

Rodriguez v Long Is. Fixed Group, LLC
2007 NY Slip Op 30053(U)
March 7, 2007
Supreme Court, Suffolk County
Docket Number: 0002282
Judge: John J.J. Jones
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.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 10/4/2006
MOTION NO.: MOT D

-----X

GREGORY RODRIGUEZ, :

Plaintiff, :

-against- :

LONG ISLAND FIXED GROUP, LLC, CAMMEBY'S
INTERNATIONAL, CAMMEBY'S MANAGEMENT, :

Defendants. :

-----X

LONG ISLAND FIXED GROUP, LLC, CAMMEBY'S
INTERNATIONAL, CAMMEBY'S MANAGEMENT, :

Third-Party Plaintiffs, :

-against- :

HILL-ROM COMPANY, INC. and WDW
MAINTENANCE CORP., :

Third-Party Defendants. :

-----X

Index No.: 002282/2005

Third-Party
Index No.: 26-193

Upon the following papers numbered 1 to 18 read on this motion for dismissal

of complaint pursuant to CPLR 3211; Notice of Motion/Order to Show Cause and supporting papers 1-11; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 12-16; Replying Affidavits and supporting papers 17-18; Other _____; it is

ORDERED that this motion by third-party defendant, Hill-Rom Company, Inc., for an order pursuant to CPLR 3211 (a) (1) and (7) dismissing the third-party complaint is granted only to the extent that the fifth cause of action against said third-party defendant is dismissed for failure to state a cause of action, and such motion is otherwise denied without prejudice to any timely application for dismissal pursuant to CPLR 3212.

Plaintiff Gregory Rodriguez, an employee of movant/third-party defendant, Hill-Rom Company, Inc. (Hill-Rom), commenced an action against the property owner and managers to recover damages for personal injuries allegedly sustained on January 29, 2004 on premises known as 1 Commack Loop, Ronkonkoma, New York, “when he was caused to be thrown violently to the ground as a result of a dangerous, defective, trap-like condition located between the entrance/exit door of the aforesaid premises and the parking area of said [sic] premises.” The facility is leased by Hill-Rom from defendant/third-party plaintiff, Long Island Fixed Group, LLC (LIFG) pursuant to the terms of a written lease agreement.

Defendants/third-party plaintiffs commenced a third-party action against Hill-Rom for contribution and indemnification under a variety of theories. A common law claim for indemnity based on allegations of negligence, recklessness, carelessness and/or breach of contract is set forth under the first cause of action of the third-party complaint, a claim for common law contribution is asserted in the second cause of action, a claim for contractual indemnity arising out of movant’s alleged failure to keep the sidewalk of the premises free of ice and snow is alleged in the third cause of action, a claim for contractual indemnity arising out of the alleged failure to obtain liability insurance is set forth under the fourth cause of action, and a claim for contribution based on vicarious liability is alleged in the fifth cause of action. Third-party defendant now moves for an order pursuant to CPLR 3211 (a) (1) and (7) for an order dismissing the third-party complaint. In essence, it is asserted that the third-party complaint fails to state a cause of action since Hill-Rom can not be held liable for common-law contribution or indemnification because the plaintiff did not suffer a “grave injury” as defined under the Workers’ Compensation Law. Hill-Rom also claims that it possesses a defense founded upon documentary evidence under paragraph “8” of the lease agreement, which contains a contractual indemnification clause, which states that Hill-Rom’s obligation to indemnify LIFG does not cover claims and expenses “for which [LIFG] shall not be reimbursed by insurance” and that it does not cover claims arising out of the

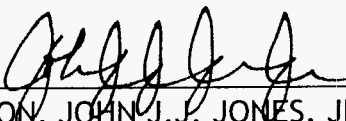
defendant/third-party plaintiff's own negligence. In support of its motion, third-party defendant Hill-Rom submitted the affidavit of Pasquale Ciota, plaintiff's supervisor, as proof that plaintiff applied for and received workers' compensation benefits through his employer, Hill-Rom.

Under Workers' Compensation Law § 11, "[a]n 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'" within the definition of the statute. Where the plaintiff has not sustained a "grave injury," section 11 of the Workers' Compensation Law bars third-party actions against employers for indemnification or contribution unless the third-party action is for contractual indemnification pursuant to a written contract in which the employer "expressly agreed" to indemnify the claimant (*Tonking v Port Auth.*, 3 NY3d 486, 490, 821 NE2d 133, 787 NYS2d 708 [2004]).

Contrary to LIFG's contention, it can not be concluded, as a matter of law, that the terms of its lease with Hill-Rom conclusively establish a defense to the allegations made in the third-party complaint (see CPLR 3211[a][1]; see also *Wolfe v Long Is. Power Auth.*, 34 AD3d 575, 824 NYS2d 390 [2d Dept 2006]). On a motion to dismiss pursuant to CPLR 3211, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, the motion will fail, but when evidentiary material is considered in a summary judgment motion, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17, 401 NYS2d 182 [1977]). Construing the third-party complaint liberally and affording LIFG the benefit of every possible favorable inference, the first, second, third and fourth causes of action in the third-party complaint state viable claims (see CPLR 3211[a][7]; see also *Wolfe v Long Is. Power Auth.*, *supra* at 34 AD3d 575, 824 NYS2d 390 [2d Dept 2006]). Whether plaintiff's injury falls within the statutory definition of "grave injury", however, is not an issue to be determined upon a motion for dismissal under CPLR 3211 (a) (7) but, instead, is a factual determination more properly considered through a summary judgment motion (see, e.g., *Ramos v DEGI Deutsche Gesellschaft Fuer Immobilienfonds MBH*, ___ AD3d ___, 2007 NY Slip Op 1714 [2d Dept 2007]; see also *Marshall v Arias*, 12 AD3d 423, 784 NYS2d 589 [2d Dept 2004]). Likewise, issues relating to the contractual indemnification claims in the third and fourth causes of action, such as whether plaintiff's accident occurred on a sidewalk or upon a paved parking lot, or whether Hill-Rom breached any obligation to obtain insurance coverage, are not properly

raised on a CPLR 3211 motion but, rather, should be considered on a summary judgment application made on proper notice. To the extent that defendants/third-party plaintiffs have asserted a secondary or vicarious liability claim in the fifth cause of action, however, such claim can not be supported under the allegations in plaintiff's complaint and dismissal of the fifth cause of action, therefore, is warranted.

DATED: 7 March 07



HON. JOHN J. J. JONES, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION

TO:

MESCALL MAFFEI & CONDON, LLP

By: Kevin Mescall, Esq.

Attys. for Plaintiff

25 Candee Avenue

Sayville, NY 11782

HAVKINS ROSENFELD RITZERT & VARRIALE, LLP

By: Jessica M. Serva, Esq.

Attys. for Defendants/Third-Party Plaintiffs

114 Old Country Road, Suite 300

Mineola, NY 11501

LUBOJA & THAU, LLP

By: Richard M. Hunter, Esq.

Attys. for Third-Party Defendant

Hill-Rom Company, Inc.

10 E. 40th Street

New York, NY 10016

WDW MAINTENANCE CORP.

Third-Party Defendant

14 Old Dock Road

Yaphank, NY 11980