

<b>Cusumano v Extell Rock, LLC</b>
2008 NY Slip Op 31582(U)
June 9, 2008
Supreme Court, New York County
Docket Number: 0115389/2005
Judge: Carol R. Edmead
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) 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

HON. CAROL EDMEAD

PRESENT: \_\_\_\_\_

PART 35

Index Number : 115389/2005

CUSUMANO, FRANK

vs

EXTELL ROCK, LLC

Sequence Number : 005

DISMISS

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

MOTION DATE 5/5/08

MOTION SEQ. NO. 005

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

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

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JUN 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

The Court determines that the motion by second third-party defendant, Remco Maintenance, LLC pursuant to CPLR 3211 to dismiss the second third-party complaint of Hard Rock Café International (USA) Inc. s/h/a Hard Rock Café International, Inc. ("Hard Rock Café") is resolved as follows:

It is ORDERED that the branch of Remco's motion seeking to dismiss Hard Rock Café's common law indemnification and contribution claims is granted, and such claims are dismissed; and it is further

ORDERED that the branch of Remco's motion seeking to dismiss Hard Rock Café's claims for contractual indemnification and claim for breach of contract for failure to procure insurance is denied, without prejudice; and it is further

ORDERED that Remco shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 6/9/08

*[Signature]*  
J.S.C.

HON. CAROL EDMEAD

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):

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

-----X  
FRANK CUSUMANO,

Plaintiff,

Index No. 115389-2005

-against-

EXTELL ROCK, LLC, ABCO MANAGEMENT  
CORP., and REGIONS FACILITY SERVICES, INC.,

Defendants.  
-----X

EXTELL ROCK, LLC,

Third-Party Plaintiff,

Index No. 90032-2007

-against-

HARD ROCK CAFÉ INTERNATIONAL,

Third-Party Defendant.  
-----X

HARD ROCK CAFÉ INTERNATIONAL,

Second Third-Party Plaintiff,

Index No. 90005-2007

-against-

REMCO MAINTENANCE, LLC,

Second Third-Party Defendant.  
-----X

MEMORANDUM DECISION

Second third-party defendant, Remco Maintenance, LLC ("Remco") moves pursuant to CPLR 3211 to dismiss the second third-party complaint of Hard Rock Café International (USA) Inc. s/h/a Hard Rock Café International, Inc. ("Hard Rock Café").

**FILED**  
JUN 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

### Factual Background

Extell Rock, LLC is the owner and lessor of the premises located at 221 West 57<sup>th</sup> Street, New York, New York (the “premises” or “work site”). Extell leased the premises to Hard Rock Café International, Inc. (“Hard Rock Café”). Hard Rock Café entered into an agreement with Regions Facility Services, Inc. (“Regions”), whereby Regions was to perform construction work at the premises (“Construction Agreement”). Regions, in turn, hired Remco to perform marble restoration work at the subject premises.

Frank Cusumano was employed as a marble polisher for Remco, when he “was caused to fall from a scaffold after being struck on the head by a light arranged, placed and/or hanging inside of the scaffold” at the work site. Frank Cusumano allegedly sustained numerous injuries, including “contusion and lacerations to the head requiring approximately 9 staples”; lacerations to his knee “requiring approximately 10 stitches”; back sprain and pain; disc bulges and disc herniations; and internal derangement of the left knee.<sup>1</sup>

Frank Cusumano and his wife Lina Cusumano commenced an action alleging claims pursuant to Labor Law §§200, 240(1), 241(6), as well as claims for common law negligence against Extell (the owner and lessor), ABCO Management Corp., and Regions. In turn, Extell commenced a third-party action against its lessee, Hard Rock Café, which in turn commenced a second third-party action against Remco, plaintiff’s employer. Hard Rock Cafe’s second third-party complaint alleges claims for contractual indemnification, breach of contract for failure to provide additional insured coverage, and common law indemnification/contribution.

---

<sup>1</sup> The nature of plaintiff’s accident and injuries are taken from the verified bill of particulars in the main action.

