

Moskowitz v Casio, Inc.

2009 NY Slip Op 30194(U)

January 22, 2009

Supreme Court, Nassau County

Docket Number: 11217/04

Judge: Anthony L. Parga

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.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X **PART 10**

**LORI MOSKOWITZ, Individually and as
Mother and Natural Guardian of TAYLOR
MOSKOWITZ, an Infant,**

Plaintiff,

INDEX NO. 11217/04

-against-

**MOTION DATE: 11/10/08
SEQUENCE NO. 05, 06, 07, 08**

**CASIO, INC., PHILLIPS ACCESSORIES AND
COMPUTER PERIPHERALS, and DIRECT
TRADING LIMITED, C/O GEMINI
INDUSTRIES,**

Defendants

-----X

3-Notices of Motion, Affs. & Exs.....	<u>1-3</u>
Notice of Cross-Motion, Affs. & Exs.....	<u>4</u>
Affirmations In Opposition & Exs.....	<u>5-9</u>
Reply Affirmation & Exs.....	<u>10-12</u>

Upon the foregoing papers, it is ordered that the motion by defendant Casio for an order granting summary judgment on their cross-claims against co-defendant Direct Trading is denied. The branch of defendant Casio's motion seeking to dismiss plaintiff's claims against Casio is denied.

The motion by defendant Phillips Accessories and Computer Peripherals ("Phillips") for an order granting summary judgment dismissing all claims and cross-claims is denied.

The motion by defendant Direct/Gemini for an order granting summary judgment dismissing plaintiff's Complaint against it and granting their cross-claims against Phillips Accessories and Computer Peripherals is denied.

The motion by plaintiff for an order permitting plaintiff to serve a Second Supplemental Summons and Complaint is granted.

In the present action, infant plaintiff seeks damages for injuries allegedly sustained on June 4, 2004 due to the negligence and strict liability of defendants in the design and manufacture sale of a keyboard stand. Gemini (and subsidiary Direct) merged into Phillips Accessories and Computer Peripherals after 2004. Testimony indicates that "Direct Trading was a company wholly owned by Gemini, set up in Hong Kong, to be used as a vehicle to allow customers to deal directly with Asia".

The proponent of a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 (1980)).

In support of defendant Casio's motion for summary judgment on its cross-claim against defendant Direct, Casio argues that it is uncontroverted that plaintiff was injured by the keyboard stand, not the detachable keyboard that was on the floor at the time of plaintiff's alleged injury. Casio notes manufacturer Direct sold the GSDX stand to Casio in October 2002. Casio also notes that the agreement between Casio and Direct contained indemnification language that compels Direct to defend

and indemnify Casio for claims such as this. The agreement between Casio and Direct also required Direct to maintain liability insurance which Casio challenges Direct's compliance therewith.

Defendant Direct opposes this application with sworn testimony of Harry Pila, former Senior Vice President of Gemini describing the business relationship between Casio and Direct/Gemini. Specifically, with the Casio keyboard stands "when Casio came to Gemini with samples and specs of what they wanted, Gemini contracted with one of its existing vendors on behalf of Casio". Pila testified, in summary, that the stand was probably manufactured by "King Best" according to "specs provided by Casio" and "subsequent to that, the samples were provided to Casio for Casio's approval."

Defendant Direct also argues that any design defect as alleged in the Complaint is Casio's responsibility and the indemnification language of the sales agreement does not confer any liability for plaintiff's injury on Direct. With respect to the insurance issue, Direct submits documentary evidence of insurance for November 2003-November 2004, the period of plaintiff's accident.

Notwithstanding undisputed facts : ". . . the agreement between DIRECT and CASIO contained indemnification language; . . . CASIO sells musical instruments that it purchases from other companies; . . . By purchase order dated October 7, 2002, CASIO purchased six thousand (6000) GSDX stands from Direct", there remain questions of fact with respect to the cause of plaintiff's injury and defendant Casio's liability thereto that preclude summary disposition. The obligation by Direct to provide a defense for Casio pursuant to their agreement cannot be resolved until the cause of the stand injury is resolved and it is clear that Casio and Direct have no conflicts in interest.

In support of that part of Casio's motion for summary judgment dismissing plaintiff's claims, Casio has not met its burden of demonstrating the absence of any questions of fact to absolve it of any liability for plaintiff's claims.

