Paccio v Whiting Door Mfg.
2007 NY Slip Op 33883(U)
November 26, 2007
Supreme Court, Nassau County
Docket Number: 8346-03/
Judge: Ute W. Lally
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SCAN

SHORT FORM ORDER mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 8
NASSAU COUNTY

DONALD PACCIO and AMY PACCIO,

Plaintiff(s),

-against-

WHITING DOOR MANUFACTURING and DEROSA TRUCK BODIES, INC,

Defendant(s).

MOTION DATE: 8/17/07
INDEX No. 8346/03
MOTION SEQUENCE NO:4

CAL. NO.: 2007H1458

WHITING DOOR MANUFACTURING,

Third Party Plaintiff(s),

-against-

CITY & SUBURBAN DELIVERY SYSTEMS, INC., JOYIA REFINISHERS,INC. and NEW YORK TIMES,

Third Party Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause..... 1-4
Answering Affidavits..... 5-10
Replying Affidavits.....11-14
Briefs: .....

Upon the foregoing papers, it is ordered that this motion by third-party defendant City & Suburban Delivery Systems, Inc. (hereinafter "City & Suburban") for an order pursuant to CPLR 3212

granting summary judgment in its favor is denied and by third party defendant New York Times for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing defendant Whiting Door Manufacturing's claim for contribution or indemnity is granted.

This is an action to recover money damages for personal injuries allegedly sustained as the result of defendants' negligence, breach of warranty, and strict products liability. Plaintiff Donald Paccio was an employee of third-party defendant City & Suburban, which is a subsidiary of third party defendant New York Times. Paccio's job was to deliver newspapers by truck. Paccio was assigned truck #8011, which he had been driving for a year before the accident.

The body of the truck was manufactured by defendant Derosa Trucking. The truck was equipped with a rear door which was designed and manufactured by defendant Whiting Door Manufacturing. The door, referred to as a "hinged truss door," is comprised of hollow aluminum panels, or "trusses," which are joined together with hinges. The trusses are fitted together horizontally, and the hinges allow for the trusses to be "rolled up" when the door is in the open position. The door is 85-90 inches wide, 75 inches high, and is raised and lowered manually.

When the door is rolled up, it is braced with a holding pin. In order to close the door, it is necessary to remove the pin and then pull the door down with a "pull down strap." The strap is made of nylon and is located at the bottom of the door on the right hand side. The strap is attached to the bottom truss with a mounting bracket and two rivets, known as "monobolts," which are driven into the door.

On March 22, 2003, as Paccio was pulling the door closed, the mounting bracket separated from the door, causing Paccio to fall off the truck's platform to the concrete floor below. Paccio landed on his head and left side, sustaining brain and spinal cord injury. Paccio was 42 years old at the time of the accident.

This action to recover for Paccio's injuries was commenced against Whiting Door and Derosa Trucking on May 29, 2003. Plaintiff Amy Paccio, Donald's wife, asserts a claim for loss of

services. Plaintiffs' theory is that the mounting bracket of the strap was defectively designed because it did not utilize "through fastening" to secure the mounting bracket to the door. When the roll up door was manufactured by Whiting, the monobolts went through only the exterior surface of the hollow door. Plaintiffs' expert is of the opinion that the monobolts should have gone through both the exterior and the interior surfaces and should have been reinforced with a washer, backing plate, or other strengthening material. According to the expert, the failure to secure the mounting bracket in this manner caused the rivets to loosen over time. Plaintiffs further assert that the manufacturer failed to give adequate warnings, instructing users to inspect the strap bracket periodically for tightness. Finally, plaintiffs allege that users should have been warned to reinstall the strap bracket with "through-fastening bolt attachments" and reinforcing material.

