

**Jennosa v Vermeer Mfg. Co.**

2008 NY Slip Op 33292(U)

December 4, 2008

Supreme Court, Suffolk County

Docket Number: 03-27516

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 43 - SUFFOLK COUNTY

**PRESENT:**

Hon. ARTHUR G. PITTS  
Justice of the Supreme Court

MOTION DATE 6-5-08  
ADJ. DATE 10-9-08  
Mot. Seq. # 010 - MD  
# 011 - XMD

-----X  
JOSEPH JENNOSA, :  
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 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 VERMEER MANUFACTURING COMPANY, :  
 ADVANTAGE RENTAL CENTER and :  
 NICHOLAS GOVERNALE, :  
 :  
 Defendants. :

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-----X  
NICHOLAS GOVERNALE, :  
 :  
 :  
 Third-Party Plaintiff, :  
 - against - :  
 :  
 DUNNE IN THE SUN, INC., :  
 :  
 :  
 Third-Party Defendant. :

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-----X  
VERMEER MANUFACTURING COMPANY, :  
 :  
 :  
 Fourth-Party Plaintiff, :  
 - against - :  
 :  
 DUNNE IN THE SUN, INC., :  
 :  
 :  
 Fourth-Party Defendant. :  
-----X

HAMMILL, O'BRIEN, CROUTIER, DEMPSEY  
& PENDER, P.C.  
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Upon the following papers numbered 1 to 24 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers 5 - 7; Answering Affidavits and supporting papers 8 - 9; 10 - 12; 13 - 15; 16 - 17; 18 - 19; 20 - 22; Replying Affidavits and supporting papers 23 - 24; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (010) by defendant, Advantage Rental Center, for an order dismissing plaintiff's first cause of action and for an order granting summary judgment on its cross claim for common law indemnification from defendant/fourth-party plaintiff, Vermeer Manufacturing Company, is denied; and it is further

**ORDERED** that the cross motion (011) by third-party defendant/fourth-party defendant, Dunne in the Sun, for an order granting summary judgment dismissing the third-party and fourth-party actions as against it, is denied.

In this action, plaintiff, Joseph Jennosa, seeks damages for personal injuries he allegedly sustained on April 19, 2003, while employed for third-party defendant/fourth-party defendant, Dunne in the Sun ("Dunne"), and performing landscaping duties at the premises owned by defendant/third-party plaintiff, Nicholas Governale ("Governale"), located at 323 Lake Avenue South, Nesconset, New York. Plaintiff alleges that his employer rented a stump cutter on that day from defendant, Advantage Rental Center ("Advantage"), which was manufactured by defendant/fourth-party plaintiff, Vermeer Manufacturing Company ("Vermeer"). Plaintiff alleges causes of action sounding in common law negligence and strict products liability. Plaintiff testified that while he was operating the stump cutter at the end of the day, he noticed a piece of hose and lowered the idle of the stump cutter, disengaged and raised the cutting wheel but did not shut down the engine. He further testified that he walked away from the stump cutter, grabbed the hose and his hand was pulled into the stump cutter, causing severe injuries to his right wrist and hand, requiring surgery.

By his complaint and bill of particulars, plaintiff alleges that Advantage was negligent in its maintenance, repair, and/or modification of the machine. Advantage moves for summary judgment dismissing plaintiff's common-law negligence claims as against it and contends that there is no evidence which demonstrates that it improperly repaired or maintained the machine or that its actions proximately caused plaintiff's injuries.

In support of the motion, Advantage submits, among other things, the pleadings, bill of particulars, the examination before trial testimony of the plaintiff, non-party Hector Rodriguez ("Rodriguez"), Raymond Enste and Ivan Brand. Rodriguez testified to the effect that he was the co-owner of Dunne at the time of the accident. He stated that he did not witness plaintiff's accident. Dunne had been retained by Governale to perform general spring cleanup of the grounds on the premises as well as to remove tree stumps, according to an oral agreement between Rodriguez and Governale. He stated that he hired plaintiff approximately two weeks prior to that day. He rented the stump grinder on April 19, 2003 and began operating it at the job site. He ground twelve of thirteen stumps. Plaintiff cleaned up the debris along with two helpers. He stated that plaintiff operated the machine to the extent that he moved it to each stump for Rodriguez.

In the afternoon, Rodriguez needed to leave for a short time to obtain money from the bank to pay his workers. There was only one stump left to grind. He instructed plaintiff how to control the machine and when he felt satisfied that plaintiff was competent, he left the job site. He later received a telephone call by another worker that plaintiff was injured. Rodriguez stated that he returned to the premises and found plaintiff holding his hand with a towel and observed bone fragments near the

machine. He stated that he had rented this machine several times before and was aware that it took three to four minutes for the cutter wheel to stop turning after the machine was turned off. While Rodriguez operated the stump cutter, he did not encounter any hoses, however, he recalled being told by Governale that there was an underground sprinkler system.

Plaintiff testified to the effect that on the date of the accident, he was employed by Dunne as a supervisor performing landscaping and lawn maintenance. He stated that he was familiar with operating a stump grinder from previous experience. He stated that he operated a similar Vermeer 252 stump grinder 25 to 30 times. He and the two helpers were told by the boss, Rodriguez, that they would be clearing stumps on the date of the accident. They stopped to pick up the machine from Advantage Rental Center. When they arrived at Governale's premises, Rodriguez showed him the stumps. Rodriguez also showed plaintiff how to operate the machine, the controls, how to engage and disengage the cutter wheel with a switch and how to shut the machine down. As stated above, as he was grinding a stump, he observed a piece of hose. After he disengaged the cutting wheel, he stepped away and pulled the piece of hose, and was pulled by the machine toward the cutting wheel. He did not recall the warning stickers on the machine and was not informed of them by Rodriguez.