### Remco's Motion to Dismiss

In support of dismissal of the second third-party complaint, Remco contends that it submitted a one-page proposal (the "Proposal") to Regions to perform marble restoration work at the premises. According to Remco's Vice-President, William Naples ("Naples"), Remco's work for Regions on the date of plaintiff's accident was done solely pursuant to the Proposal, and solely for Regions, as indicated on Remco's work order for the work. No other agreement between Remco and Regions, or any other entity, was ever executed for that work. Further, there exists no written provision requiring Remco to indemnify Regions or Hard Rock Café or provide it or any other entity with insurance coverage. The Proposal contains no language requiring Remco to indemnify Regions or any other entity for its work. Nor does the Proposal contain any provision that requires Remco to name Regions or any other entity as an additional insured on its general liability insurance policy. Nor did anyone from Regions or Hard Rock ever request that Remco defend, indemnify, or add them as additional insureds on Remco's policy in connection with Remco's work under the Proposal. Therefore, the contractual indemnification and breach of contract claims should be dismissed, as there is no contract between Remco and Hard Rock to support any contract-based claims, and no contractual provision requiring Remco to indemnify or name any entity as an additional insured in connection with Regions' premises or the work in which plaintiff was engaged.

Remco also argues that the common law indemnification and contribution claims should be dismissed pursuant to section 11 of the Worker's Compensation Law. Plaintiff's injuries, as set forth in his bill of particulars, do not rise to the level of "grave injury" as required to sustain such a claim.

### Opposition

In opposition, Hard Rock Café argues that Remco's motion is premature as no meaningful discovery has been taken between Hard Rock Café and Remco. Hard Rock Café contends that plaintiff was using Remco's equipment to repair the marble facade at the premises in connection with Regions. Based on paragraph 10 of Hard Rock Café's Construction Agreement with Regions, Regions agreed to maintain and require all subcontractors, including Remco, to maintain comprehensive general or commercial liability insurance. Further, pursuant to paragraphs 5 and 10 of the Construction Agreement, the subcontractors, including Remco, were required to meet the insurance and indemnity obligations contained in the Construction Agreement. Hard Rock Café's Risk Manager, John Pinkerton, executed an affidavit stating that "Upon information and belief" Remco was obligated to indemnify Hard Rock Café and procure liability insurance naming Hard Rock Café as an additional insured. Thus, Remco was obligated to name Hard Rock Café as an additional insured and was to indemnify Hard Rock Café for any injuries that occurred at the work site. And, Remco's arguments do not eliminate the issue of whether Remco was contractually obligated to indemnify Hard Rock Café in any contract between Regions and Remco.

Hard Rock Café served comprehensive discovery demands upon Remco. Remco's Proposal, two Remco invoices provided by Regions, additional Remco documents recently produced by Regions, and a contractual provision between Hard Rock Café and Regions requiring Regions to have its subcontractors obtain liability insurance and name Hard Rock Café as additional insured, raise the prospect of additional subcontracts between Regions and Remco and Hard Rock Café and Remco. The existence of such subcontracts are necessary to determine

the contractual duty of Remco. The Court should deny Remco's motion, pending Remco's response to Hard Rock Café's discovery demands. A deposition of Remco's Vice-President is also necessary to determine the existence of any contractual duty of Remco to indemnify Hard Rock Café.

Further, Remco's duty to indemnify Hard Rock Café does not depend on a contract between Hard Rock Café and Remco, but rather, the subcontract between Regions and Remco. The subcontract between Regions and Remco will likely reveal any contractual duty on Remco's part to indemnify and hold harmless Hard Rock Café.

#### Reply

In further support of its motion to dismiss, Remco points out that Hard Rock Café admits that the relevant contract regarding any duty of Remco to indemnify Hard Rock Café is within the subcontract, should it exist, and it is undisputed that Remco never entered into any contract with Hard Rock Café or Region to defend, indemnify, or procure additional insured coverage for Hard Rock Café, Regions, or any other entity.

Additionally, Hard Rock Café's counsel indicated that he had "no idea" whether Remco had a contract with an party requiring it to defend, indemnify, or procure insurance coverage for Hard Rock Café. If any such documents did exist, they would be in the possession of and would have been produced by Regions and/or Hard Rock during the course of discovery in the main action.

Further, Hard Rock Café offers no opposition to the dismissal of its common law indemnification and contribution claims.

### Analysis

On a motion to dismiss made pursuant to CPLR § 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1<sup>st</sup> Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a] [7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen*

*Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

#### *Common Law Indemnification and Contribution Claims*

Remco's motion to dismiss Hard Rock Café's common law indemnification and contribution claims rests on plaintiff's bill of particulars and its description of the injuries suffered by Frank Cusumano. Notably, Remco served its motion upon plaintiff's counsel, and plaintiff did not oppose the motion, nor submit any affidavit or documentary evidence regarding the injuries he allegedly sustained from the subject accident. Therefore, it is uncontested that the injuries allegedly suffered by the plaintiff are limited to those contained in his bill of particulars.

