

Perron v Hendrickson/Scalamandre/Posillico (TV)

2004 NY Slip Op 30074(U)

September 8, 2004

Supreme Court, Suffolk County

Docket Number: 0004668/4668

Judge: Denise F. Molia

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA**,
Justice

DAVID PERRON and LINDA PERRON,

Plaintiffs,

- against -

**HENDRICKSON/SCALAMANDRE/POSILLICO (TV),
HENDRICKSON BROS., INC., PETER
SCALAMANDRE & SONS, INC., J.D. POSILLICO,
INC., URS GREINER CONSULTANTS, INC.,
ESCHBACHER & ASSOCIATES, SCI ENGINEERING
AND SURVEYING PC, A&H ENGINEERS PC, JAC
PLANNING CORP. and MABEY BRIDGE, INC.,**

Defendants.

**HENDRICKSON/SCALAMANDRE/POSILLICO, A
TRI-VENTURE,**

Third-Party Plaintiff,

- against -

RICE MOHAWK U.S. CONSTRUCTION CO., LTD.,

Third-Party Defendant.

CASE DISPOSED: NO
MOTION R/D: 5/15/02
SUBMISSION DATE: 7/2/04
MOTION SEQUENCE No.: 022 MG

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated September 4, 2002; Affidavit in Support dated September 4, 2002; Affirmation in Opposition dated September 10, 2002; Exhibit annexed thereto; Affirmation in Opposition dated September 10, 2002; and upon due deliberation; it is

ORDERED, that the motion by third-party defendant, Rice Mohawk U.S. Construction Co., Ltd., pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of third-party defendant dismissing any and all cross-claims against the third-party defendant, is granted.

Workers' Compensation Law section 11 provides in pertinent part 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" 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 external force resulting in permanent or total disability.

The same section 11 also provides that the only other way an employer can be liable to a third-party is for a "claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered."

The party seeking indemnification bears the burden of pleading and proving a "grave injury" within the strict requirements of the statute. See, Workers' Compensation Law section 11; see also, Ibarra v Equip. Control Inc., 268 A.D.2d 13; Brownstein v. LeCroy Corp., 178 Misc.2d 197, 678 N.Y.S.2d 712; Barbieri v. Mount Sinai Hospital, 264 A.D.2d 1.

In interpreting Workers' Compensation Law section 11, the courts of this state have adhered to the mandate of the Court of Appeals in Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 584-85, to attempt to effectuate the intent of the Legislature by giving effect to the plain

meaning of the language of the statute. See, e.g., Castro v. United Container Mach. Group, 273 A.D.2d 90, 91 (the amputation of the tips of five fingers was found not to constitute the “loss of multiple fingers” as defined by the statute); Banegaz v. F.L. Smithe Mach. Co., 266 A.D.2d 113 (the complete amputation of one finger and the partial amputation of a second finger does not constitute the “loss of multiple fingers” under the statute); Johnson v. Space Saver Corp., 172 Misc.2d 147 (allegations that the plaintiff was “rendered sick, sore, wounded, and bruised about her body and limbs by the impact of the shelving upon her body, and has suffered and will continue to suffer severe, permanent injuries to her head, neck and back, causing plaintiff continuing physical pain, disability and mental anguish,” was found not to constitute a “grave injury” within the meaning of the statute).

In his bill of particulars, the plaintiff has alleged multiple injuries, including: fractures of the second, third and fourth metatarsal bones of the left foot; reflex sympathetic dystrophy of the left leg and left foot; reflex sympathetic dystrophy of the upper extremities; cyanotic discoloration of both hands; low back syndrome; crush injury left foot; numbness and tingling in the left foot; hyperalgesia, burning, coldness, erythema and atrophy of the left foot; allodynia of the left foot and ankle; impaired growth of nails on the left foot; hair loss on the left foot and lower extremity; tendon achilles contracture; and lumbar radiculopathy.

Upon a review of the alleged injuries set forth in the bill of particulars, plaintiff’s medical records and deposition testimony, and applying the standard as enunciated by the Court of Appeals in Majewski, the Court finds that the plaintiff has failed to sustain his burden of demonstrating that he has sustained a “grave injury” as defined by statute.

As previously stated, Workers’ Compensation Law section 11 bars all claims for contribution and indemnification from an injured plaintiff’s employer, unless the plaintiff has suffered a “grave injury” or there is a “written contract . . . by which the employer expressly agreed to contribution to or indemnification of the claimant.” In the instant matter, and as discussed in the Order of this Court dated September 7, 2004, no such contract has been produced which would meet this criteria.

In the absence of a “grave injury” to the plaintiff, and without the benefit of a contract between the plaintiff’s employer and a third-party providing for indemnification for the injuries sustained by the plaintiff, there is no authority, statutory or otherwise, to sustain a cause of action against plaintiff’s employer by a third-party. Accordingly, all cross-claims against Rice Mohawk for contractual indemnification are hereby dismissed.

The foregoing constitutes the Order of this Court.

Dated: September 8, 2004

DENISE F. MOLIA

HON. DENISE F. MOLIA J.S.C.