Mr. Raymond Enste testified to the effect that he was the president of Pifco, Inc., and the owner of Advantage at the time of the accident. Advantage sells and rents machines to contractors and the general public and also makes repairs. He stated that Advantage purchased the subject Vermeer 252 stump grinder on or about July, 1996. He learned about the accident when the machine was returned and he took it out of service by placing it in the warehouse. He stated that Advantage performs its own maintenance and repair to the Vermeer 252 after each rental. However, he stated that there are no maintenance records on the subject machine prior to the date of the accident and after the accident. His records reveal that maintenance was once again recorded sometime in November, 2004 when it was placed in service again. The machine was subsequently inspected by several people, however he was unaware of the results of the inspection, and is unaware if its condition was the same as prior to the inspection. He stated that regular maintenance includes changing oil and oil filters, lubricating points, changing teeth and checking belt tension. He stated that there were no injuries or complaints related to the subject machine prior to plaintiff's accident.

Mr. Ivan Brand testified to the effect that he is employed by Vermeer Manufacturing Company as a senior technical coordinator and product safety manager. He stated that he inspected the subject machine after the injury was reported. He wrote a report and took pictures. He checked the machine's controls, performed an overall check of the safety signs and the general condition of the machine, measured the cutter wheel guards, measured stopping times and checked the wheel lock pins. He was not aware how the accident happened. At the end of the inspection, he concluded that the hydraulic fluid level was low and that the safety bar was abnormally positioned. He further noted trauma to the cutter wheel guard with bending which resulted in the guard resting somewhat lower in its resting position. He could not say whether or not the machine had been repaired or modified. However, in this position, the guard would interfere with cutting a stump.

Pursuant to CPLR 3212, a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an

attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (*Olan v Farrell Lines, Inc.*, 105 AD2d 653, 481 NYS2d 370 [1<sup>st</sup> Dept 1984], *aff'd* 64 NY 2d 1092, 489 NYS2d 884 [1985]); *Spearmon v Times Square Stores Corp.*, 100 AD2d 964, 475 NYS2d 348 [2d Dept 1984]); Weinstein-Korn-Miller, NY Civil Prac ¶ 3212.09 [2d ed]). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

The Court finds that defendant Advantage has failed to provide sufficient admissible evidence which shows that it was not negligent. Issues of fact exist regarding whether the cutter wheel guard was abnormally positioned and/or damaged prior to the accident, which may have proximately caused plaintiff's injuries. In addition, no evidence was submitted regarding the condition of the subject machine prior to April 19, 2003, inasmuch as Advantage conceded that the repair records are no longer available. Thus, Advantage has not demonstrated its entitlement to judgment as a matter of law by its failure to establish that it was not negligent in the maintenance and repair of the subject stump cutter prior to the plaintiff's accident. Consequently, the branch of Advantage's motion for an order granting summary judgment on its cross claim for common law indemnification against defendant/fourth-party plaintiff Vermeer is denied as premature.

Turning to the cross motion by third-party defendant/fourth-party defendant Dunne, who seeks summary judgment on the indemnification claims by defendant/third-party plaintiff Governale and defendant/fourth-party plaintiff Vermeer, Dunne contends that Hector Rodriguez was not negligent in leaving plaintiff to operate the stump cutter in his absence after learning that plaintiff had prior experience with the operation of the machine. Plaintiff's testimony that he had prior experience and that Mr. Rodriguez showed him the controls and observed him with the machine supports Mr. Rodriguez' opinion that plaintiff was competent. In opposition, however, both Governale and Vermeer claim that Rodriguez was negligent by his cursory demonstration to plaintiff, his failure to inform plaintiff that there was an owner's manual on the machine which provided operating instructions, and his failure to warn plaintiff that the cutter wheel would continue to spin even after it was disengaged.

New York Workers' Compensation Law § 11 shields employers from third-party actions seeking contribution or indemnification (*see, Schramm v Cold Spring Harbor Lab.*, 17 AD3d 661, 793 NYS2d 530 [2d Dept 2005]). The statute allows a third party claim against an injured worker's employer in only two circumstances: where the injured worker has suffered a "grave injury" or the employer has agreed to indemnification pursuant to a written contract (*see Flores v Lower East Side Serv. Ctr.*, 4 NY3d 363, 795 NYS2d 491 [2005], *rearg. den.* 5 NY3d 746 [2005]). Here, Mr. Rodriguez testified that there was an oral agreement with third-party plaintiff Governale regarding the details of the work to be performed, and thus no written contract existed. However, Dunne has failed to submit competent medical evidence to prove that the plaintiff did not sustain a grave injury, as alleged by both Governale and Vermeer. Thus, Dunne has failed to demonstrate its prima facie entitlement to judgment as a matter of law that it should not be held liable for indemnification of Governale and/or Vermeer.

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Accordingly, the motion by Advantage for an order granting summary judgment dismissing the plaintiff's cause of action as against it and on its cross claim as against Vermeer is denied. Likewise, the cross motion by Dunne for an order granting summary judgment dismissing the third-party and fourth-party actions is denied.

Dated: December 4, 2008

  
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J.S.C.

\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION