

Carlson v Rockefeller Ctr. N., Inc.

2010 NY Slip Op 33711(U)

December 27, 2010

Sup Ct, New York County

Docket Number: 110191/07

Judge: Paul Wooten

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

PRESENT: Paul Wooten

PART 2

Index Number : 110191/2007

CARLSEN, MICHAEL

vs

ROCKEFELLER CENTER NORTH

Sequence Number : 007

SEVER ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided per the long form order on motion sequence 006.

FILED

JAN 24 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12-27-10

Paul Wooten J.S.C.

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 — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

MICHAEL CARLSEN and SUSAN CARLSEN,

Plaintiffs,

INDEX NO. 110191/07

- against -

MOTION DATE _____

ROCKEFELLER CENTER NORTH, INC., and
TISHMAN SPEYER PROPERTIES, L.P.,

MOTION SEQ. NO. 006

Defendants.

MOTION CAL. NO. _____

ROCKEFELLER CENTER NORTH, INC.,

Third-party Plaintiff,

INDEX NO. 591069/07

- against -

DAVID SHULDINER, INC.,

Third-party Defendant.

The following papers were read on this Motion for Summary Judgment by third-party defendant David Shuldiner, Inc.

Notice of Motion — Affidavits — Exhibits

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits (Memo) _____

3, 4, 5

Replying Affidavits (Reply Memo) _____

6, 7

Cross-Motion: Yes No

Motion sequences 006 and 007 are consolidated for disposition.

FILED

JAN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

The motions at issue arise from a case involving an alleged construction site accident. Plaintiff¹ alleges that on June 1, 2007, he sustained serious injuries when he fell from scaffolding as a result of the negligence of defendant Rockefeller Center North, Inc. (hereinafter "Rockefeller")². The action commenced on July 25, 2007, and plaintiff filed a note of issue on April 16, 2009.

At the time of the alleged incident, plaintiff was employed by David Shuldiner, Inc. (hereinafter "Shuldiner"). On or about November 29, 2007, Rockefeller served a third-party complaint upon Shuldiner seeking contractual indemnification and alleging a breach of contract claim for failing to procure insurance covering Rockefeller as an additional insured. The two causes of action in the original third-party complaint were resolved by the decision and order in motion sequence 005, which dismissed Rockefeller's claim for contractual indemnification, but granted summary judgment in Rockefeller's favor as to the breach of contract claim.

A third and fourth cause of action, which are at issue here, were added later in an amended third-party complaint. Rockefeller moved, in motion sequence 002, to amend the third-party complaint to allege that plaintiff sustained a grave injury within the meaning of Workers Compensation Law §11. On June 4, 2009, Hon. Michael D. Stallman, J.S.C. denied the motion to amend, stating that Rockefeller's motion was curious in that plaintiff did not allege that he suffered a grave injury, and Rockefeller did not submit any evidence of a grave injury.

However, the June 4, 2009 decision granted Rockefeller leave to renew its request to amend if plaintiff received an award of Social Security disability benefits. Rockefeller so moved in motion sequence 004, which was granted in a decision dated September 21, 2009. That decision notes that an award of Social Security disability benefits is "some evidence" of

¹"Plaintiff" is used in the singular for convenience purposes, and where appropriate shall indicate both the allegedly injured plaintiff, Michael Carlsen, and his wife, Susan Carlsen.

²Defendant Tishman Speyer, L.P. was stipulated out of the case on December 6, 2007, after Tishman filed a motion for summary judgment.

unemployability in any capacity, which is the standard in determining the existence of a grave injury. The decision also vacated the note of issue, and allowed the parties to the third-party action to conduct additional discovery on the limited issue of whether or not plaintiff had suffered a grave injury. The limited discovery was to include medical and vocational rehabilitation examinations.

Shuldiner now makes the instant motion sequence 006, for summary judgment³ pursuant to CPLR §3212, contending that there is no triable issue of fact as to whether plaintiff has suffered a grave injury. As indicated above, this is the third motion to address the same issue of whether plaintiff suffered a grave injury. Shuldiner argues that plaintiff's injury does not meet the standard of being unemployable in any capacity, and that no expert reports by plaintiff or Rockefeller allege that plaintiff is unemployable in any capacity.

Shuldiner attaches five documents in support. The first document is a signed, unsworn letter report from Wilfred G. van Gorp, Ph.D., ABPP, Professor of Clinical Psychology and Director of Neuropsychology in the Department of Psychiatry at the Columbia University College of Physicians and Surgeons. No curriculum vitae is provided for Dr. van Gorp. The second document is a similarly signed, but unsworn Employability Analysis Report from a Robert C. Brower, CRC, CDMS, of Brower Rehabilitation Services, Inc. No curriculum vitae is provided for Brower, either, although a certificate from the Commission on Rehabilitation Counselor Certification, designating Brower as a Certified Rehabilitation Counselor, is appended to the report.

The third document is the first in a series of two sworn letter reports from William B. Head, Jr., M.D., who was apparently retained by Rockefeller's counsel. In the first report, dated

³Shuldiner's Notice of Motion and accompanying Affidavit request relief of dismissal, and do not state that they seek summary judgment. However, the opposition and reply papers both reference the motion as a summary judgment motion, and the Court will treat it as such.

February 10, 2009, Dr. Head states that he concludes, within a reasonable degree of medical certainty, that "there is no objective clinical evidence of a neurological disability . . . I fail to find objective evidence of neurological disability. In my opinion . . . there is no need for neurological treatment. I would conclude that the June 1, 2007 [incident] has not resulted in any permanent neurological condition of disability" (Shuldiner's Affirmation in Support, Exhibit H, Report dtd February 10, 2009 at 10). Dr. Head also stated that there were signs of "conscious exaggeration" of testing (*id* at 8).

In the second report, dated March 10, 2009, Dr. Head reviewed additional reports from the Center for Cognition and Communication (hereinafter the "Cognition Center"), including a Neurobehavioral Screen report. In the Screen report, "[i]t was stated that [plaintiff] had been unable to work due to his cognitive and physical symptoms. It was reported that, in a test designed to assess the effort put forth by the patient, Mr. Carlsen's performance had been within normal limits (Rey 15 Item test: 9/15). It was noted that only a brief to moderate battery of tests had been administered . . ." (Shuldiner's Affirmation in Support, Exhibit H, Report dtd March 10, 2009 at 1).

The fifth and final document is the unsigned transcript of plaintiff's deposition, which Shuldiner contends shows that plaintiff is employable in that "plaintiff could sit for a deposition that ran from 10:15 to 3:30, stating how his accident happened and what his physical manifestations were" (Shuldiner's Affirmation in Support at ¶123).⁴

In opposition, Rockefeller argues that Shuldiner presented no evidence establishing that plaintiff did not suffer a grave injury, as the reports submitted by Shuldiner are inadmissible. Rockefeller also contends that Shuldiner failed to meet the requirements of CPLR 3212 by failing to submit an affidavit from an individual with personal knowledge of the relevant facts.

⁴Shuldiner also points to a list of activities that plaintiff can no longer do, and asks the Court to jump to the inference that it is an exclusive list. However, the pages cited by Shuldiner contain no such list.

Rockefeller submits records and reports from the Cognition Center, including unsigned Outpatient Rehabilitation Treatment Plan / Progress Reports, dated December, 2008 and January, 2009, the previously discussed Neurobehavioral Screen report, dated December 12 and December 15, 2008, and various notes, forms, and test results. The Neurobehavioral Screen report is signed by Kim Busichio, Ph.D. and Jason Brown, M.D., but is unsworn. These records and reports are apparently submitted to raise a triable issue of fact, although Rockefeller's opposition papers do not mention these records and reports except to state that Brower and Dr. van Gorp did not discuss the same, which "concluded that Plaintiff has cognitive issues and is unemployable" (Rockefeller's Affirmation in Opposition at ¶19). A review of the records and reports, however, does not reveal any discussion of employability whatsoever. The Neurobehavioral Screen report does indicate potential cognitive issues in that plaintiff's memory is "impaired" and his information processing speed is "borderline," but that his cognitive functioning, including his "Global Cognitive Score," is within average range (Neurobehavioral Screen report at 3).

In reply, Shuldiner notes that plaintiff is able to, for example, "answer phones in an office" (Shuldiner's Reply Affirmation at ¶13). Shuldiner also submits Rockefeller's recently exchanged CPLR 3101(d) Expert Witness Disclosure of Life Care Planner Jane D. Mattson, Ph.D., together with Dr. Mattson's unsigned and unsworn Life Care Plan report. This Life Care Plan does not discuss or offer any opinions regarding plaintiff's employability.

Motion sequence 007 is also before the Court. Shuldiner seeks to sever the third-party action from the primary action, and also requests leave to implead Island Risk Management Associates, Inc., for their failure to procure additional insured status for Rockefeller. Plaintiff supports Shuldiner's motion in its entirety. Rockefeller opposes the motion only as to severance of the third-party action. Rockefeller reasons that there are common issues of fact, in that the jury in the primary action should also determine whether plaintiff suffered a grave

brain injury. Shuldiner replies that no such common issues exist.

