

**Blackburn v Wysong and Miles Co.**

2003 NY Slip Op 30079(U)

February 13, 2003

Supreme Court, Suffolk County

Docket Number: 1002800/1999

Judge: William L. Underwood

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM. PART XIV - SUFFOLK COUNTY**

**PRESENT:**

**Hon. WILLIAM L. UNDERWOOD, JR.**

PAUL BLACKBURN,

Plaintiff(s),

-against-

WYSONG AND MILES CO., H. WEISS & CO.,  
AR MACHINERY CO., and STEIN  
INDUSTRIES, INC.,

Defendant(s).

WYSONG & MILES COMPANY,

Third-Party Plaintiff,

-against-

STEIN INDUSTRIES, INC.,

Third-party Defendant.

**ORIG. RETURN DATE: 09/26/02**

**FINAL RETURN DATE: 11/27/02**

**MTN. SEQ. #: 005-MG**

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Upon the following papers numbered 1 to 29 read on this motion to dismiss third party complaint  
Notice of Motion/Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers \_\_\_\_\_;  
Answering Affidavits and supporting papers 10-22; 23; 25-27; Replying Affidavits and supporting papers 28; 29; Other  
\_\_\_\_\_; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that defendant/third party defendant Stein Industries, Inc., motion to  
dismiss the third party complaint is granted under the circumstances presented herein.

(Workers Compensation Law 11).

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This is an action for personal injuries allegedly sustained by the plaintiff Paul Blackburn on May 21, 1999, an employee of defendant/third party defendant Stein Industries, Inc. ("Stein") while operating a power press brake machine. By decision and order of this Court dated July 20, 2001, this matter was consolidated with the action commenced under Index No. 12940-00. A third action commenced by the plaintiff under Index No. 05609-02 was consolidated by stipulation dated July 26, 2002. Defendant/third party plaintiff Wysong & Miles Company, the alleged designer of the subject brake press machine, commenced a third party complaint against Stein seeking indemnification and contribution based upon the plaintiffs employment with Stein.

Workers Compensation Law section 11 provides **as** follows:

*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 which shall mean only one or more of the following: 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, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

In **support** of the instant motion Stein has proffered the affirmation of Thomas J.

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Palmieri, M.D., a hand surgeon, dated October 8, 2001, who examined the plaintiff on that same date. In said affirmation Dr. Palmieri summarized the plaintiffs injuries as “amputations at various lengths of all fingers, except the left little finger, which is uninjured.”

“Workers Compensation Law section 11 was amended in 1996 to permit an employer to be held liable for contribution or indemnity only where the third-party plaintiff proves through competent medical evidence that the employee sustained a ‘grave injury’ (see, *Curran v Auto Lab Sew. Ctr.*, 280 AD2d 636). The term ‘grave injury’ has been defined as a ‘statutorily defined threshold for catastrophic injuries’ ... and includes only those injuries which are listed in the statute and determined to be permanent (*Zbarra v. Equipment Control*, 268 AD2d 13, 17-18, quoting *Kerr v Black Clawson Co.*, 241 AD2d 686).” (*McCoy v. Queens Hydraulic Co., Inc.*, 286 A.D.2d 425, 729 N.Y.S.2d 733 [2<sup>nd</sup> Dept. 2001]). Said statute provides that the “loss of multiple fingers” constitutes a “grave injury”. In *Castro v. United Container Machinery Group, Inc.*, 96 N.Y.2d 398, 736 N.Y.S.2d 287 [2001], the Court held that “the term ‘loss of multiple fingers’ cannot be sensibly read to mean partial loss of multiple fingers. Words in a statute are to be given their plain meaning without resort to forced or unnatural interpretations. (see, *McKinney's Cons Laws of NY, Book 1, Statutes § 232; Majewski v Broadalbin-Perth Cent, School Dist.*, 91 NY2d 577, 583). As a matter of standard English usage, the word ‘finger’ means the whole finger, not just its tip.”


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It is clear that the injuries sustained by the plaintiff as described in Dr. Palmieri's affirmation do not meet the threshold of grave injury. Accordingly, based upon the foregoing and the circumstances presented herein, the third party complaint and cross claims of defendant Wysong **as** to defendant Stein **are** hereby dismissed.

This shall constitute the decision and order of the **Court**.

*So* ordered.

**Dated: February 13,2003**

  
\_\_\_\_\_  
**HON. WILLIAM L. UNDERWOOD, JR.**  
**J.S.C.**

**CHECK ONE:**  FINAL DISPOSITION

NON-FINAL DISPOSITION