

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

D33070
C/kmb

_____AD3d_____

Submitted - November 7, 2011

REINALDO E. RIVERA, J.P.
JOHN M. LEVENTHAL
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2009-07134

DECISION & ORDER

Mynor Folgar, plaintiff-respondent, v Vermeer Manufacturing Company, defendant-respondent, Taylor Rental, appellant, et al., defendant (and a third-party action).

(Index No. 28578/05)

Callahan & Fusco, LLC, New York, N.Y. (Matthew D. Stockwell of counsel), for appellant.

In an action to recover damages for personal injuries, the defendant Taylor Rental appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Farneti, J.), dated June 24, 2009, as denied those branches of its cross motion which were for summary judgment dismissing the complaint and all cross claims insofar as asserted against it by the defendant Vermeer Manufacturing Company, and for summary judgment on its cross claim for indemnification against the defendant Vermeer Manufacturing Company.

ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.

The defendant Taylor Rental failed to establish its prima facie entitlement to judgment as a matter of law by showing that it was not negligent in renting an allegedly defective stump grinder to the plaintiff's employer (*see Martin v Hacker*, 83 NY2d 1, 9 n 1; *Haight v Banner Metals*, 300 AD2d 356; *Johnson v Johnson Chem. Co.*, 183 AD2d 64, 69). Furthermore, Taylor Rental failed to establish its entitlement to judgment as a matter of law based on a lack of proximate cause, since it did not prove that the plaintiff did not use the allegedly defective stump grinder on

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the date of the accident (*see Restrepo v Rockland Corp.*, 38 AD3d 742).

Furthermore, Taylor Rental failed to establish its entitlement to judgment as a matter of law on its cross claim for indemnification against Vermeer Manufacturing Company (hereinafter Vermeer) (*see Gilbert v Kingsbrook Jewish Ctr.*, 4 AD3d 392, 393). Therefore, the Supreme Court properly denied those branches of Taylor Rental's cross motion which were for summary judgment dismissing the complaint and all cross claims insofar as asserted against it by Vermeer, and for summary judgment on the cross claim against Vermeer.

RIVERA, J.P., LEVENTHAL, BELEN and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court