Rice v West 37th Group, LLC
2011 NY Slip Op 31910(U)
June 30, 2011
Supreme Court, New York County
Docket Number: 101207/2005
Judge: Emily Jane Goodman
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SCANNED ON 7/13/2011

[* 1]

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

EMILY JANE GOODMAN

PART 17

Index Number : 101207/2005

RICE, JAMES

VS.

WEST 37TH GROUP LLC.

SEQUENCE NUMBER : 010

PARTIAL SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No and cross motion

Upon the foregoing papers, it is ordered that this motion are decided per attached

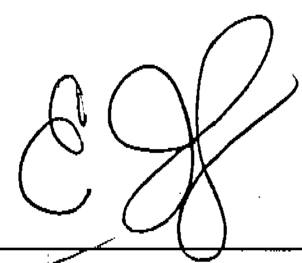
FILED

JUL 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6/30/11



EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

--X

KATHLEEN RICE as Administrator of the Estate of JAMES RICE, decedent and KATHLEEN RICE, individually,

Plaintiffs,

Index No. 101207/05

-against-

WEST 37TH GROUP, LLC, GJF CONSTRUCTION CORP. d/b/a BUILDERS GROUP and CORD CONTRACTING CO.,

Defendants.

--X

WEST 37TH GROUP, LLC, GJF CONSTRUCTION CORP. d/b/a BUILDERS GROUP,

Third-Party Plaintiffs,

Third-Party Index No. 590813/05

-against-

FIVE BORO ASSOCIATES,

Third-Party Defendant.

--X

WEST 37TH GROUP, LLC, GJF CONSTRUCTION CORP. d/b/a BUILDERS GROUP,

Second Third-Party Plaintiffs,

Second Third-Party Index No. 590592/08

-against-

JOSEPH CARFI, M.D., and BRUCE HERMAN, PHD.,

Second Third-Party Defendants.

--X

FILED

JUL 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

CORD CONTRACTING CO., INC.,

Third Third-Party Plaintiff,

Third Third-Party Index No. 590611/08

-against-

FIVE BORO ASSOCIATES, INC.,

Third Third-Party Defendant.

--X

WEST 37TH GROUP, LLC, GJF CONSTRUCTION CORP. d/b/a BUILDERS GROUP,

Fourth Third-Party Plaintiffs,

Fourth Third-Party Index No. 590598/09

-against-

FIVE BORO ASSOCIATES,

Fourth Third-Party Defendant.

--X

FILED
JUL 13 2011
NEW YORK
COUNTY CLERK'S OFFICE

Emily Jane Goodman, J.:

In this motion sequence number 010, defendants West 37th Group, LLC and GJF Construction Corp., d/b/a Builders Group (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' fourth cause of action for wrongful death, maintaining that, as a matter of law, James Rice's abuse of medications, and his doctors' malpractice in prescribing and monitoring that use, constitute intervening, superseding causes, relieving them of liability for Rice's death. Fourth third-party defendant Five Boro Associates (Five Boro) cross-moves for summary judgment dismissing the fourth third-party complaint which alleges causes of action for common-law

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indemnification and contribution against decedent James Rice's employer, Five Boro, on the basis that Rice suffered a "grave injury" as defined in Workers' Compensation Law § 11.[1]

The facts of this matter are set forth in prior decisions, familiarity with which is presumed. Briefly, James Rice (Rice) fell from a ladder at a construction site, and was severely injured. His injuries included multiple displaced fractures of the spine, severe spinal stenosis, numerous pelvic fractures, communited and displaced hand fracture, with surgery, ulnar and rib fractures, and splenic laceration. The evidence demonstrates that after his release from the hospital, he was confined to bed for 7 months, and used a hospital bed and male urinal because he was not able to walk. Rice often dropped objects due to weakness in grip, he would fall when his legs would buckle, and he suffered from chronic pain. Two years later, he died of an accidental overdose of prescription medications, including pain medications. By prior decision, Defendants have been found liable for the accident under Labor Law § 240 (1).

DISCUSSION

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[1]The court notes that this action has been dismissed as against defendant Cord Contracting Co., Inc., and that, as a result, Cord's third third-party action against Five Boro was dismissed. In addition, by stipulation dated February 3, 2006, defendants' third-party action against Five Boro was discontinued.

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"It has long been settled that 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 eliminate any material issues of fact from the case'" (*Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once the movant has met its burden, "the party opposing such motion must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212 [b]) 'by producing evidentiary proof in admissible form'" (*id.* at 510, quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "When there is any doubt as to the existence of triable issues, summary judgment should not be granted" (*Udoh v Inwood Gardens*, 70 AD3d 563, 565 [1st Dept 2010]).

On these motions, foreseeability is key. Plaintiffs contend that the issue at bar is whether the death of an injured worker from the effects of medications which were prescribed for his injuries was a foreseeable consequence of the initial accident. Defendants maintain that Rice's prior history of drug and alcohol abuse, and his negligent overuse of prescription medications, in addition to his doctors' negligent prescribing and monitoring of Rice's medications, were intervening, superseding causes of Rice's death, and that defendants could not foresee, prior to the accident, that Rice would die two years

later from an accidental overdose of prescription medications.

"Liability for damages caused by wrong ceases at a point dictated by public policy or common sense" (*Milks v McIver*, 264 NY 267, 269 [1934]). In other words, the concept of proximate/legal cause "stems from policy considerations that serve to place manageable limits on the liability that flows from negligent conduct" (*Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 314 [1980]; *see also Mack v Altmans Stage Lighting Co.*, 98 AD2d 468, 470 [2d Dept 1984]). "As a general rule, the question of proximate cause is to be decided by the finder of fact, aided by appropriate instructions" (*Derdiarian*, 51 NY2d at 312; *see also Jackson v New York City Housing Authority*, 214 AD2d 605, 606 [2d Dept 1995] [whether act is foreseeable and course of events is normal are issues for finder of fact to resolve]; *Bjelicic v Lynned Realty Corp.*, 152 AD2d 151, 155 [1st Dept 1989], citing *Derdiarian*). To prove his prima facie case, a plaintiff "must generally show that the defendant's negligence was a substantial cause of the events which produced the injury," but "[p]laintiff need not demonstrate ... that the precise manner in which the accident happened, or the extent of injuries, was foreseeable" (*Derdiarian*, 51 NY2d at 315; *see also Kush v City of Buffalo*, 59 NY2d 26, 32-33 [1983], quoting *Derdiarian*).

"A defendant remains liable for all normal and foreseeable consequences of his acts" (*Mack v Altmans Stage

Lighting Co., 98 AD2d at 471; *see also Gordon v Eastern Railway Supply*, 82 NY2d 555, 562 [1993] [to establish a prima facie case, plaintiff need not demonstrate that manner of accident or injuries suffered was foreseeable; "it is sufficient that he demonstrate that the risk of some injury from defendants' conduct was foreseeable"]; *see also Betancourt v Manhattan Ford Lincoln Mercury*, 195 AD2d 246, 249 [1st Dept 1994]). "[A]dded injuries may be included in the damage provided they arose out of the first injury or would not have happened but for the first injury, and are not due to the neglect or carelessness of the injured party" (*Wagner v Mittendorf*, 232 NY 481, 486 [1922]).

The clear legislative intent of Labor Law § 240 (1) was to "provide exceptional protection for workers against the special hazards that arise when the work site either is itself elevated or is positioned below the level where materials or load [are] hoisted or secured [internal quotation marks and citations omitted]" (*Harris v City of New York*, 83 AD3d 104, 108 [1st Dept 2011]). "In enacting the statute, the Legislature intended to place ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor rather than on the workers themselves [interior quotation marks and citations omitted]" (*Stringer v Musacchia*, 11 NY3d 212, 216 [2008]), "'who are scarcely in a position to protect themselves from accident'"

(*Mingo v Lebedowicz*, 57 AD3d 491, 493 [2d Dept 2008], quoting *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985]).

The legislative intent and enactment of the statute evince the clear understanding that if owners, contractors and their agents fail to provide "proper protection" to workers involved in the activities enumerated in the statute, the risk of injury is foreseeable (Labor Law § 240 (1); *see also Gordon v Eastern Railway Supply*, 82 NY2d at 562).

Defendants contend that Rice's own abuse of his medications, and his doctors' malpractice in prescribing and monitoring Rice's use of his medications, constitute intervening, superseding causes, relieving defendants of liability for the original accident and injuries.

