

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Submitted - January 22, 2008

ROBERT A. SPOLZINO, J.P.
FRED T. SANTUCCI
DANIEL D. ANGIOLILLO
EDWARD D. CARNI, JJ.

2007-00135
2007-04123
2007-05900

DECISION & ORDER

Jose Ruiz, etc., plaintiff-appellant, v Kevin Griffin, et al., defendants, Old Navy, Inc., defendant third-party plaintiff-appellant; Crystal Run Company, L.P., defendant third-party defendant-respondent.

(Index No. 8302/04)

Brand, Brand, Nomberg & Rosenbaum, LLP, New York, N.Y. (Thomas S. Pardo of counsel), for plaintiff-appellant.

McAndrew, Conboy & Prisco, Woodbury, N.Y. (Mary C. Azzaretto of counsel), for defendant third-party plaintiff-appellant.

Cerussi & Spring, P.C., White Plains, N.Y. (Richard D. Bentzen of counsel), for defendant third-party defendant-respondent.

In an action, inter alia, to recover damages for wrongful death, (1) the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Orange County (Slobod, J.), dated November 27, 2006, as granted that branch of the motion of the defendant third-party defendant, Crystal Run Company, L.P., which was to dismiss the supplemental summons and amended verified complaint insofar as asserted against it, and the defendant third-party plaintiff, Old Navy, Inc., separately appeals, as limited by its brief, from so much of the same order as, in effect, granted that branch of the motion of the defendant third-party defendant which was to dismiss the

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third-party complaint, (2) the plaintiff and the defendant third-party plaintiff, Old Navy, Inc., separately appeal, as limited by their respective briefs, from so much of an order of the same court, dated April 5, 2007, as, upon granting their respective motions for reargument, adhered to the respective determinations in the order dated November 27, 2006, and (3) the plaintiff appeals, as limited by his brief, from so much of an order of the same court, dated May 23, 2007, as, upon reargument, adhered to so much of the determination in the order dated November 27, 2006, as granted that branch of the motion of the defendant third-party defendant, Crystal Run Company, L.P., which was to dismiss the supplemental summons and amended verified complaint insofar as asserted against it.

ORDERED that the appeals from the order dated November 27, 2006, are dismissed, as that order was superseded by the order dated April 5, 2007, made upon reargument; and it is further,

ORDERED that the appeal by the plaintiff from so much of the order dated April 5, 2007, as, upon reargument, adhered to that portion of the order dated November 27, 2006, granting that branch of the motion of the defendant third-party defendant, Crystal Run Company, L.P., which was to dismiss the supplemental summons and amended verified complaint insofar as asserted against it is dismissed, as that portion of the order appealed from was superseded by the order dated May 23, 2007, made upon reargument; and it is further,

ORDERED that the order dated April 5, 2007, is modified, on the law, by deleting the provision thereof which, upon reargument, adhered to so much of the order dated November 27, 2006, as, in effect, granted that branch of the motion of the defendant third-party defendant, Crystal Run Company, L.P., which was to dismiss the first and second causes of action in the third-party complaint and substituting therefor a provision, upon reargument, vacating so much of the order dated November 27, 2006, as granted that branch of the motion and thereupon denying that branch of the motion; as so modified, the order dated April 5, 2007, is affirmed insofar as appealed from by the defendant third-party plaintiff, Old Navy, Inc.; and it is further,

ORDERED that the order dated May 23, 2007, is reversed insofar as appealed from, upon reargument, so much of the order dated November 27, 2006, as granted that branch of the motion of the defendant third-party defendant, Crystal Run Company, L.P., which was to dismiss the supplemental summons and verified amended complaint insofar as asserted against it is vacated, that branch of the motion is denied, and the order dated April 5, 2007, is modified accordingly; and it is further,

ORDERED that one bill of costs is awarded to the appellants payable by the respondent.

The Supreme Court erred in granting that branch of the motion of the defendant third-party defendant, Crystal Run Company, L.P. (hereinafter Crystal Run), which was to dismiss the plaintiff's supplemental summons and amended verified complaint insofar as asserted against it. Since jurisdiction had been obtained over Crystal Run by virtue of the commencement of the third-party action by Old Navy, Inc. (hereinafter Old Navy), and Crystal Run's failure to assert any objection to

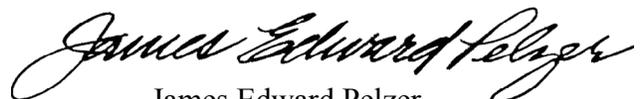
jurisdiction in its answer (see CPLR 1009, 2103[b]; *Doyle v Happy Tumbler Wash-O-Mat*, 113 AD2d 818, 820-821), the plaintiff was not obligated to serve a supplemental summons with the amended verified complaint (see *Patrician Plastic Corp. v Bernadel Realty Corp.*, 25 NY2d 599, 607; *Micari v Van Kesteren*, 121 AD2d 524, 524-525; see also *Guarino v 233 E. 69th St. Owners Corp.*, 14 AD3d 652, 653; *Doyle v Happy Tumbler Wash-O-Mat*, 113 AD2d at 820-821). Since there is no dispute that the amended verified complaint was timely (see CPLR 1009), the plaintiff's direct action against Crystal Run was properly commenced (see *Guarino v 233 E. 69th St. Owners Corp.*, 14 AD3d at 653; *Harlem Riv. Consumers Coop. v Manufacturers Hanover Trust Co.*, 68 Misc 2d 608, 609).

The Supreme Court properly dismissed the third cause of action in Old Navy's third-party complaint for contractual indemnification on the ground that the terms of the parties' lease contained no express provision (see *Morales v 569 Myrtle Ave., LLC*, 17 AD3d 418, 420; *Scally v Regional Indus. Partnership*, 9 AD3d 865, 869; *Aiello v Rockmor Elec. Enters., Inc.*, 255 AD2d 470, 472). Further, Old Navy cannot seek common-law indemnification from Crystal Run because its loss-prevention agents participated to some degree in the injury and its liability is not purely vicarious (see *Tulley v Straus*, 265 AD2d 399, 401; *Kagan v Jacobs*, 260 AD2d 442, 442-443). Similarly, the Supreme Court properly dismissed the fourth cause of action in Old Navy's third-party complaint. The parties' lease required Old Navy to procure liability insurance naming Crystal Run as an additional insured, but not the converse (see *Empire Ins. Co. v Insurance Corp. of New York*, 40 AD3d 686, 688; *Trapani v 10 Aerial Way Assocs.*, 301 AD2d 644, 647; cf. *Jung v Kum Gang, Inc.*, 22 AD3d 441, 443; *Taylor v Gannett Co. Inc.*, 303 AD2d 397).

However, the Supreme Court erred in granting that branch of Crystal Run's motion which was to dismiss the third-party complaint in its entirety. The third-party complaint set forth a claim for common-law contribution arising out of Crystal Run's duty to maintain the common area, which included the parking lot where the plaintiff's decedent suffered fatal injuries (see *Sutherland v Hallen Constr. Co.*, 183 AD2d 887, 890). Further, contrary to the holding of the Supreme Court, a claim for contribution, whether asserted in a third-party complaint or a separate action, accrues at the time of payment of the underlying claim (see *Bay Ridge Air Rights v State of New York*, 44 NY2d 49; *Blum v Good Humor Corp.*, 57 AD2d 911; CPLR 1401) and is subject to a six-year limitations period, which had not run (see CPLR 213). Consequently, Crystal Run was not entitled to dismissal of the third-party complaint in its entirety.

SPOLZINO, J.P., SANTUCCI, ANGIOLILLO and CARNI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court