On or about July 18, 2005, Whiting Door commenced a third-party action against City & Suburban and Joyia Refinishers, Inc.[1] Whiting alleges that City & Suburban and Joyia made substantial and material alterations to the mounting bracket and strap which caused plaintiff's injury. More specifically, Whiting alleges that when the pull down strap was replaced, City & Suburban changed the method of fastening the strap to a "bolt and nut assembly." Whiting further alleges that the roll up door had warning labels when it left Whiting's possession, but the warning labels were subsequently changed to those of another manufacturer. In the third-party complaint, Whiting seeks contribution or indemnity from the third-party defendants.

On May 15, 2006, Whiting commenced a "fourth-party" action against New York Times Co.[2] In the supplemental third-party

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[1]Derosa has never appeared in the action.

[2]Properly speaking, a fourth-party complaint is filed not by the defendant/third-party plaintiff but rather by the third-party defendant(See CPLR 1011 and accompanying practice commentary). Thus, what Whiting actually did was to supplement its third-party complaint to name another third-party defendant(See CPLR 3025[b]). By adopting Whiting's terminology, the other parties have impliedly

complaint, Whiting seeks indemnity or contribution from New York Times on the ground that City & Suburban was under the direction and control of New York Times when the alterations to the mounting bracket and strap were made. Whiting further alleges that New York Times, as an owner of the truck, is vicariously liable for injuries caused by the negligent use or operation of the vehicle.

City & Suburban and New York Times are moving for summary judgment dismissing Whiting's third-party and supplemental third-party complaints. The third-party defendants assert that pursuant to Workers Compensation Law § 11, City & Suburban cannot be liable for contribution or indemnity because plaintiff did not sustain a "grave injury" within the meaning of the statute. Third-party defendants further argue that New York Times, as the corporate parent, is not liable for the torts of its wholly-owned subsidiary. Finally, third-party defendants argue that City & Suburban did not perform any alterations to the mounting bracket or pull down strap, and, in any event, contribution is not available to Whiting. Although plaintiffs have not asserted any claim against City & Suburban and New York Times directly, plaintiffs oppose third-party defendants' motion to dismiss to the extent that it is based upon lack of a grave injury.

CPLR § 1401 provides that with certain exceptions, including § 11 of the Workers' Compensation Law, two or more persons who are subject to liability for damages for the same personal injury may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought. A defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party, either because of a procedural bar or because of a substantive legal rule, such as workers' compensation(*Raquet v. Braun* , 90 NY2d 177, 182). [3] A

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stipulated to its procedure. Nonetheless, in the interests of clarity, the court will refer to Whiting's pleading as a supplemental third-party complaint and City & Suburban and New York Times as third-party defendants in the balance of this decision.

[3]Pursuant to §§ 10-11 of the Workers' Compensation Law, an employer's liability for an-on-the job injury is generally limited

contribution claim can be made even when the contributor has no duty to the injured plaintiff(Id). In *Raquet*, the Court of Appeals stated that "in such situations," i.e. when the contributor owes no duty to plaintiff, a claim of contribution may be asserted if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable. Whether the contributor owes a duty to the defendant or to the injured plaintiff, the "critical requirement" for apportionment by contribution is that "the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought"(Id at 183). Thus, contribution is available whether the culpable parties are allegedly liable for the injury under the same or different theories(Id). The remedy of contribution may be invoked against concurrent, successive, independent, alternative, and even intentional tortfeasors(Id).

Where the manufacturer of a defective product is sued for products liability, contribution is available from the employer of the injured party, subject to the limitations of the Workers' Compensation Law, and provided that a breach of duty by the employer had a part in causing or augmenting the injury(See, *Cooney v. Osgood Machinery, Inc.*, 81 NY2d 66, 70). The court rejects Whiting's argument that New York Times was under a duty to plaintiff by virtue of the vicarious liability provided by § 388 of the Vehicle and Traffic Law. The certificate of title covering truck # 8011 is *prima facie* evidence that City & Suburban, not New York Times, is the owner of the vehicle(*Van Wart v. Van Wart, Inc.*, 221 AD2d 624). Whiting's evidence concerning the relationship between New York Times and its subsidiary is insufficient to rebut this presumption. Moreover, the liability imposed by VTL § 388 arises without regard to any duty toward the plaintiff or control over the operator of the vehicle(*Pulka v. Edelman*, 40 NY2d 781, 784). Because New York Times was not under a duty toward plaintiff, it may be liable for contribution only by virtue of its relationship to City & Suburban.

