

**Miller v Staples, The Office Superstore E., Inc.**

2007 NY Slip Op 32840(U)

September 7, 2007

Supreme Court, New York County

Docket Number: 0112236/2004

Judge: Jane S. Solomon

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 OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 112236/2004

MILLER, LAUREN SCOTT

vs  
STAPLES

Sequence Number : 003

REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_

MOTION DATE 6/25/07

MOTION SEQ. NO. \_\_\_\_\_

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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 and orders.

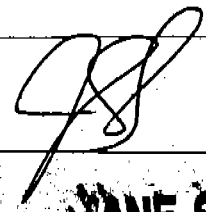
M.B. -- Pre-trial conf scheduled for 10/1/07 at 2 PM.

**FILED**

SEP 12 2007

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/7/07



Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

JANE S. SOLOMON L.S.C.

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

-----X

LAUREN SCOTT MILLER,

Plaintiff,

-against-

INDEX NO. 112236/04

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

DECISION AND ORDER

Defendants.

-----X

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

Third Party Plaintiffs,

-against-

INDEX NO. 590835/06

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

Third Party Defendant.

-----X

JANE S. SOLOMON, J.

Plaintiff Lauren Scott Miller ("Miller") alleges that she suffered a severe injury when a bungee cord snapped, propelling its hooked end into her eye. The bungee cord was attached to a luggage cart she had purchased at a store owned by defendant Staples, The Office Superstore East, Inc. d/b/a Staples ("Staples"). Staples had purchased the cart from defendant TJC Incorporated, d/b/a Jourdan ("TJC"). The cart was manufactured

by non-party Fortune Torch Co., Ltd., or one of its associated companies, all of which are located in the People's Republic of China. Documentation shows that the luggage carts were shipped f/o/b from Shanghai, China, but Fortune Torch also has a Taipei address. The subject bungee cord allegedly was manufactured by the third-party defendant, Fujian Changtai Zhidai Youxian Gongsi a/k/a the Fujian Changtain Belt Company ("FCBC"). Fortune Torch used FCBC belts in assembling the cart.

TJC's president testified that he had an oral agreement with Fortune Torch to manufacture and ship luggage carts for sale to Staples, under which Fortune Torch supplied 254,403 luggage carts between 1999 and the date of the accident in 2004. TJC acted as the exclusive agent to sell the subject luggage cart model in the United States. A Staples inventory control manager submitted an affidavit stating that for the years 2004 through 2006, Staples sold 17,589 luggage carts in New York State of the type involved in Miller's accident. No evidence was offered as to Fortune Torch's overall sales.

In a prior motion, defendants sought leave to amend their answers to assert a counterclaim for a declaration that Article 16 of the CPLR is applicable to this action, and upon such leave, for a declaration that Article 16 so applies. The import of defendants' motion is that under Article 16, a defendant may avoid joint liability in non-economic damages for

---

\* 4 ]  
that portion of liability attributable to a different party. Miller alleges non-economic damages in this case, and defendants no doubt intend to prove at trial that the cart manufacturer, Fortune Torch, bears significant responsibility.

Defendants' motion was granted in an order, declaration and partial judgment dated March 30, 2007 ("Prior Order"). On this motion, plaintiff seeks to reargue the prior motion, and for leave to amend her complaint to affirmatively assert an exception to Article 16 under CPLR 1602(10). The motion is denied for the reasons below.

Miller does not contest that she failed to plead that any exception to CPLR 1601 applies. As such, she presents no argument why the court should not have followed the legal precedent of Cole v Mandell Food Stores, Inc. (93 NY2d 34 [1999]) and Roseboro v New York City Transit Auth. (286 AD2d 222 [1<sup>st</sup> Dept 2001]), wherein the courts held that a plaintiff who fails to allege the applicability of an exception to CPLR 1601(1) waives the exception. And see CPLR 1603.

In opposing the prior motion, Miller erroneously contended that *defendants* had the burden of showing that *no exception* to Article 16 applied. See, Affirmation of Michael M. Gotkin, dated 2/9/2007, paragraph 12, annexed as Exhibit D to Notice of Motion (CPLR 1603 is misquoted to reverse the burden of proof). She did not seek leave to amend her complaint to allege

---

[\* 5 ]

an exception to Article 16, although she clearly was on notice of the issue since it was the subject of defendants' motion.

In the present motion, Miller acknowledges that she needed to allege an exception to Article 16, and now, for the first time, seeks leave to make that amendment. Generally, leave to amend pleadings is freely given (CPLR 3025[b]), but the court must examine the underlying merit of the proposed amendment.

Zaid Theatre Corp. v Sona Realty Co., 18 AD3d 352 (1<sup>st</sup> Dept 2005). Here, the proposed amendment is without merit because it is inconsistent with the determination in the Prior Order. The issue of whether defendants are entitled to summary judgment declaring the parties' rights vis-a-vis Article 16 has been litigated and decided. Miller submits no authority for the proposition that a party may retroactively vacate a fully litigated matter by amending its pleading after the fact.