In opposition to Casio's motion, plaintiff contends that Casio's denial of any responsibility for the stand design or manufacture does not absolve it from liability in negligence or strict liability claims in the Complaint.

Defendant Phillips' motion for summary judgment dismissing all claims and cross-claims against it is supported by the time line and corporate pedigree of the parties. Phillips argues that Direct is a subsidiary of Gemini; on January 1, 2005 a merger between non-party Phillips Electronics North America Corp. (PENAC) and Gemini resulted in PENAC with divisions of defendant Direct/Gemini and defendant Phillips Peripheral.

Phillips concludes that based on the sworn deposition testimony, defendant Phillips Peripherals had no role in the sale or manufacture of the keyboard stand. Defendant Phillips points to sworn testimony that "King Best" manufactured the keyboard stand specifically for Casio to Casio's specific speculations.

In opposition to Phillips' motion, defendant Casio reiterates its position that it does not manufacture or design keyboard stands. Rather, Casio contends it merely sells: "musical instruments that it purchases from other company. By purchase order dated October 7, 2002, CASIO purchased six thousand (6000) GSDX stands from DIRECT".

Defendant Phillips has not met its burden of demonstrating the absence of questions of fact as to its liability to plaintiff for the keyboard stand. It is not clear as to the relationship for shared liability amongst PENAC, subsidiaries and business partners.

The motion by defendant Direct/Gemini for an order dismissing plaintiff's Complaint and granting its the cross-claims against Phillips is supported by the sworn testimony of plaintiff, Lori Moskowitz, indicating she was misusing the keyboard stand by "fooling around and we were leaning on the thing and it just snapped".

Defendant Direct also offers the sworn report of engineer, David Guido, who inspected the keyboard and stand involved in plaintiff's injury. Guido concluded that: "It is my opinion with a reasonable degree of engineering certainty that the subject stand failed in service due to overload that resulted from misuse. . . . allegations made regarding the collapse of the stand are inconsistent with the configuration of the stand and the testimony regarding the described circumstances. Rather, it is apparent that the stand collapse resulted from other conditions or circumstances." Defendant Direct concludes that plaintiff's misuse was the sole cause of plaintiff's injuries and the claims should be dismissed.

As to their cross-claims against Phillips, defendant Direct also refers to testimony of Phillips General Counsel, Dan Sheridan, as to the business details of the merger as well as stating that Direct ordered the stands from non-party manufacturer, "King Best" and then sold them to Casio.

In opposition to defendant Direct/Gemini's motion, plaintiff argues that their engineering expert David Guido's conclusion that the keyboard stand was misused is a conclusion made without seeing the stand before the accident and plaintiff finds this opinion to not be dispositive on the issue of defendant Direct/Gemini's liability for plaintiff's injuries. In plaintiff's engineer Rudolph Ulfstam's affidavit, he concludes that defendant Direct/Gemini as manufacturer is responsible for the defect: "failure of the manufacturer to indicate the weight bearing capacity on the keyboard. . . ."

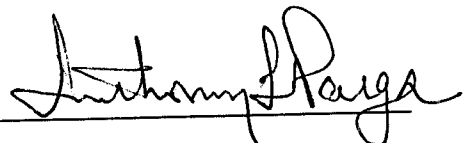
Defendant Direct/Gemini's motion is also opposed by defendant Phillips with the argument that Phillips did not exist as a corporate entity at the time of plaintiff's injury. Gemini and Direct, separate corporations, merely merged with Phillips; hence, Phillips was not the manufacturer and not liable to plaintiff. Defendant Direct/Gemini has not met its burden of demonstrating the absence of any questions of fact with respect to its liability to plaintiff directly and as liability to co-defendants pursuant to contractual agreements.

The motion by plaintiffs for an order granting leave to serve a Second Supplemental Summons and Complaint is granted.

Plaintiff seeks to amend the Complaint to have Direct and Gemini as separate distinct business entities. Plaintiff argues that this aspect of the business ownership of these defendants became apparent at their depositions. Defendant Phillips does not dispute plaintiff's contention that Gemini is a "separate and distinct corporate entity from Direct". There has been no showing of prejudice to any defendant by separating Direct from Gemini.

Plaintiff shall serve the Second Supplemental Summons and Amended Complaint on all parties within 20 days of the date of this order.

Dated: January 22, 2009.



Anthony L. Parga, J. S. C.

ENTERED
JAN 25 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE