Fede v Costco Wholesale Corp.
2010 NY Slip Op 30162(U)
January 25, 2010
Supreme Court, Richmond County
Docket Number: 103168/05
Judge: Joseph J. Maltese
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.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No. 103168/05
Motion No.: 8

ANTHONY FEDE AND WENDY FEDE,

Plaintiffs

against

COSTCO WHOLESALE CORPORATION AND GLACEAU WATER CO., INC.,

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

GLACEAU WATER CO., INC.,

Third-Party Plaintiff,

against

SIM-KEE, INC. AND BIG GEYSER, INC.

Third-Party Defendants

TP Index No:
A103168/05

The following items were considered in the review of the following motion by Simm-Kee, Inc. for an order granting summary judgment dismissing all claims made by third-party plaintiff, Glaceau Water Co., Inc.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2, 3, 4
Replying Affidavits	5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The third-party defendant SIMM-KEE, Inc. ("SIMM-KEE") moves for an order granting summary judgment dismissing the complaint brought by third-party plaintiff Glaceau Water Co., Inc.("Glaceau") under New York Civil Practice Law and Rules ("CPLR") § 3212.[1] SIMM-KEE's motion is denied in the entirety. The Court notes the proper spelling of SIMM-KEE as

[1]CPLR § 3212 (a).

asserted by its counsel and corrects the caption *sua sponte*.

Facts

Big Geyser, Inc. ("Big Geyser") is a distributor of flavored water beverages. Anthony Fede ("Mr. Fede") was an employee of Big Geyser, delivering those beverages by a truck. On May 28, 2004, Fede was off-loading a pallet of beverages from a truck at Costco Wholesale Corporation ("COSTCO") while making a delivery. Mr. Fede experienced difficulty in moving a pallet and a COSTCO employee assisted in moving the pallet with a fork lift in order to unload the delivery. Mr. Fede alleges injuries that occurred when cases of the beverages fell from the pallet during off-loading and delivery at COSTCO and struck him.

Glaceau manufactured and bottled beverages in bottle lots of single flavors. Glaceau placed single-flavor lots on pallets and shipped those pallets to SIMM-KEE. At SIMM-KEE, the beverages were sorted, re-packaged and placed on pallets in packages containing a variety of flavors. SIMM-KEE transferred those variegated pallets to Big Geyser. Big Geyser transshipped the beverages on SIMM-KEE's pallets to COSTCO and to other markets and stores. In 2004, Glaceau used pallets purchased from a manufacturer of pallets known as Bett-A-Way. SIMM-KEE used Glaceau's Bett-A-Way pallets. Big Geyser transhipped the pallets as they received them from SIMM-KEE, in "palletized units".[2]

An action alleging negligence was initially filed by Mr. Fede against COSTCO and Glacaeu on November 1, 2005. A third party complaint by Glaceau against both SIMM-KEE and Big Geyser was dated February 16, 2007, in which Glaceau asserted that SIMM-KEE committed a tortious act resulting in injury to Mr. Fede. Glaceau further asserted that SIMM-KEE was contractually obligated to maintain liability insurance for at least $1,000,000.00 and to name Glaceau as an additional insured on the policy.

---

[2]Third Party Defendant SIMM-KEE, Affirmation in Support, pages 4-5.

Discussion

Under CPLR § 3212, a motion for summary judgment requires that "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."[3] Not withstanding pertinent facts presented by any party, "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."[4] When the Appellate Division, Second Department evaluates for summary judgment, all evidence must be examined in the light most favorable to the non-moving party;[5] and the non-movant must be given the benefit of every favorable inference.[6] Presentation of facts, not mere conclusory assertions of a lack of liability properly support summary judgment.[7] The Court of Appeals states that "summary judgment is a drastic remedy and should not be granted when there is any doubt as the to the existence of a triable issue."[8] The Court of Appeals further declines to grant summary judgment where the existence of an issue is arguable.[9]

The proponent of a motion for summary judgment has the burden of tendering sufficient

---

[3]CPLR § 3212 (b).

[4]*Id.*

[5]*Nicklas v. Tedlen Realty* Corp., 305 AD 2d 385, 386 [2d Dept 2003].

[6]*Gray v. N. Y. City Transit Auth.*, 12 AD 3d 638, 639 [2d Dept 2004]; *Perez v. Exel Logistics, Inc.*, 278 AD 2d 213, 214 [2d Dept 2000]

[7]*Winegrad v. New York Univ. Med. Ctr.*, 64 NY 2d 851, 853 [1985]; *Lopez v. Senatore*, 65 NY 2d 1017, 1019-20 [1985].

[8]*Rotuba Extruders, Inc. v. Ceppos,* 46 NY 2d 223, 231 [1978], *quoting Moskowitz v.* Garlock*, 23 AD 2d 943, 944 [1965]; Herrin v. Airborne Freight Corp.*, 301 AD 2d 500, 500-501 [2d Dept 2003]; *and American Home Assurance Co. v. Amerford International Corp.*, 200 AD 2d 472 [1st Dept 1994].

[9]*Sillman v. Twentieth Century-Fox Film Corp.*, 2 NY 395, 404 [1957]; *and American Home Assurance Co. v. Amerford International Corp.* at 472.

evidence to show the absence of opposing material issues of fact.[10] Once a moving party has made a showing of sufficient evidence, the burden shifts to the opposing party to put forth evidence in admissible form to establish a triable issue for the fact finder.[11] The opposing party may then submit proof in opposing papers. In a concurrence, the Court of Appeals stated "[i]t is not the court's function on a motion for summary judgment to assess credibility."[12] The concurrence continues, "[c]redibility determinations ... are jury functions, not those of a judge."[13] Assessment of the credibility of statements made in testimony, as well as disputed facts are proper for a trier of fact and can not be determined in a motion for summary judgment.