CPLR 2221(d) provides that a motion to reargue shall be identified specifically as such, and shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion. The present motion is designated as one to reargue, but there is no argument that the court overlooked or misapprehended the law with respect to Miller's failure to allege an exemption from Article 16, or to seek leave to amend the complaint to allege an exemption.

In Cole, the Court of Appeals stated that:

---

In this personal injury action, the primary issue is whether a plaintiff seeking to recover noneconomic damages from a defendant whose liability is less than 50% may claim an exemption set forth in CPLR 1602 without pleading the exemption or seeking leave to amend the pleading to include the allegation at any stage of the action. We answer the question in the negative.

93 NY2d 37.

Miller contends that the court overlooked or misapprehended her argument that an exemption could apply, even though she failed to allege one. Under Cole, the court is required to apply the plain language of the pleading requirement in CPLR 1603. Accordingly, on the papers submitted, the Prior Order is correct and Miller does not articulate any error by the court to support reargument.

Miller contends that the court overlooked or misapprehended her argument that she could have demonstrated that an exemption from the Article 16 limitation on liability applies. CPLR 1602(10) provides that the limitations of Article 16 shall not apply:

to any person held liable in a product liability action where the manufacturer of the product is not a party to the action and the claimant establishes by a preponderance of the evidence that jurisdiction over the manufacturer could not with due diligence be obtained and that if the manufacturer were a party to the action, liability for claimant's injury would have been imposed by reason of the doctrine of strict liability, to the

~~extent of such manufacturer.~~

Miller contends that Fortune Torch is a manufacturer within the meaning of CPLR 1602(10). There is no evidence that Miller made any effort, diligent or otherwise, to sue Fortune Torch and obtain jurisdiction over it. She argues, however, that the court need not consider whether jurisdiction over Fortune Torch could have been obtained with due diligence if she can establish that the court could not exercise long-arm jurisdiction over it.<sup>1</sup>

There is evidence that Fortune Torch is located in China, which is a party to the Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (20 U.S.T. 361, T.I.A.S. 6638). Under the Hague Convention, China has agreed to permit service of process within its borders pursuant to specifically defined procedures. Miller admits she made no effort to follow these procedures, and there is no evidence that it could not be accomplished with due diligence.

Under New York's long arm statute, the court may exercise personal jurisdiction over any non-domiciliary who in person, or through an agent, commits a tortious act outside the State causing injury to a person within the state, if he "(i)

---

<sup>1</sup> Plaintiff cites a footnote from In Re New York City Asbestos Litigation v A.C. &S., Inc., 194 Misc 2d 214 (Sup. Ct. NY County, 2002), which stated that whether plaintiff used due diligence in that case was an issue of fact. Here, there is no issue of fact because plaintiff offers no proof of any diligence.

regularly . . . engages in any . . . persistent course of conduct, or derives substantial revenue from goods used . . . in the state, or (ii) expects or should expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; . . .” CPLR 302 (3)(i)-(ii). Fortune Torch shipped hundreds of thousands of luggage carts from China to Staples over the course of at least seven years, suggesting a persistent course of conduct, substantial revenue from goods used in New York State, substantial revenue from international commerce, and knowledge that its products were destined for retail sale in New York State. While this does not definitively establish that Fortune Torch would be subject to long arm jurisdiction, Miller did not show by a preponderance of the evidence that long arm jurisdiction could not apply. CPLR 1603.

Miller further maintains that the court failed to consider defendants’ difficulties in obtaining jurisdiction over the bungee cord manufacturer, FCBC, in the third-party action. Notably, on this motion plaintiff omits much of the paper submitted on the prior motion, including part of counsel’s affirmation addressing the third-party action against FCBC. The basis of defendants’ motion, however, was that the limitation on liability under Article 16 was applicable because Miller had failed to sue Fortune Torch. Defendants’ difficulty in obtaining

---

the court's personal jurisdiction over FCBC is not relevant to determining whether Miller could have sued Fortune Torch.

Finally, Miller maintains that an oral sales agreement, like the one between Fortune Torch and TJC, can not be a basis for obtaining long arm jurisdiction over a non-domiciliary that sold goods in New York State through an agent. Defendants argue persuasively that Miller's interpretation of relevant case law is mistaken. In any event, none of Miller's arguments with respect to whether she could have obtained long arm jurisdiction over Fortune Torch address her failure to plead (or seek leave to plead) an exemption under CPLR 1602 when the prior motion was fully submitted. Accordingly, it hereby is

ORDERED that the motion to reargue and to amend the complaint is denied; and it further is

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on October 1, 2007 at 2 PM.

Dated: September 7, 2007

ENTER:

**FILED**  
SEP. 12 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

*JSS*  
\_\_\_\_\_  
J.S.C.  
**JANE S. SOLOMON**