Standards - Summary Judgment and Grave Injury

"The proponent of a summary judgment motion [pursuant to CPLR 3212] 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" (*Santiago v Filstein*, 35 AD3d 184, 185-86 [1 Dept 2006]). The burden then shifts to the opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 228, 228 [1 Dept 2006]).

As movant, Shuldiner has the initial burden of tendering sufficient evidence to eliminate any material issue of fact as to whether the plaintiff suffered a grave injury pursuant to Workers Compensation Law ¶11, which 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:
 . . . an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

"[T]he test we adopt for permanent total disability under [Workers Compensation Law] section 11 is one of unemployability *in any capacity*" (*Rubeis v Aqua Club*, 3 NY3d 408, 417 [2004] [emphasis in original]). If Shuldiner meets their burden of eliminating any issue as to whether plaintiff is unemployable in any capacity, the burden of raising a triable issue of fact shifts to Rockefeller.

Discussion - Motion Sequence 006

In reviewing the evidence submitted by the movant, the Court first notes that plaintiff's transcript is of itself insufficient to establish movant's entitlement to summary judgment. While plaintiff's ability to sit for a lengthy deposition and provide coherent answers to counsel should

weigh in movant's favor, it does not rise to the level of proving plaintiff's employability to the extent that there is no triable issue of fact thereon (*see Rubeis v Aqua Club*, 3 NY3d at 416-17 [holding that test is whether plaintiff is unemployable, not whether plaintiff is in a persistent vegetative state]).

Rockefeller argues that the expert letter reports submitted by Shuldiner may not be considered, as they are unsworn and therefore inadmissible. The reports of Brower and Dr. van Gorp cannot be considered for this reason. Dr. Head's reports are admissible, however, as those reports are signed and sworn to within a reasonable degree of medical certainty. Because Dr. Head concluded that he found no evidence of any brain injury or neurological disability of any kind or magnitude, let alone one rendering plaintiff unemployable in any capacity, Shuldiner has presented prima facie evidence of entitlement to summary judgment in its favor.

Rockefeller contends that summary judgment is nevertheless inappropriate, as Shuldiner failed to submit an affidavit from an individual with personal knowledge of the facts. However, CPLR 3212 does not specifically require a supporting affidavit, but rather a minimum of supporting evidence in admissible form; to this end, if an affidavit is presented as supporting evidence, the affidavit must be from a person with personal knowledge of the relevant facts rather than from a person essentially swearing to hearsay. A physician's letter report, if admissible, therefore satisfies the minimum evidence requirement under CPLR 3212.⁵

As Shuldiner has established prima facie entitlement to summary judgment, the burden shifts to Rockefeller to establish a material question of fact as to the existence of a grave injury such that plaintiff is rendered unemployable. Rockefeller submits, as evidence of the existence

⁵Also, the relevant facts are with respect to whether or not plaintiff suffered a grave injury such that he is unemployable in any capacity. A non-self-serving affidavit as to this issue could only come from an expert physician such as Dr. Head, and so his letter report satisfies the statutory requirement of submitting a supporting affidavit.

of such a grave injury, various unsworn and/or unsigned reports from the Cognition Center. These reports are admissible because the various reports submitted by Shuldiner refer to the Cognition Center reports (*see Thompson v Abbasi*, 15 AD2d 95, 97 [1 Dept 2005], citing *Ayzen v Melendez*, 299 AD2d 381, 381 [2 Dept 2002]). The Cognition Center reports nevertheless fail to establish a question of fact sufficient to overcome Shuldiner's prima facie showing, as none of the Cognition Center reports discuss employability at all. Rockefeller's opposition papers therefore fail to make a coherent argument sufficient to raise a triable issue of fact as to employability.

Furthermore, the Cognition Center records and reports indicate that plaintiff is within the average range of cognitive functioning, except with respect to his memory and information processing speed, neither of which could impede performance of a menial labor job. While the proffered records and reports may raise a question of fact as to whether plaintiff suffered a brain injury at all, they do not raise such a question of fact as to whether plaintiff suffered a grave brain injury such that he is unemployable in any capacity, which is the relevant higher standard.⁶

Discussion - Motion Sequence 007

CPLR 1011 provides in part that a "third-party defendant may proceed pursuant to section 1007 against any person who is or may be liable to him for all or part of the third-party claim." CPLR 1007 provides that a defendant may commence a third-party action. Here,

