

Gutierrez v Kimberly Holdings, LLC

2009 NY Slip Op 31020(U)

May 1, 2009

Supreme Court, New York County

Docket Number: 116507/06

Judge: Judith J. Gische

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
HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Index Number : 116507/2006

GUTIERREZ, EDSON

vs

KIMBERLY HOLDINGS, LLC

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Is 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

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAY 05 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 1, 2009

[Signature]
HON. JUDITH J. GISCHE J.S.C.
NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Edson Gutierrez,
Plaintiff (s),

-against-

Kimberly Holdings, LLC,
JJMAG Restaurant, Corp.,
Nikki Midtown f/d/b/a Vue Club,
George Iordanou and Zane Sellis,
Defendant (s).

-----X
JJMAG Restaurant Corp. and
Nikki Midtown f/d/b/a Vue Club,
3rd Party Plaintiff (s),

-against-

Musically Yours, Inc. and
Musically Yours Pro Sound,
Lights & Musical Instruments, Inc.,
3rd Party Defendant (s)

-----X
Kimberly Holdings, LLC,
2nd - 3rd Party Plaintiff (s),

-against-

Musically Yours, Inc. and
Musically Yours Pro Sound,
Lights & Musical Instruments, Inc.,
2nd- 3rd Party Defendant (s)
-----X

DECISION/ ORDER
Index No.: 116507/06
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

Third Party Index No.:
590858/06

FILED
MAY 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

2nd-Third Party Index No.:
590280/08

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Musically Yours etc n/m (§3212) w/WRW, exhs	1
Supplemental Affirm in Support (WRW), exh	2
JJMAG opp w/JLR affirm	3
Kimberly opp w/ HCA affirm	4
Musically Yours w/WRW affirm	5

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff Edson Gutierrez ("Gutierrez") for personal injuries based upon alleged violations of sections 200, 240 (1) and 241 (6) of the Labor Law. Two of the defendants in plaintiff's action ("JJMAG" and "Kimberly") have separately commenced third party actions against Gutierrez's employer, Musically Yours, Inc. and Musically Yours Pro Sound, Lights & Musical Instruments, Inc. ("Musically" at times "employer"). Issue has been joined.

Musically now moves for summary judgment dismissing each third party action. The motion is opposed by JJMAG, the third party plaintiff and Kimberly, the 2nd-third party plaintiff. Plaintiff Edson Gutierrez ("Gutierrez") takes no position on this motion, though due proof of service has been filed with the court. The note of issue has not yet been filed.

Since any party can move for summary judgment after issue has been joined, this motion will be decided on the merits. CPLR § 3212 (a); Brill v. City of New York, 2 NY3d 648 (2004).

The court's decision and order is as follows:

Arguments Presented

Plaintiff Gutierrez contends he sustained injuries on October 23, 2004 ("date of

the accident") when he fell from a ladder while replacing a light fixture at a disco called the "Vue." The injuries alleged include fractures of the right ankle, tibia and fistula which required surgery and skin grafts. Plaintiff was deposed on November 7, 2008. At that time he testified that he still has pain in his leg and he anticipates having surgery to reduce the size of the skin grafts he received. These grafts have caused bulging scars on his leg. This procedure is expected to enhance the cosmetic appearance of his leg and reduce some discomfort he has experienced. Although Gutierrez testified he has very limited mobility in his ankle and residual pain in his toes, he can walk unassisted by a cane, etc., and he has returned to work. He may ultimately need surgery to permanently fuse together some bones in his ankle; this would eliminate motion in that joint altogether. Although Gutierrez testified that after his injury he saw a doctor who recommended an amputation of his foot, that recommendation was made before his surgery, which took place shortly after the accident.

Gutierrez was examined by a doctor that JJMAG expects to call at trial ("Dr. Crane"). Dr. Crane has prepared a report dated January 6, 2009, based upon his examination of plaintiff and other records. The reports that plaintiff can walk "normally and without limping," although he has a very limited range of motion. His prognosis for Gutierrez is "fair to good. No further treatment is anticipated at this time."