At SIMM-KEE, the wooden pallets from Glaceau were unloaded, some of the beverages were put onto pallets packed for COSTCO, and some pallets were"tossed to the side". Beverages destined for delivery to COSTCO were loaded onto new pallets.[14] Pallets designated for COSTCO were among those designated as "club pallets".[15] Those new pallets assigned to shipment to COSTCO were shipped to Big Geyser. Mr. Fede did not notice if any pallets were damaged when he loaded them without difficulty into a truck at Big Geyser. However, at the time of delivery to COSTCO, Mr. Fede was unable to move the pallet himself and requested help. SIMM-KEE concludes that there was no defect in the pallet when it arrived at Big Geyser and any defect occurred after processing by SIMM-KEE. SIMM-KEE asserts that Glaceau provided all the packaging supplies for shipments to recipients, including wooden pallets

---

[10]*Wasserman v. Carella*, 307 AD 2d 225, 226 [1st Dept 2003].

[11]*Zuckerman v. City of New York*, 49 NY 2d 557, 562 [1980]; *and In the Matter of Javon T. v. Ashton T.*, 2009 NY Slip Op *1 [2d Dept 2009].

[12]*Forest v. Jewish Guild for the Blind*, 3 NY 3d 295, 315 [2004 Smith, J. *concurring*], *quoting Ferrant*e *v. American Lung Assn.*, 90 NY 2d 623, 631 [1997].

[13]*Forest v. Jewish Guild for the Blind*, 3 NY 3d at 315, *quoting Anderson v. Liberty Lobby, Inc.*, 477 US 242, 255 [1986].

[14]Third Party Defendant SIMM-KEE, Affirmation in Support, pages 4-5.

[15]*Id.* at page 6.

manufactured by Bett-A-Way,[16] without "discretion to use another pallet company."[17] SIMM-KEE speculated that pallets could be damaged during delivery by Big Geyser's delivery truck, or damaged from improper attempts to use hydraulic lifts.[18] On these bases, SIMM-KEE asserts that there was nothing wrong with the wooden club pallet at issue when SIMM-KEE delivered products to Big Geyser.[19]

Affirmation in Opposition offered by Mr. Fede is terse, "... SIMM-KEE, Inc., is an integral part of the process of how this drink is repackaged and moved to various distributors. Hence, if they are part and parcel of the process, then they are inherently liable as well."[20] Affirmation in Opposition by COSTCO is more particularized. COSTCO asserts that SIMM-KEE has "at least six individual instances where ... [SIMM-KEE] have the opportunity to damage or break a pallet."[21] "[T]he role played by SIMM-KEE cannot be ignored or minimized."[22] The defendant and third-party plaintiff, Glaceau properly points out that conclusory statements offered *in lieu* of unopposed facts is inadequate foundation for summary judgment.[23] In opposition, SIMM-KEE concludes that the assertion that SIMM-KEE improperly packaged beverages is remote.[24]

SIMM-KEE simply concludes that the corporation did nothing wrong. The plaintiff Mr.

---

[16]*Id.* at page 6.

[17]*Id.* at pages 5-6.

[18]*Id.*, page 8, ¶ 8.

[19]*Id.*, page 9.

[20]Plaintiff Mr. Fede's Affirmation in Opposition.

[21]Defendant COSTCO's Affirmation in Opposition, ¶ 6.

[22]*Id.* at ¶ 7.

[23]*Citing Winegrad v. New York Univ. Med Center*, 64 NY 2d 851 [1985].

[24]Cross-Defendant SIMM-KEE's Reply Affirmation, page 2.

Fede assumes that the presence of SIMM-KEE in the stream of processing and distribution of this product speaks for itself. COSTCO asserts that SIMM-KEE may bear the burden of some or of all of the liability of this action, and may be apportioned damages resulting from any injury to Mr. Fede resulting from negligence in the creation, loading, shipping, or handling of the pallet he attempted to move on May 28, 2004. As noted, these issues of fact and credibility are within the proper provenance of the jury to determine.[25] Even if the facts are uncontested, the very nature of negligence cases "do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination."[26]

Conclusion

Motion for summary judgment in favor of SIMM-KEE, Inc.on the claim of Glaceau Water Co., Inc. against SIMM-KEE, Inc. is dismissed in its entirety. The caption will be amended to direct the action against SIMM-KEE, Inc. in its proper spelling.

Accordingly, it is hereby:

ORDERED, that the motion made by the cross defendant SIMM-KEE, Inc. for summary judgment in it's favor is denied in its entirety; and it is further

ORDERED, that the caption as to Third-Parties shall be amended to read:

---

[25] *Forest v. Jewish Guild for the Blind*, 3 NY 3d at 315.

[26] *Ugarriza v. Schmieder*, 46 NY 2d 471, 474 [1979].

[* 7]

GLACEAU WATER CO., INC., **TP Index No: A103168/05**

***Third-Party Plaintiff*,**

against

SIMM-KEE, INC. AND BIG GEYSER, INC.

Third-Party Defendants.

and it is further;

ORDERED, that all parties shall return to **DCM Part 3** on **Monday, February 22, 2010** for **Pre-Trial Conference**.

ENTER,

DATED: January 25, 2010

Joseph J. Maltese
Justice of the Supreme Court

[* 8]