As plaintiff's employer, City & Suburban was under a duty to provide plaintiff with a reasonably safe workplace(*England v.Vacri Construction Corp.*, 24 AD3d 1122, 1124). City & Suburban was

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to workers' compensation benefits.

under such a duty despite the fact that plaintiff's exclusive remedy for its violation is Workers' Compensation. If this duty was violated, City & Suburban may provide contribution to the extent not limited by the Workers' Compensation Law.

Contrary to City & Suburban's position, Whiting's defense of material alteration is not incompatible with their contribution claim. In support of material alteration, Whiting relies upon deposition testimony to the effect that City & Suburban had a practice of replacing the rivets, and perhaps the mounting bracket as well, with a bolt and nut assembly.[4] City & Suburban counters that the truck maintenance records do not indicate that the pull down strap was replaced prior to the accident.[5] Thus, there must be a trial to determine whether there was a material alteration of the mounting bracket, and if not whether City & Suburban is liable for contribution.

Furthermore, while material alteration precludes liability for design defect, it is not necessarily a complete defense to a failure to warn theory(*Liriano v. Hobart Corp.*, 92 NY2d 232, 236 [1998]). Thus, with respect to plaintiff's failure to warn theory, if Whiting can prove that City & Suburban breached its duty to provide a reasonably safe workplace, contribution is available, subject to the limitations of the Workers' Compensation Law.

Workers' Compensation Law § 11 provides that "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury'...." The statute defines the term "grave injury," as meaning only certain conditions, including an "acquired injury to the brain caused by an external physical force resulting in

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[4]See deposition of Stuart Epper, City & Suburban's fleet manager, Whiting Ex. E at 31-32.

[5]Deposition of Stuart Epper at 53.

permanent total disability"(Workers Compensation Law § 11).[6] In enacting § 11, the legislative intended to narrow tort exposure for employers while also protecting the interests of injured workers(*Rubeis v. The Aqua Club, Inc.*, 3 NY3d 408, 417 [2004]). Thus, the injuries enumerated as "grave" were deliberately both narrowly and completely described(Id at 415-16). In *Rubeis*, the Court of Appeals held that for a brain injury to result in permanent total disability, it must render the employee incapable of employment in any capacity. However, the employee need not be unable to engage in the functions of daily living or be reduced to a vegetative state(Id at 416-17).

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact(*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers(Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial(*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324).

In support of their motion for summary judgment, third party defendants submit the affirmation of Dr. Joyce Mesh-Spinello, who is an expert in vocational rehabilitation and apparently a psychologist. Dr. Mesh-Spinello reviewed plaintiff's medical records and conducted an evaluation of him on March 16, 2007. According to Dr. Mesh-Spinello, Paccio displayed low average cognitive abilities, impaired auditory attention, poor mental

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[6]The other grave injuries which will render the employer liable for contribution or indemnity are: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, and loss of an index finger(Workers' Compensation Law § 11).

flexibility and visuospatial and sequencing abilities, and delayed memory and recognition. Paccio had also been diagnosed as having adult attention deficit hyperactivity disorder ("ADHD"). However, he was aware of his attention and memory deficits. Dr. Mesh-Spinello noted that occupational therapy reports indicated that Paccio had intact sensation, coordination, balance, endurance, and communication. A neuropsychological evaluation indicated intact orientation, comprehension, mood, verbal ability and visual perception.[7]

