied upon by defendant Columbus do not permit the court to conclude as a matter of law that the statutory threshold was not met.

That branch of the motion by defendant Columbus which is for summary judgment dismissing the cross claims based on contractual indemnification asserted against it by defendant RCN has been withdrawn.

That branch of the motion by defendant Columbus which is for summary judgment dismissing the cross claims asserted against it by defendant Sardoni is denied. First, there is little significance in the procedural argument made by defendant Columbus

concerning the impropriety of a third-party defendant's interposition of a cross claim against a defendant in the main action. Whatever the label placed upon the claims made by third-party defendant Sardoni against defendant Columbus, CPLR 1008 allows a third-party defendant all "the rights of a party adverse to the other parties in the action, including the right to counter-claim, cross-claim and appeal." (See, Giandana v Providence Rest Nursing Home, 8 NY3d 859.) Second, the plaintiff's medical records pertaining to his facial scarring do not eliminate the issue of fact concerning whether he sustained a "grave injury." (See, Workers' Compensation Law § 11; Congregation Nezach Israel v ABGG Const. Inc., 38 AD3d 332.)

Short form order signed herewith.

J.S.C.