Worker's Compensation Law § 11 provides:

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 an external physical force resulting in permanent total disability.

Since injuries qualifying as grave are narrowly defined, the only determination to be made is whether the injury falls within the statute's objective requirements (*Castro v United Container Machinery Group, Inc.*, 96 NY2d 398, 736 NYS2d 287 [2001]).

A fair reading of the plaintiff's bill of particulars reveals that none of the injuries suffered

by the plaintiff fall within the list of injuries contained in Workers' Compensation Law § 11.

Thus, Hard Rock Café's claims for common law indemnification and contribution are dismissed without opposition, on the ground that plaintiff did not suffer a "grave injury" as that term is defined under Workers Compensation Law § 11.

*Contractual Indemnification and Breach of Contract*

The intent to indemnify must be "clear from the language of the promise" (*Atiencia v MMBCO II*, 17 Misc 3d 1138 [Supreme Court 2007]). Where there is no written contract containing an express provision agreeing to indemnify a party, such a party cannot obtain contractual indemnification (*Palacios v Beulah Commons Assocs.*, 13 Misc 3d 129 [1<sup>st</sup> Dept 2006]). In support of its motion, Remco established that the only "promise" made by Remco was that which was contained in Remco's work order with Regions, which fails to set forth any indemnification obligation with respect to Hard Rock Café, or any other party. Nor does the Proposal contain any language requiring that it procure insurance on behalf of or in favor of Hard Rock Café. The Proposal, coupled with the affidavit of Remco's Risk Manager, demonstrates that there is no written contract by which Remco expressly agreed to indemnify or hold harmless Hard Rock Café, or procure insurance (*Palacios v Beulah Commons Assocs., L.P.*, 13 Misc 3d 129 [Supreme Court, New York County 2006]). Thus, Remco has demonstrated that there is no basis to support a claim for contractual indemnification or breach of duty to procure insurance.

Hard Rock Café, however, indicates that discovery has not been completely produced by Remco or Regions. In this regard, CPLR 3211(d) provides:

Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the

objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Under CPLR 3211(d), a party opposing a motion to dismiss need only show that facts unavailable to the plaintiff *may* exist which will justify denial of the motion, and need not demonstrate the actual existence of such facts (*Peterson v Spartan Indus.*, 33 NY2d 463, 354 NYS2d 905 [1974]).

Here, the affidavit of Hard Rock Café's Vice-President indicates that additional discovery in the form of a deposition of Remco's vice-president, and discovery from Regions may reveal that Regions required that Remco obtain insurance on Hard Rock Cafe's behalf and/or that Regions required that Remco indemnify and hold harmless Hard Rock Café from injuries resulting from work being performed by Remco at the work site. According to such affidavit, Remco was performing work at the work site under an agreement between Remco and Regions, pursuant to which Remco "was to indemnify, hold-harmless and defend Hard Rock for any and all injuries resulting from the work performed by REMCO and its employees at the subject premises, including Frank Cusumano." Further, pursuant to the Construction Agreement between Regions and Hard Rock Café, Regions was to maintain certain insurance, and require all subcontractors to maintain certain insurance. Similarly, pursuant to an agreement between Regions and Remco, Remco was to procure such insurance and name Hard Rock Café as an additional insured for injuries resulting from the work performed by Remco and Remco's employees. Such affidavit raises the possibility that facts unavailable to Hard Rock Café *may* exist so as to justify denial of Remco's motion.

#### Conclusion

Based on the foregoing, the Court determines that the motion by second third-party defendant, Remco Maintenance, LLC pursuant to CPLR 3211 to dismiss the second third-party complaint of Hard Rock Café International (USA) Inc. s/h/a Hard Rock Café International, Inc. ("Hard Rock Café") is resolved as follows:

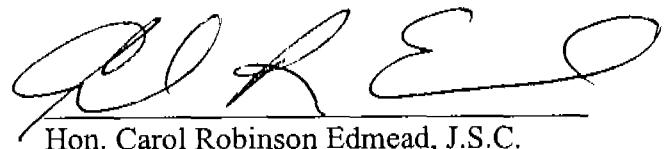
It is ORDERED that the branch of Remco's motion seeking to dismiss Hard Rock Café's common law indemnification and contribution claims is granted, and such claims are dismissed; and it is further

ORDERED that the branch of Remco's motion seeking to dismiss Hard Rock Café's claims for contractual indemnification and claim for breach of contract for failure to procure insurance is denied, without prejudice; and it is further

ORDERED that Remco shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 9, 2008



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

**FILED**  
JUN 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK