

Jaspaul v Toyota Lift of N.Y.

2016 NY Slip Op 32071(U)

September 29, 2016

Supreme Court, Queens County

Docket Number: 1944/2011

Judge: David Elliot

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

DEO JASPAUL,
Plaintiff(s)
-against-

Index
No. 1944 2011

Motion
Date June 22, 2016

TOYOTA LIFT OF NEW YORK a/k/a TOYOTA
LIFT OF NEW YORK, INC., THE AIR GROUP,
INC., MOBILE AIR TRANSPORT, INC., AND
FORK LIFT HEADQUARTERS, INC.,
Defendant(s).

Motion
Cal. No. 69

Motion
Seq. No. 15

MOBILE AIR TRANSPORT, INC., and
THE AIR GROUP, INC.,
Third-Party Plaintiff(s)
-against-

KAWAL TRUCKING, INC., and SUMMIT
HANDLING SYSTEMS, INC.,
Third-Party Defendant(s).

HI-LIFT OF NEW YORK INC. d/b/a TOYOTA
LIFT OF NEW YORK (i/p/a TOYOTA LIFT OF
NEW YORK a/k/a TOYOTA LIFT OF NEW
YORK, INC.) and FORK LIFT HEADQUARTERS,
INC.,
Third-Party Plaintiff(s)
-against-

SUMMIT HANDLING SYSTEMS, INC.,
Third-Party Defendant(s).

The following papers read on this motion by third-party defendant Summit Handling Systems, Inc. (Summit), pursuant to CPLR 2221 (e) granting it leave to renew its motion for summary judgment or, alternatively, extending the time to file a motion for summary judgment pursuant to CPLR 3212 (a) and, pursuant to CPLR 3212, dismissing the third-party complaint by defendants/third-party plaintiffs Mobile Air Transport, Inc. (Mobile Air) and The Air Group (Air Group), insofar as asserted against third-party defendant Summit.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-7
Reply Affidavits	8-10

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

Plaintiff commenced this action on January 26, 2011 alleging he suffered personal injuries during the course of his employment as a dock worker for Kawal Trucking Inc. (Kawal),¹ a freight/cargo shipping company. Plaintiff alleges that, on February 19, 2008, while he was working at the loading docks at a warehouse facility operated by defendant Air Group, a wholly owned subsidiary of defendant Mobile Air, he was struck in the left foot and ankle by a defective forklift operated by Rajkumar Deonarine (“Raj”), his coworker, who is now deceased. Plaintiff also alleges that the forklift was leased by defendants Mobile Air and Air Group from defendants Toyota Lift of New York a/k/a Toyota Lift of New York, Inc. (Toyota Lift) and Fork Lift Headquarters, Inc. (Fork Lift Headquarters), for use on the premises by his employer and coworkers. He further alleges that defendants failed to provide him with a safe place to work, negligently maintained the forklift in a defective condition, and failed to properly train Raj in the operation of the forklift. Plaintiff asserts causes of action based upon negligence and violations of Labor Law §§ 200, 240(1), and § 241(6) against defendants.

Defendants Mobile Air and Air Group served a joint answer and subsequently, served a third-party complaint against third-party defendant Kawal. Defendants Hi-Lift of New York, Inc. d/b/a Toyota Lift of New York (sued herein as Toyota Lift of New York a/k/a Toyota Lift of New York, Inc.) (Hi-Lift) and Fork Lift Headquarters served a joint answer, and thereafter Hi-Lift and Fork Lift Headquarters filed a third-party complaint against third-party defendant Summit asserting claims for contribution, indemnification and breach of

1. By order dated January 18, 2014, the third-party complaint asserted against third-party defendant Kawal was dismissed.

contract. Third-party defendant Summit served a third-party answer to the third-party complaint of Hi-Lift and Fork Lift Headquarters.

Plaintiff sought leave to amend his complaint to add third-party defendant Summit as a direct defendant, which motion was denied by order dated February 4, 2014. By the same order, the court denied the motion by defendants Mobile Air and Air Group for leave to file and serve a third-party action against Summit, and granted third-party defendant Summit's motion for summary judgment dismissing the third-party claims asserted against it by third-party plaintiffs Hi-Lift and Fork Lift Headquarters.

On April 30, 2014, Mobile Air and Air Group commenced the action entitled *Mobile Air Transport, Inc. v Summit Handling Systems, Inc.* (Supreme Court, Queens County, Index No. 6807/2014) (*Mobile Air* action) against Summit, asserting claims based upon contribution, indemnification and breach of contract. Summit moved to dismiss the complaint therein pursuant to CPLR 3211 (a) based upon res judicata grounds, which motion was granted by order of the Supreme Court dated December 23, 2014 (Raffaele, J.). By Decision and Order of the Appellate Division, Second Department, dated November 4, 2015, however, the order of the Supreme Court was reversed on the law, and the motion to dismiss the complaint was denied (133 AD3d 576 [2015]).

Mobile Air and Air Group moved to consolidate the *Mobile Air* action with this action, which was granted by order dated January 29, 2016 and entered on February 8, 2016. By order dated April 12, 2016, a motion – which was filed on the *Mobile Air* action – by Summit for summary judgment dismissing the complaint asserted against it by Mobile Air and Air Group was denied for failure to establish that issue had been joined.

Defendants/third-party plaintiffs Mobile Air and Air Group oppose the motion. Plaintiff has not appeared in relation thereto.

It appears at this juncture that the remaining claims in this action are plaintiff's claims against Mobile Air and Air Group, Mobile Air and Air Group against Summit, and Summit's counterclaims against Mobile Air and Air Group.

With respect to that branch of the motion by third-party defendant Summit for leave to renew its prior motion for summary judgment dismissing the now third-party complaint asserted against it by now third-party plaintiffs Mobile Air and Air Group, the prior motion was denied on the ground that third-party defendant Summit had failed to demonstrate issue had been joined (CPLR 3212 [a]). In fact, third-party defendant Summit had yet to serve an answer to the third-party complaint of third-party plaintiffs Mobile Air and Air Group and consequently, the prior motion for summary judgment was premature (CPLR 3212[a]).

Subsequent to the entry of the April 12, 2016 order, third-party defendant Summit served an answer to such third-party complaint, asserting various affirmative defenses and counterclaims for indemnification and contribution, and offers this responsive pleading in support of the instant motion. Consequently, that branch of the motion by third-party defendant Summit for leave to renew the motion for summary judgment dismissing the third-party complaint by third-party plaintiffs Mobile Air and Air Group insofar as asserted against Summit is granted (*see Miller v Nationwide Mut. Fire Ins. Co.*, 92 AD2d 723 [1983]; *Matter of Ruth M. Berger v Lipkowitz Property, Inc.*, 57 AD2d 817 [1977]).

That branch of the motion by third-party defendant Summit for leave to extend the time in which to make the motion for summary judgment is denied as moot. A motion for summary judgment may be made by any party to an action after the joinder of issue (CPLR 3212 [a]). The court may set a date after which no such motion may be made, provided that the date is no earlier than 30 days after the filing of the note of issue (*id.*). In this case, the preliminary conference order dated June 22, 2011 directed that any motion for summary judgment be made no later than 120 days after the filing of the note of issue. By order dated January 11, 2016, the court directed that a new note of issue be served and filed by February 15, 2016. Plaintiff filed the note of issue on February 4, 2016, and this motion was made on May 16, 2016. The instant motion, therefore, is timely made.

It is well established that the proponent of a summary judgment motion “must 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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In their third-party complaint, defendants/third-party plaintiffs Mobile Air and Air Group assert as a first cause of action that, if plaintiff recovers a judgment against them, they are entitled to contribution and/or indemnification in whole or in part over and against third-party defendant Summit. As a second cause of action, defendants/third-party plaintiffs Mobile Air and Air Group allege they entered into a written contract with Toyota Lift of New York, concerning the maintenance of the forklift referenced in plaintiff’s complaint. They also allege that Summit assumed the “handling” of that contract. They further allege that third-party defendant Summit agreed and assumed the service, maintenance and repair of the forklift which plaintiff claims caused the accident. Defendants/third-party plaintiffs Mobile Air and Air Group additionally allege that, if it is found that plaintiff was injured as the result of improper service, maintenance and repair of the forklift in question, then they “will allege” that Summit breached its contract with them by failing to properly service, maintain and repair that forklift.

In support of its motion for summary judgment, third-party defendant Summit argues it is entitled to summary judgment dismissing the claims of defendants/third-party plaintiffs Mobile Air and Air Group asserted against it based upon the “law of the case” doctrine. Third-party defendant Summit contends that the claims of third-party plaintiffs Mobile Air and Air Group are identical to those which were asserted against it by Hi-Lift and Fork Lift Headquarters, and thereafter dismissed pursuant to the order dated February 4, 2014. Defendants/third-party plaintiffs Mobile Air and Air Group argue that, by virtue of the decision and order of the Appellate Division in the *Mobile Air* action, and the consolidation of that action with the instant action, their claims against third-party defendant Summit must be considered valid.

Under the law of the case doctrine, judicial determinations made during the course of a litigation before final judgment is entered may have preclusive effect provided that the parties had a full and fair opportunity to litigate the initial determination (*see Marcus Dairy, Inc. v Jacene Realty Corp.*, 27 AD3d 427 [2006], *lv to appeal dismissed* 7 NY3d 783 [2006]; *Purpura v Purpura*, 21 AD3d 542 [2005]; *Stone v Stone*, 19 AD3d 404 [2005]; *Engel v Eichler*, 300 AD2d 622 [2002]). At the time of the issuance of the February 4, 2014 order, defendants Mobile Air and Air Group had no direct claims against third-party defendant Summit, and the court denied their motion for leave to commence a third-party action against Summit because they failed to offer any good cause for their failure to bring a third-party action within 30 days following the completion of depositions, as was required pursuant to the compliance conference order dated March 26, 2012. The court made no finding relative to the merits of the proposed claims of Mobile Air and Air Group against Summit based upon contribution, indemnification and breach of contract. Nor did the Appellate Division. The Appellate Division simply determined that the commencement of the *Mobile Air* action was not barred by the doctrine of res judicata, insofar as the denial of the motion by Mobile Air and Air Group in this action to assert a direct claim against Summit was not on the merits or with prejudice. As a consequence, the law of the case doctrine is inapplicable to mandate summary judgment dismissing the claims by third-party plaintiffs Mobile Air and Air Group against third-party defendant Summit for contribution, indemnification and breach of contract. In addition, that the court granted the consolidation of the *Mobile Air* action with this action does not mean the court concluded thereby that the claims asserted by defendants/third-party plaintiffs Mobile Air and Air Group against third-party defendant Summit are valid claims. Rather, the court determined that the two lawsuits shared common questions of law and fact and the interests of justice and judicial economy warranted the relief sought.

To the extent defendants/third-party plaintiffs Mobile Air and Air Group make a claim against third-party defendant Summit for “indemnification,” third-party plaintiffs Mobile Air and Air Group concede they make no claim for contractual indemnification against Summit.

They admit the absence of a written contractual agreement between them and Summit whereby Summit agreed to indemnify them. Third-party plaintiffs Mobile Air and Air Group, however, assert that they are entitled to common-law indemnification against Summit.

With respect to the branch of the motion by third-party defendant Summit for summary judgment dismissing the third-party claim asserted against it by defendants/third-party plaintiffs Mobile Air and Air Group for common-law indemnification, a party's right to indemnification may be implied "based upon the law's notion of what is fair and proper as between the parties" (*Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 [1990]). "Implied[, or common-law,] indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other" (*id.*, citing *McDermott v City of New York*, 50 NY2d 211, 216–217 [1980]; *see also Rosado v Proctor & Schwartz*, 66 NY2d 21, 24 [1985] [indemnity may be implied "to prevent a result which is regarded as unjust or unsatisfactory" and "is frequently employed in favor of one who is vicariously liable for the tort of another" (internal quotation marks and citations omitted)]). "Common-law indemnification is generally available 'in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer' (*Mas*, 75 NY2d at 690; *see D'Ambrosio v City of New York*, 55 NY2d 454, 460 [1982])" (*McCarthy v Turner Const., Inc.*, 17 NY3d 369, 375 [2011]). Plaintiff's claims against defendants Hi-Lift and Fork Lift Headquarters have been dismissed by prior order dated January 31, 2014. But as to defendants/third-party plaintiffs Mobile Air and Air Group, there has been no finding yet with respect to their respective liability, if any, for the accident. Furthermore, third-party defendant Summit has failed to establish its prima facie entitlement to summary judgment dismissing the cause of action asserted against it by defendants/third-party plaintiffs Mobile Air and Air Group for common-law indemnification because it has failed to show that liability of Mobile Air and Air Group to plaintiff would be based on their own actual wrongdoing as opposed to a theory of vicarious liability for Summit's conduct (*see Dreyfus v MPCC Corp.*, 124 AD3d 830 [2015]; *U.S. Fire Ins. Co. v Raia*, 121 AD3d 970 [2014]). In any event, Summit has not established, as a matter of law, that it is free from wrongdoing, as the record reveals, inter alia, that plaintiff's expert in forklift maintenance opined that the forklift tires should have been replaced as a matter of regular maintenance but were not during the time that Summit assumed full service and maintenance responsibilities for Hi-Lift (*see* January 31, 2014 and February 4, 2014 orders of this court). As such, that branch of the motion by third-party defendant Summit for summary judgment dismissing the third-party claim asserted against it by defendants/third-party plaintiffs Mobile Air and Air Group for common-law indemnification is denied.

Third-party defendant Summit also has failed to establish its prima facie entitlement to judgment as a matter of law dismissing the cause of action for common-law contribution

asserted against it by defendants/third-party plaintiffs Mobile Air and Air Group. Contribution may be sought when a party is subject to liability for damages for the same personal injury as a defendant, based on either breach of a duty owed directly to the plaintiff or breach of some duty owed to the defendant (*see* CPLR 1401; *Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 71 NY2d 599 [1988]; *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559 [1987]; *Garrett v Holiday Inns*, 58 NY2d 253 [1983]; *Duenas v North Harbor Co.*, 278 AD2d 193 [2000]). The evidence submitted by third-party defendant Summit in support of its motion does not eliminate triable issues of fact as to the relative liability of the parties (*see Kinsky v Escada Hair Salon, Inc.*, 113 AD3d 656 [2014]; *Duenas*, 278 AD2d at 193). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Thus, that branch of the motion by third-party defendant Summit which is for summary judgment dismissing the cause of action for common-law contribution asserted against it by defendants/third-party plaintiffs Mobile Air and Air Group is denied (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

With respect to the claim by defendants/third-party plaintiffs Mobile Air and Air Group against third-party defendant Summit based upon breach of contract, they have not alleged any damages separate and apart from those sought in the contribution and indemnification claims. Under such circumstances, the third-party claim for alleged breach of contract asserted against third-party defendant Summit by defendants/third-party plaintiffs Mobile Air and Air Group is in effect, a duplication of those third-party claims for contribution and indemnification. That branch of the motion by third-party defendant Summit for summary judgment dismissing the cause of action asserted against it by defendants/third-party plaintiffs Mobile Air and Air Group based upon breach of contract is granted.

Accordingly, that branch of Summit's motion for an order granting it leave to renew its motion for summary judgment is granted. The branch of the motion for an order extending its time to file a motion for summary judgment is denied as moot. The branch of the motion for an order granting it summary judgment dismissing the third-party complaint of Mobile Air and Air Group is granted only to the extent that their cause of action based upon breach of contract is dismissed, and is otherwise denied.

Dated: September 29, 2016

J.S.C.