> It is well settled that plaintiff's own conduct can be an intervening cause, sufficient to replace defendant's negligence as the legal cause of plaintiff's injuries. In such a case, however, defendant is absolved from liability only if plaintiff's intervening act is not a normal or foreseeable consequence of the situation created by the defendant's negligence [internal quotation marks and citations omitted]

(*Iglesias v Townhouse Penthouse Industries*, 187 AD2d 977, 977 [4th Dept 1992]).

Defendants maintain that the evidence demonstrates that Rice, who has admitted to prior alcohol and Oxycontin addiction,

prescribed in connection with a prior back injury, was abusing the medications prescribed for him, and that such drug abuse, along with Dr. Carfi's negligent treatment, led to Rice's death, and were unforeseeable consequences of the accident, such that defendants should be absolved of their liability for Rice's injuries, as a matter of law. Defendants rely upon the following testimony, among other things, in support of their contention: four times Rice asked for additional Percocet, an opiod, before the prescription had expired, and Dr. Carfi gave him a prescription for additional pills (*see e.g.* Dr. Carfi Depo., at 59 [24 pills]); after Dr. Carfi prescribed a Duragesic patch, an opiod, which releases a "sustained" release of pain medication for three days (*id.* at 85), he expressed some concern that Rice was using the Percocet along with the patch, instead of as prescribed, as a "rescue" or "breakthrough" medication in times of pain "spikes" (*id.* at 85-86, 100-102); because of his concern that Rice might have a "control issue" with the opiods (Percocet and the Duragesic patch) that he was taking, Dr. Carfi suggested that plaintiff, Rice's wife, should hold the Percocet for Rice, "so that it [could] be used properly for spikes of pain," but Rice "declined that suggestion" (*id.* at 102-104; 10/26/05 Dr. Carfi medical report); one of the medications in Rice's system at the time of the autopsy was Alprazolam (generic Xanax), which, although it had been prescribed for him at an earlier time, it

had been replaced with Valium in July or August 2006, so that it was no longer one of the medications prescribed for him at the time of his death (Dr. Carfi Depo., at 211-214).

In their turn, plaintiffs put forth deposition and documentary evidence that repeatedly relate that, as a result of the accident, Rice had "significant," "chronic," "severe" pain, for which combinations of powerful pain medications were prescribed (*see e.g.* Dr. Carfi medical reports: 4/11/05 - Rice "in his usual state of excellent health" until accident; significant pain; Rice unable to do his accustomed activities - "is effectively homebound"; 8/2/05 - "very severe range of injuries"; "significant pain"; 9/26/05 report of Joseph Sanelli, Long Island Spine Specialists: "His condition stems from a work related injury on 11/23/04"; "constant pain"; Dr. Carfi medical reports: 12/9/05 - "severe pain"; 12/29/05 - "Since retaining control of his medication he has not run short"; 2/16/06 - "His pain remains extreme"; 4/18/06 - "significant pain"; 6/5/06 - "His pain has been in excess of usual so he has been taking more pain medication and actually ran out a week ago. He did not request more"; 7/7/06 - "He unfortunately again took a bit more pain medication averaging out to one more pill per day than what was prescribed. This was the pattern last time. So it is clear that his pain management is inadequate at the moment"; 8/17/06 - "severe pain"; 9/7/06 - "in terrible pain today due to the

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inclement weather"; 8/31/06 letter of medical necessity for a new recliner: "Mr. Rice has been under my care over the past year and a half or so for injuries suffered in a work related accident."

Although Rice had at one time been addicted to OxyContin, he had gone to a treatment center called Veritas Villa for 28 days (Kathleen Rice Depo., at 58, 60), and later had informed Dr. Carfi of this, asking him not to prescribe it for him ("he prefers not to take this as he ran into some trouble with that medication in the past" [Dr. Carfi Depo., at 67-68]). There is no evidence that Rice was abusing OxyContin between the time of the accident and his death, and the drug was not found in his system at the time of his autopsy (Grandell Affirm. in Opp., Ex. T).

Although Dr. Carfi prescribed the Duragesic patch for Rice in September 2005 (Dr. Carfi Depo., at 84-85), approximately two months later, Rice returned the unused patches because the patches "didn't make him 'feel right,'" and Dr. Carfi discontinued the medication (*id.* at 123-124; Dr. Carfi 11/15/05 report). However, in response to Rice's ongoing severe pain, Dr. Carfi again prescribed the Duragesic patch in September 2006, along with Percocet, as part of his pain management regimen.