⁶Rockefeller might have brought additional evidence in the form of documents showing that plaintiff is receiving Social Security disability payments for total disability. This court granted Rockefeller's motion to amend its third-party complaint, on renewal, based upon such evidence. However, such documentation is not before the Court on this motion. Furthermore, while evidence of disability status is "some evidence" of unemployability sufficient to survive a motion to dismiss or opposition to a motion to amend (*see* Decision, dtd September 21, 2009, motion sequence 4), it is insufficient to survive a motion for summary judgment (*see generally Solorto v Asplundh Tree Expert Co.*, 402 FSupp2d 490, 500 [SDNY 2005] [noting that total disability award standards have "dubious applicability" to a Workers Compensation Law §11 grave injury analysis], citing *Rubeis*, 3 NY3d 408). The court vacated the note of issue in order to give Rockefeller the opportunity to conduct further discovery as to this specific issue, and its utter failure to find any additional evidence of a grave injury means that it cannot survive this summary judgment motion.

Shuldiner has alleged that Island Risk Management Associates, Inc. is liable to Shuldiner for Rockefeller's third-party breach of contract claim. Thus, leave to implead is granted.

Moving to the portion of the motion seeking to sever the third-party action, Rockefeller's opposition is no longer applicable, as the Court has just determined that there is no triable issue of fact as to whether plaintiff suffered a grave brain injury. As the primary action and third-party action have no common issues of law or fact, severance of the third-party action is appropriate (*see Cruz v Taino Constr. Corp.*, 38 AD3d 391, 391-92 [1 Dept 2007]).⁷

It is therefore,

ORDERED that the motion herein by third-party defendant David Shuldiner, Inc. for summary judgment dismissing the third and fourth causes of action of Rockefeller's amended third-party complaint is hereby granted, and those third and fourth causes of action are dismissed with prejudice; and it is further

ORDERED that third-party defendant David Shuldiner, Inc.'s motion to sever the third-party action is hereby granted in its entirety, and Rockefeller's amended third-party complaint against David Shuldiner, Inc. is hereby severed from the primary action for all purposes, and shall proceed under its own caption with index number 591069/2007; and it is further

ORDERED that third-party defendant David Shuldiner, Inc.'s motion for leave to implead Island Risk Management Associates, Inc. is hereby granted; and it is further

ORDERED that the caption be amended to reflect the severance and that all future papers filed with the Court bear the amended caption; and it is further

ORDERED, that the caption shall also be amended to reflect the stipulation, dated December 6, 2007, in the herein action, by which plaintiffs withdrew all claims as against

⁷Furthermore, it is well settled that insurers, and by extension their insureds, are prejudiced when insurance coverage issues are tried before the same jury that tries the underlying action (*see Cruz*, 38 AD3d at 392, citing *Kelly v Yanotti*, 4 NY2d 603, 607 [discussing how knowledge of possible insurance coverage could affect a jury's verdict on liability or damages]).

defendant Tishman Speyer, L.P., and that all future papers filed with the Court bear the amended caption; and it is further

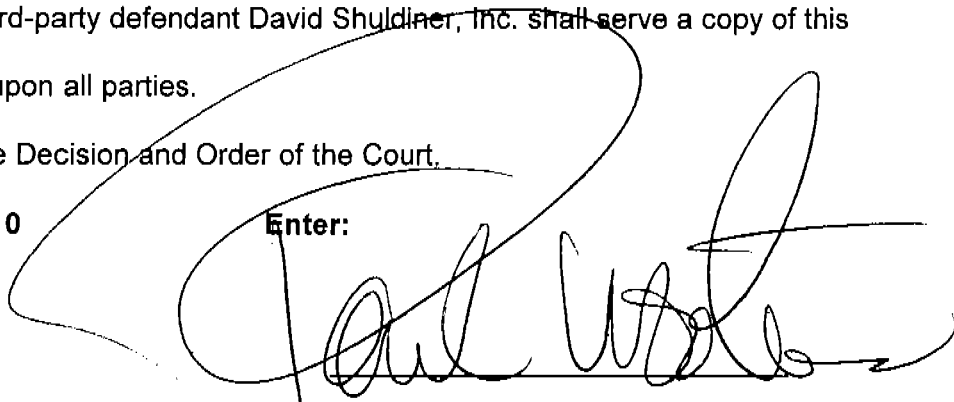
ORDERED that third-party defendant David Shuldiner, Inc. shall serve a copy of this order upon the County Clerk (60 Centre Street, Room 141B) and the Trial Support Office (60 Centre Street, Room 158), who are directed to mark the court's records to reflect the changes in the caption herein; and it is further,

ORDERED that third-party defendant David Shuldiner, Inc. shall serve a copy of this order with notice of entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: December 27, 2010

Enter:



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: : DO NOT POST REFERENCE

FILED

JAN 24 2011

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