Dr. Mesh-Spinello noted that Paccio was able to drive a car, travel independently by public transportation, and that he arrived alone for his examination. The doctor considered Paccio to be alert, responsive, and personable. Paccio reported neck, back, shoulder, and knee pain, left hand weakness, and impaired night vision. However, the Doctor observed that he was ambulatory without any assistive device and that he walked with an unremarkable gait. Dr. Mesh-Spinello concluded that while Paccio was unable to return to work as a delivery driver, he might qualify for modified employment with decreased exertion requirements. The doctor was of the view that with vocational rehabilitation Paccio could obtain sedentary, manual work in a supportive environment. As examples of this type of work, Dr. Mesh-Spinello suggested that Paccio could find work as a wrapper, packer, ticketer, tagger, collator, or reproduction graphics technician. The court concludes that third-party defendants have established prima facie that Paccio is capable of employment. Accordingly, the burden shifts to plaintiffs to show a triable issue as to whether Paccio suffered a grave injury within the meaning of the Workers' Compensation Law.

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[7]It is unclear from Dr. Mesch-Spinello's affirmation whether she conducted the neuropsychological evaluation herself or simply relied upon the evaluation which was provided to her. In any event, because the evaluation appears to be the kind of material which is accepted in the psychology profession as reliable in forming a professional opinion, it was not necessary to include the evaluation with Dr. Mesh-Spinello's affirmation(See *People v. Jones*, 73 NY2d 427, 430 [1989]).

In opposition to third party defendants' motion, plaintiffs submit the affidavit of Dr. Marcia Knight, a clinical psychologist and an expert in the field of neuropsychology. Dr. Knight reviewed Paccio's hospital and medical records, along with other material, and interviewed both Paccio and his wife on April 10, 2006. Dr. Knight's affidavit is dated July 31, 2007. Third-party defendants argue that the affidavit is insufficient to carry plaintiffs' burden of proof because it is not based on a recent examination. On a summary judgment motion under the No-Fault Law, if defendant's physicians report that plaintiff suffers from no orthopedic or neurological disability or impairment, plaintiff is required to come forward with objective medical evidence, based upon a recent examination, to carry his burden to show a "serious injury"(*Farozes v. Kamran*, 22 AD3d 458).

The question of "serious injury" ordinarily turns on whether subjective complaints of pain can be objectively verified. By contrast, because most categories of grave injury involve loss of use of a body part, or loss of the part itself, most claims of grave injury are easily objectively verified. Even with respect to head injuries, objective findings should ordinarily be readily available to determine whether the injury qualifies as a grave injury under the Workers Compensation Law.[8] Moreover, the No-Fault Law was enacted in response to the high cost of automobile liability insurance relative to the compensation of victims and was designed to "weed out" frivolous claims(See *Toure v. Avis Rent a Car Systems*, 98 NY2d 345, 350 and *Montgomery v. Daniels*, 38 NY2d 41, 49-51). Section 11 of the Workers' Compensation Law was also enacted as part of a comprehensive reform intended to reduce insurance costs(*Rubeis v. The Aqua Club, Inc.*, supra, 3 NY3d at 417). However, there does not appear to be a comparable history of frivolous workers compensation claims. Thus, rules of practice designed to weed out frivolous serious injury claims under No-Fault should not be mechanistically applied to claims of grave injury under the Workers Compensation Law. Therefore, the court will

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[8]Paccio was given a brain scan on March 25, 2005. The scan shows a "bilateral frontal decrease extending across 5 slices." Statistical analysis based on the scan shows "reduced relative metabolic rate in the frontal pole and adjacent white matter areas." See plaintiffs' Ex. F.

consider Dr. Knight's affidavit although it is not based upon a recent examination.