Defendants rely heavily on their assertion that Dr. Carfi was negligent in his treatment and lack of proper monitoring of Rice's medications, frequently implying and avowing

that Dr. Carfi was guilty of medical malpractice. However, although this issue is the subject of the third-party action, no argument or discussion, let alone a finding, has yet been had on this issue.

Moreover, it is well-settled that

> [w]hen one receives an injury through the carelessness of another, he is bound to use ordinary care to cure and restore himself. ... He is not obliged to employ the most skillful surgeon that can be found, or resort to the greatest expense to ward off the consequence of an injury which another has inflicted upon him. He is bound to act in good faith and to resort to such means and adopt such methods reasonably within his reach as will make his damage as small as he can

(*Lyons v Erie Railway Co.*, 57 NY 489, 490-491 [1874]). In fact, the rule is that a wrongdoer is liable for the ultimate result even if a mistake or the negligence of a doctor increased the damage from the original wrong (*see Milks v McIver*, 264 NY at 270.

Further, the case of *Fuller v Preist* (35 NY2d 425 [1974]) is instructive. In that case, the Court of Appeals held that, as a matter of law, the suicide by a person who has been injured by negligence, resulting in destruction of the will to live which creates an irresistible impulse to commit suicide, is not a superceding cause. Therefore, if suicide is not a superceding cause in such an instance, then surely a jury could find that Rice's death was the result of irresistible impulses,

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which were foreseeable. Given the evidence before the court, it cannot be said, as a matter of law, that Rice's death on September 8, 2006, from an accidental overdose of medications prescribed for him as a result of injuries he suffered in the accident on November 23, 2004, either was, or was not, a normal, foreseeable consequence of that accident. The court cannot determine, as a matter of law, that Rice's own actions, and/or those of his treating doctors, were an intervening, superseding cause of his death, such that defendants would be relieved of liability for his death.

Thus, defendants' motion for summary judgment dismissing plaintiffs' fourth cause of action for wrongful death is denied.

Five Boro's cross-motion for summary judgment dismissing the fourth third-party complaint which alleges causes of action for common-law indemnification and contribution it, because Rice suffered a "grave injury" is denied.

"Workers' Compensation Law § 11 prohibits a third-party action for common-law indemnification or contribution against an employer except in the case where, inter alia, the employee has sustained a grave injury" (*Cocum-Tambriz v Surita Demolition Contracting*, 84 AD3d 1300, 2011 NY Slip Op 04622, *1 [2d Dept 2011]; *see also Fleming v Graham*, 10 NY3d 296, 299-300 [2008]). "Grave injury is a statutorily-defined threshold for catastrophic

injuries, and includes only those injuries which are listed in the statute and determined to be permanent" (*Blackburn v Wysong & Miles Co.*, 11 AD3d 421, 422 [2d Dept 2004]). "Death" is the first "grave injury" listed in the statute.

However, "[c]ommon-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Associates*, 72 AD3d 483, 484 [1st Dept 2010]). "[I]n contribution, the tort-feasors responsible for plaintiff's loss share liability for it. Since they are in pari delicto, their common liability to plaintiff is apportioned and each tort-feasor pays his ratable part of the loss" (*Mas v Two Bridges Associates*, 75 NY2d 680, 689-690 [1990]; *see also Siegl v New Plan Excel Realty Trust*, 84 AD3d 1702, 2011 NY Slip Op 03744, *2 [4th Dept 2011] ["where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy (interior quotation marks and citation omitted)"]).

Here, as yet, there has been no determination that either defendants or Five Boro were, or were not, tort-feasors responsible for the causation of Rice's accident, including his death. Without such a finding, Five Boro's cross motion for summary judgment dismissing defendants' fourth third-party

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complaint must be denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion of West 37th Group, LLC and GJF Construction Corp. d/b/a Builders Group is denied; and it is further

ORDERED that the cross motion of Five Boro Associates is denied.

Dated: June 30, 2011

This Constitutes the Decision and Order of the Court.

ENTER:

J.S.C.

HON. EMILY JANE GOODMAN

FILED
JUL 13 2011
NEW YORK
COUNTY CLERK'S OFFICE