Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

JERI SMITH,

Plaintiff,

-against-

THE CITY OF NEW YORK, MALCOM PIRNIE, INC., WDF, INC. and JOHN P. PICONE, INC.,

Defendants.

Index No: 705492/14

Motion Date: 2/4/16

Motion Seq. No.: 1

MALCOM PIRNIE INC.,

Third-party Plaintiff,

-against-

JOHN P. PICONE, NC.,

Third-party Defendant.

WDF INC

Second-Third-Party Plaintiff,

-against-

PRO SAFETY SERVICES, LLC and JOHN P. PICONE, INC.,

Second-Third-Party Defendant.

The following numbered papers read on this motion by Pro Safety Services, LLC (PSS), to dismiss the second third-party complaint, pursuant to CPLR 3211.

	Papers EFNumbered
Notice of Motion - Affidavits - Exhibits	58 - 62
Answering Affidavits - Exhibits	69 - 78, 91
Reply Affidavits	79 - 81

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff in this negligence/labor law action seeks damages for personal injuries sustained in an accident on February 6, 2014, at a construction site located at 127-01 Powells Cove Boulevard, in College Point, New York. Plaintiff, an employee of PSS at the time of the subject accident, alleges that she slipped and fell on a patch of black ice. While plaintiff alleges injury to her person, none of the injuries are alleged to be "grave" within the meaning of the Workers Compensation Law.

PSS had entered into a contract with WDF, Inc. (WDF), to provided a full-time Site Safety representative to WDF for the Tailman Island construction project, to observe and report any safety hazards to WDF. As per the contract between the parties, the hold harmless and indemnification provision was crossed-out and initialed by WDF and PSS. Additionally, under the contract, PSS assumed no responsibility for obtaining insurance naming WDF as an additional insured under any of its insurance policies procured for the project. PSS submits that it was simply required to obtain the requisite insurance, without any obligation to name WDF as an additional insured.

Based upon the absence of a "grave injury" and the absence of an indemnification provision in the contract, PSS moves to dismiss the second third-party complaint. WDF opposes the motion. Plaintiff submitted an opposition to the same in which she states that she "takes no position in the matter, but stresses that this motion should not affect the claims brought by the plaintiff against the defendants in the main action."

Discussion

"Workers' Compensation Law §11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a grave injury,' or the claim is based upon a provision in 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 or person asserting the cause of action for the type of loss

suffered' " (*Rodrigues v. N & S Building Contractors, Inc.,* 5 NY3d 427, 429 [2005]). "Grave injury is a statutorily-defined threshold for catastrophic injuries, and includes only those injuries that are listed in the statute and are determined to be permanent" (*Blackburn v Wysong & Miles Co.,* 11 AD3d 421, 422 [2004]; see, *Rego v 55 Leone Lane, LLC,* 56 AD3d 748 [2008]).

On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez,* 84 NY2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Breytman v Olinville Realty, LLC,* 54 A.D.3d 703, 864 N.Y.S.2d 70). A court is permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7) (*Clarke v Laidlaw Transit, Inc.*, 125 AD3d 920, 922 [2015]; *Sokol v Leader,* 74 AD3d 1180, 1181). "If the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one' " (*id.* at 1181–1182, quoting *Guggenheimer v Ginzburg,* 43 NY2d 268, 275).

Plaintiff set forth her injuries in her verified bill of particulars, and testified regarding them at her 50-h hearing. Her claimed injuries, however, do not include injuries which are listed in the statute. In plaintiff's Verified Bill of Particulars, plaintiff alleges that she sustained a left knee fracture (no surgery), medial meniscal tear (arthroscopic surgery on May 27, 2014), traumatic synovitis of the left shoulder (arthroscopic surgery on October 14, 2014), cervical disc disorder with radiculopathy (no surgery), lumbar disc herniation with radiculopathy (no surgery), small joint effusion of the scaphoid capitac joint (no surgery), and several other soft tissue injuries. None of these injuries are considered "grave" under WCL §11 and, in fact, WDF failed to allege in its second third-party complaint that any of plaintiff's injuries were "grave" as defined by the statute.

WDF alleges in their second third-party complaint that there exists a contractual obligation for indemnification/contribution, however, a review of the subject agreement between the parties reveals that no such provision exists. In fact, the parties specifically "crossed out" the indemnification/contribution provisions of the contract. Thus, the contract refutes WDF's claim for indemnification/contribution " 'based upon a provision in a written contract' " (*Rodrigues v N & S Bldg. Contrs., Inc.,* 5 NY3d 427, 429–430, 805 N.Y.S.2d 299, 839 N.E.2d 357, quoting Workers' Compensation Law § 11; *Persaud v Bovis Lend Lease, Inc.*, 93 A.D.3d 831, 833, 941 N.Y.S.2d 208, 210 (2012).

In sum, the materials establish that there is no legally cognizable exception to the provisions of Workers' Compensation Law § 11, which otherwise serve to bar the cause of

action for contribution and indemnification asserted here. Accordingly, the court grants that branch of PSS's motion which is to dismiss the complaint pursuant to CPLR 3211(a)(7) (*see New York Hosp. Med. Ctr. of Queens v Microtech Contracting Corp.*, 98 AD3d 1096, 1101 [2012], *aff'd*, 22 NY3d 501 [2014]).

The branch of the motion which is for sanctions is denied. "In its discretion, a court may award costs and financial sanctions against an attorney or party resulting from frivolous conduct" (*Flaherty v Stavropoulos,* 199 AD2d 301, 302, 605 N.Y.S.2d 99 [2d Dept. 1993], citing 22 NYCRR 130–1.1[a]). Rule 130–1.1(c)(1) provides that conduct is frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or if it "is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (*see generally Kornblum v Kornblum,* 34 AD3d 749, 751, 828 N.Y.S.2d 402 [2d Dept. 2006], citing *Kucker v Kaminsky & Rich,* 7 AD3d 491, 492, 776 N.Y.S.2d 72 [2d Dept. 2004], *lv denied* 3 NY3d 607, 785 N.Y.S.2d 24 [2004]). Here, although WDF does not prevail on the merits of the second third-party complaint, commencing the second third-party complaint was not an abuse of judicial process approaching sanctionable conduct (*see Parks v Leahey & Johnson, P.C.*, 81 NY2d 161, 165 [1993]). Accordingly, this court declines to award costs or impose sanctions under the facts presented.

Dated: April 18, 2016

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J.S.C.

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APR 20 2016
COUNTY CLERK
QUEENS COUNTY