In support of its motion, Musically provides the foregoing report, Gutierrez's deposition testimony and the medical reports of two other doctors who examined the plaintiff ("Dr. Canario" and "Dr. Tiger"). Their reports were produced by plaintiff during the course of discovery. In his report dated March 2, 2006, Dr. Canario describes the range of motion Gutierrez has in his right foot as 40%. Dr. Canario expects that in the

future plaintiff may need an ankle fusion, if he develops arthritis. Dr. Tiger, in his report dated December 13, 2005, also describes the limitations plaintiff has in his right foot (90% loss of range of motion). While noting these limitations in range of motion, neither doctor recommends the foot be amputated.

Musically contends that since there is no claim for contractual indemnification by either of the third party plaintiffs, and JJMAG and Kimberly are seeking common law indemnification, Gutierrez would have had to have sustained a "grave injury" within the meaning of section 11 of the Workers' Compensation Law in order for either of these cases to be viable. Musically contends neither action states a cause of action because Gutierrez has both feet intact.

JJMAG and Kimberly each argue that Musically's motion is premature not only because discovery has not yet been completed, but also because Musically has mischaracterized plaintiff's deposition testimony. Both contend it is still a possibility plaintiff's right foot may need to be amputated.

Discussion

Both JJMAG and Kimberly contend that discovery is incomplete and this is a sufficient reason to deny Musically's motion for summary judgment. Where it appears that facts essential to justify opposition may exist but cannot then be stated, the court may deny a motion for summary judgment and permit an opportunity for discovery. CPLR § 3212 (f); R.C.S. Farmers Markets Corp. Best Section End v. Great Amer. Ins. Co., 56 N.Y.2d 918, 920-921 (1982). Neither JJMAG nor Kimberly describe the information that they need which has not been provided. JJMAG has had a physical examination of the plaintiff and for the purposes of this motion, Kimberly adopts

JJMAG's arguments, and therefore, also the findings by Dr. Crane. Dr. Crane makes no recommendation that plaintiff's right foot has to be amputated or anticipate this may be a possible course of treatment. Although plaintiff mentions this possibility during his EBT, his comments are based upon old information he received before he had his surgery. Neither JJMAG nor Kimberly have shown what information they need, that they do not have, before they can oppose this motion on the merits. Therefore, this is not a reason to deny the motion by Muscially.

As the proponent of this motion for summary judgment, Muscially must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Muscially has established and it is unrefuted that both 3rd party complaints are for common law, not contractual indemnification. A third-party action can be maintained against an injured worker's employer only if the injured worker has suffered a "grave injury," or the employer has entered into a written contract to indemnify the owner. Flores v. Lower East Side Service Center, Inc., 4 N.Y.3d 363, 365 (2005). Since there is no written contract, the issue is whether Gutierrez has suffered a "grave injury," as defined in the Workers' Compensation Law § 29.

The argument presented by JJMAG and Kimberly is that plaintiff *may* need an amputation of his foot. This claim, however, is without any support in this record and

neither 3rd party plaintiff has come forward with any triable issues of fact. Although plaintiff has a limited range of motion, he has both feet and can walk unassisted. He is not currently undergoing any treatment which makes the possibility of amputation likely.

Given that Gutierrez has not suffered a "grave injury," within the meaning of the Workers' Compensation Law, Musically's motion for summary judgment, dismissing the 3rd party action by JJMAG and Kimberly's 2nd- 3rd party action is hereby granted. Both third party actions are dismissed.

Conclusion


The motion for summary judgment by 3rd party defendant also 2nd - 3rd party defendant Musically Yours, Inc. and Musically Yours Pro Sound, Lights & Musical Instruments, Inc. is granted for the foregoing reasons. The 3rd party action (T.P. Index No. 590858/07) and 2nd- 3rd party action (T.P. Index No. 590280/08) are each severed and dismissed from this action. The clerk shall enter judgment in favor of Musically Yours, Inc. and Musically Yours Pro Sound, Lights & Musical Instruments, Inc. against JJMAG Restaurant Corp. and Nikki Midtown f/d/b/a Vue Club (T.P. Index No. 590858/06) and against Kimberly Holdings, LLC (T.P. Index No. 590280/08), with costs and disbursements.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 1, 2009

So Ordered:


Hon. Judith J. Gische, J.S.C.

FILED
MAY 05 2009
COUNTY CLERK'S OFFICE
NEW YORK