

Blackburn v Wysong and Miles Co.

2003 NY Slip Op 30080(U)

October 24, 2003

Supreme Court, Suffolk County

Docket Number: 1002800/1999

Judge: William L. Underwood

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

COPY

SHORT FORM ORDER

INDEX NO. 28002-99

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 AND MILES CO.,

Third-party Plaintiff,

-against-

STEIN INDUSTRIES, INC.,

Third-party Defendant.

ORIG. RETURN DATE: 07/02/03
FINAL RETURN DATE: 08/27/03
MTN. SEQ. # 006-MD
007-MD

PLTF'S/PET'S ATTORNEY :
SILBERSTEIN, AWAD & MIKLOS, P.C.
BY: PAUL N. NADLER
600 Old Country Road
Garden City, New York 11530

DEFT'S/RESP ATTORNEY:
OCONNOR, OCONNOR, HINTZ & DEVENY, LLP
Attorneys for Stein Industries, Inc.
One Huntington Quadrangle, Suite 1C07
Route 110
Melville, New York 11747

SCIBILIA, POLACCCO & ALEDORT
Attorneys for Wysong and Miles Co.
41 Hilton Avenue
Hempstead, New York 11550-2119

KELLER O'REILLY & WATSON, P.C.
Attorneys for H. Weiss & Co.
242 Crossways Park West
Woodbury, New York 11797

Upon the following papers numbered 1 to 24, read on this motion for leave to reargue and renew Notice of Motion/Order to Show Cause and supporting papers 1-15; Notice of Cross Motion and supporting papers 16-18; Answering Affidavits and supporting papers 19; 20; Replying Affidavits and supporting papers 21; 22-23; 24; Other _____; **(and after hearing counsel in support of and opposed to the motion) it is,**

ORDERED that the plaintiff Paul Blackburn's motion and the defendant/third party plaintiff Wysong & Miles Company's cross motion each for leave to renew the previous decision and order of this Court dated February 13,2003, which granted the defendadthird party defendant Stein Industries, Inc.'s motion to dismiss the third party complaint, and upon such renewal deny said motion, is denied under the circumstances presented herein. (CPLR 2221).

Blackburn v. Wysong and Miles Co., et.al.

Index No.: 28002-99

Page Two

This is **an** action for personal injuries allegedly sustained by the plaintiff Paul Blackburn on May **21, 1999**, as an employee of defendant/third party defendant Stein Industries, Inc. (“Stein”) while operating a power press brake machine. Defendant/third party plaintiff Wysong & Miles Company (“Wysong”), 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. Defendant/third party defendant Stein moved to dismiss the third party complaint pursuant to Workers Compensation Law Section **11**, averring that the plaintiffs injuries were not “grave injuries” as defined by the applicable statute and as such, it is not responsible to indemnify defendant/third party plaintiff Wysong. We agreed and by decision and order dated February **13, 2003**, the third party complaint was dismissed. The plaintiff **and** defendant/third party plaintiff Wysong have moved and cross moved for leave to renew said decision and order.

CPLR **2221**, provides, among other things, that a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” (CPLR **2221**[e][2]), and “shall contain reasonable justification for the failure to present the new facts on the prior motion.” (CPLR **2221** [e][3]). **As** such, even if there is a determination that the facts presented by the plaintiff constitute new facts, he must still offer an explanation **as** to why those facts were not offered in opposition **as** to the

Blackburn v. Wysong and Miles Co., et.al.

Index No.: 28002-99

Page Three

original motion. (see *Sherman v. Piccione*, 304 A.D.2d 552,757 N.Y.S.2d 112 [2nd Dept. 2003]).

In the matter at bar, in support of the instant motion and cross motion the movants have proffered the report of Wasim Saeed, M.D., a plastic and reconstructive surgeon with a sub-speciality in hand surgery and the plaintiffs treating physician since November, 1999, who examined the plaintiff on December 30, 2002, subsequent to the return date of the original motion to dismiss. He has further submitted an additional supplemental affidavit of Dr. Saeed dated May 2, 2003. Prior thereto, in opposition to the original motion to dismiss the third party complaint, the plaintiff submitted another affidavit of Dr. Saeed dated October 24, 2002.

In support of the instant motion, the report and affidavit proffered by the movants as new evidence are provided by the plaintiffs treating physician. Clearly, as such, they should have been readily available to be offered in opposition to the original motion. Although Dr. Saeed examined the plaintiff subsequent to the filing and submission of the original motion, as the plaintiff's treating physician he would have sufficient knowledge to expand on his previous diagnosis, opinions and conclusions if they were not adequately conveyed in his prior reports. Notwithstanding that, it is apparent that said information does not constitute new evidence, and neither the plaintiff nor the defendant/third party plaintiff have proffered

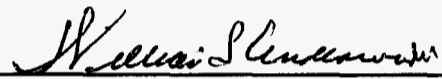
Blackburn v. Wysong and Miles Co., et.al.
Index No.: 28002-99
Page Four

an explanation **as** to their failure **to** submit such evidence and facts in opposition **to** the prior motion. The movants having failed **to** meet such burden, and upon the foregoing and the circumstances presented herein, leave **to** renew is denied.

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

So ordered.

Dated: October 24,2003



HON. WILLIAM L. UNDERWOOD, JR.
J.S.C.

CHECK ONE: F I N A L DISPOSITION

NON-FINAL DISPOSITION