

**Miller v Staples the Off. Superstore E., Inc.**

2007 NY Slip Op 30516(U)

March 30, 2007

Supreme Court, New York County

Docket Number: 0112236/2004

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SOLOMON  
Justice

PART 55

MILLER, LAUREN SCOTT

INDEX NO. 112236/04

MOTION DATE 3/2/07

STAPLES THE OFFICE SUPPLY STORE EAST, INC., ET AL

MOTION SEQ. NO. 02

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion to/for amend pleading

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-3

4-5

6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with the annexed memorandum decision, order, lecture and partial judgment.*

*N.B. -- pre-trial conference is scheduled for 4/23/07 at 2 PM.*

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 419).

Dated: 3/2/07



JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

[\* 1]

ACTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X  
LAUREN SCOTT MILLER,

Plaintiff,

-against-

STAPLES THE OFFICE SUPERSTORE EAST,  
INC. d/b/a STAPLES and TJC INCORPORATED,  
d/b/a JOURDAN,

INDEX NO. 112236/04

DECISION, ORDER,  
DECLARATION AND  
PARTIAL JUDGMENT

Defendants.

-----X  
STAPLES THE OFFICE SUPERSTORE EAST,  
INC. d/b/a STAPLES and TJC INCORPORATED,  
d/b/a JOURDAN,

Third-party

-against-

FUJIAN CHANGTAI ZHIDAI YOUXIAN GONGSI  
a/k/a THE FUJIAN CHANGTAI BELT COMPANY,

Third-party Defendants.

-----X

JANE S. SOLOMON, J.

Defendants/third-party plaintiffs Staples, the Office Superstore East, Inc. d/b/a/ Staples (Staples) and TJC Incorporated d/b/a Jourdan (TJC) move, by order to show cause, for an order granting them leave to amend their respective answers to assert a counterclaim for a declaration that Article 16 of the CPLR is applicable to this action, and upon leave so granted, for a declaration, pursuant to CPLR 3017 (b), that Article 16 so applies. For purposes of this motion, the following is undisputed. Plaintiff Lauren Scott Miller was injured on May 1, 2004, while pulling a luggage cart, when the bungee cord by which she was pulling the cart snapped, recoiled, and hit her in the eye. Plaintiff purchased the cart at a retail

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store owned by Staples. Staples had purchased the cart from TJC. TJC, in turn, had purchased the cart from non-party Fortune Torch, or from one of its associated companies, Foremost Plastic and Metal Works (Foremost), both located in Jiaxing City, Zhejiang Province, China. The cart was manufactured in a Foremost plant, transported to Shanghai, shipped to a West Coast port, and then transported to the East Coast. Staples, which is headquartered in Boston, took possession of the cart in Shanghai. The third-party complaint alleges that the subject bungee cord was manufactured by third-party defendant Fujian Changtai Zhidai Youxian Gongsi a/k/a The Fujian Changtai Belt Company (Fujian), which sold it to Fortune Torch for incorporation into the cart.

With regard to non-economic loss alleged in personal injury cases, Article 16 of the CPLR modifies the common-law doctrine that joint tortfeasors are jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. CPLR 1601 (1) provides that, in such cases, a defendant whose proportionate share of the fault is no more than 50% is liable only to the extent of such proportionate share. However, CPLR 1601 (1) also provides that a non-party's share of fault will not be considered "if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person ... ." Similarly, CPLR 1602 (10) provides that a named defendant may be charged with joint liability for a manufacturer's share of fault in a products liability case, where "the claimant establishes by a preponderance of the evidence that jurisdiction over the

manufacturer could not with due diligence be obtained." With regard to the burden of proof, CPLR 1603 provides, in relevant part, that:

[i]n any action for damages for personal injury a party asserting that the limitations on liability set forth in this article do not apply shall allege and prove by a preponderance of the evidence that one or more of the exemptions set forth in subdivision one of section sixteen hundred one or section sixteen hundred two applies.

Emphasis added.

In Cole v Mandell Food Stores, Inc. (93 NY2d 34 [1999]), the Court of Appeals squarely held that a plaintiff who fails to allege (and prove) the applicability of an exception to CPLR 1601 (1) waives that exception. See also Roseboro v New York City Transit Auth., 286 AD2d 222 (1st Dept 2001). The complaint, here, fails to allege any such exception. Moreover, plaintiff has offered no evidence to show that personal jurisdiction over Fortune Torch could not have been obtained with due diligence. Instead of offering such evidence, she argues that defendants have not proven that such jurisdiction could have been obtained. Plaintiff appears to believe, erroneously, that the burden of proof on that issue is on defendants.

Accordingly, defendants' motion will be granted. Plaintiff does not contend that, if that branch of the motion that seeks leave to amend is granted, a declaration should not be granted. At trial, of course, defendants will have the burden of proving their respective equitable shares of the total liability. CPLR 1603.

Accordingly, it is hereby

ORDERED that defendants' motion to amend their answers is granted, and the amended answers in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is

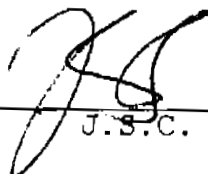
ADJUDGED and DECLARED that CPLR Article 16 applies to the instant action so as potentially to limit defendants/third-party plaintiffs' liability for plaintiff's non-economic loss; and it is further

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on April 23, 2007 at 2 PM.

This constitutes the decision and judgment of the court.

Dated: March 30, 2007

ENTER:

  
\_\_\_\_\_  
J.S.C.

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JUDGE S. D'ALESSANDRO

**UNFILED JUDGMENT**  
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