Dr. Knight states that the accident resulted in Paccio's body being weakened on the left side and his manual dexterity being impaired. Since Dr. Knight noted that Paccio's left side is "dominant," he is presumably left-handed. Dr. Knight further noted that Paccio experienced chronic double vision and lost his peripheral vision. Dr. Knight was of the opinion that Paccio's problem-solving ability was impaired as well as his ability to plan and organize effectively. Dr. Knight attributed these impairments to a dysfunction in the frontal lobe area of the brain stemming from the head injury.[9] Dr. Knight noted that Paccio's speech was slow, he misused words, and his memory for dates and numbers was poor. The doctor also noted that at times Paccio required the repetition of questions. Although the doctor noted that Paccio's IQ of 87 was in the low average range, there is no indication of his IQ score before the accident. Nonetheless, Dr. Knight was of the opinion that Paccio's cognitive and physical impairments were attributable to the brain injury. Dr. Knight was of the further opinion that as a result of these impairments, Paccio had a diminished self-image and sense of self-esteem. The doctor noted that Paccio displayed a bland affect, apathy, irritability, anxiety, and depression, all of which affected his ability to function. Based upon her interview and evaluation, Dr. Knight concluded that Paccio was disabled from obtaining competitive, or indeed any, gainful employment.

If the fact finder concludes that Paccio, despite his cognitive impairment, is capable of menial employment, City & Suburban will not be liable for contribution or indemnity. Nonetheless, the court's role is issue-finding rather than issue-determination on a summary judgment motion(*Ferrante v. Amer. Lung Ass'n*, 90 NY2d 623, 630). Based upon the testimony of Dr. Knight, a jury could find that Paccio's injury to the brain resulted in a psychological condition rendering him incapable of employment in any capacity. The court concludes that plaintiffs have carried

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[9]The frontal lobes are the area of the brain responsible for a number of thinking processes and are stimulated by tasks of attention and rule learning(See www.webmd.com.)

their burden of showing a triable issue as to whether Paccio's brain injury resulted in permanent total disability. Accordingly, third-party defendant City & Suburban's motion for summary judgment dismissing defendant Whiting's claim for contribution or indemnity is denied.

As a general rule, corporations are treated as having an existence separate and distinct from that of their shareholders(*Billy v. Consolidated Machine Tool Corp.*, 51 NY2d 152, 163). Thus, shareholders are generally not liable for the acts of the corporation, and a corporation is generally not liable for the torts of its wholly-owned subsidiary. However, liability may be assigned to the parent corporation to prevent fraud or achieve equity, if the parent has intervened in the management of the subsidiary to the extent that the subsidiary's "paraphernalia of incorporation, directors and officers" have been completely ignored(Id). Additionally, as an extension of the concept of products liability, liability may be imposed on a successor corporation if 1) it expressly or impliedly assumed the predecessor's tort liability, 2) there was a consolidation or merger of seller and purchaser, 3) the purchasing corporation is a mere continuation of the selling corporation, or 4) the transaction is entered into fraudulently to escape tort obligations(*Grant-Howard Associates* v. *General Housewares Corp.*, 63 NY2d 291, 296).

Imposing liability on the successor corporation in these circumstances allows for the burden of consumer injuries to be borne by the manufacturer, who can transfer the costs to the general public as a component of the selling price(Id).

In the case at bar, Whiting seeks to impose liability not on a parent or successor of the manufacturer but rather on a remote parent of the employer of the injured party. Third-party defendants have established that City & Suburban is owned by New York Times Capital Incorporated, which is itself a wholly-owned subsidiary of New York Times Company. Third-party defendants have further established *prima facie* that there has been no ignoring of the corporate formalities as between City & Suburban and its parent companies. Accordingly, the burden shifts to Whiting to offer evidence as to intervention in City & Suburban's management or other reason why imposition of liability on New York Times is necessary to prevent fraud or achieve equity.

Whiting offers deposition testimony to the effect that City & Suburban employees receive training from the New York Times and also receive fringe benefits from trust funds administered by the company. The court notes that there is no evidence that City & Suburban is unable to pay its share of the judgment, in the event that tort liability is found. The court concludes that Whiting has failed to carry its burden as to a need to impose liability on New York Times in order to prevent fraud or achieve equity. Accordingly, third-party defendant New York Times' motion for summary judgment dismissing defendant Whiting's claim for contribution or indemnity is granted.

Dated: NOV 26 2007

J.S.C.

ENTERED

NOV 29 2007

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