

<b>Hernandez v Stoll Am. Knitting Mach., Inc.</b>
2011 NY Slip Op 34182(U)
September 30, 2011
Supreme Court, New York County
Docket Number: 111773/06
Judge: Paul Wooten
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7 *g*

JUAN JOSE HERNANDEZ,  
Plaintiff,

-against-

Index No.: 111773/06  
Seq No.: 004

STOLL AMERICA KNITTING MACHINERY, INC.  
and MACHINIT, INC.,

Defendants.

STOLL AMERICA KNITTING MACHINERY, INC.,  
Third-Party Plaintiff,

Index No.: 590474/07

-against-

A & K KNITTING MILL, INC.,  
Third-Party Defendant.

**FILED**

RECEIVED  
OCT 21 2011  
1AS MOTION SUPPORT OFFICE  
NYS SUPREME COURT-CIVIL

OCT 24 2011

STOLL AMERICA KNITTING MACHINERY, INC.,  
Second Third-Party Plaintiff,

NEW YORK  
COURT CLERK'S OFFICE  
Index No. 591009/08

-against-

MACHINIT, INC.,  
Second Third-Party Defendant.

The following papers, numbered 1 to 6, were read on this motion by defendant/second third-party plaintiff Stoll America Knitting Machinery, Inc. for summary judgment on its second third-party complaint; and motion by defendant/second third-party defendant Machinit, Inc. for summary judgment dismissing the complaint and second third-party complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo) _____	3, 4, 5
Replying Affidavits (Reply Memo) _____	6

Cross-Motion:  Yes  No

Motion sequence numbers 004 and 005 are hereby consolidated for disposition.

In motion sequence number 004, defendant/second third-party plaintiff Stoll America Knitting Machinery, Inc. (Stoll) moves, pursuant to CPLR 3212, for summary judgment granting

it indemnification and attorney's fees on its cross-claim and third-party claims against Machinit, Inc. (Machinit).

In motion sequence number 005, defendant/second third-party defendant Machinit moves, pursuant to CPLR 3212, to dismiss the complaint and second third-party complaint asserted against it.

### **BACKGROUND**

Plaintiff, an employee of third-party defendant A & K Knitting Mill, Inc. (A&K), alleges that, on January 5, 2006, he was injured while using a computerized loom threading machine that was manufactured by Stoll and sold to Machinit, who owned the subject machine on the day of the alleged accident.

Stoll implied A&K, alleging contractual and common-law indemnification and contribution, but that action was subsequently discontinued. Stoll then commenced a second third-party action against Machinit, alleging contractual and common-law indemnification and contribution. Thereafter, plaintiff filed a second summons and complaint against Machinit. Both actions were consolidated by order of this Court on March 31, 2009.

According to the complaint, plaintiff was injured when he was rethreading a computerized loom machine manufactured by Stoll, bearing the Mach 0052 TYP label, Model number CMS 993, serial number 7610000097. Plaintiff alleges that Stoll was "reckless, careless and negligent" in failing to test the machine properly, and that the machine did not have a safe means of rethreading the loom, proper guards and warnings, and proper cut-off switches (Motion 004, Ex. C).

In response to Machinit's interrogatories, plaintiff further stated that Machinit was in the possession, custody and control of the subject machine, was negligent in allowing the machine to remain in use and operation, and was negligent in failing to admonish the machine's operators not to activate the "engagement bar" while any portion of their bodies was in the

machine (Motion 004, Ex. D).

At his examination before trial (EBT), plaintiff testified that on the date of the occurrence, he was working for A&K as a weaver, and that part of his job duties was to make sure that the computerized weaving machines produced cloth properly (Plaintiff's EBT, at 10, 15). Plaintiff averred that "a lot of times" the machines did not produce cloth properly, and it was his job to check the machines and change parts, or "rathead" the machine (*id.* at 16-17).

At the time of the incident, plaintiff was working on a machine that converted thread to cloth. This machine had 24 spools and wires on the top of a sliding glass windowed enclosure, with a table and moving carriage below, in a ten-foot bed that moves threads and needles from right to left (*id.* at 18-24). In order for the machine to work, the sliding glass doors do not need to be closed (*id.* at 34-35). Plaintiff said that, once the machine is running, there is a yellow bar in the center of the front of the machine that controls the machine's speed; that bar can also start and stop the machine (*id.* at 32-34).

Plaintiff stated that, at the time of the accident, he observed one of the ten machines that he was overseeing stop working, because the thread came off the needle. Plaintiff went to the machine, which was then in a stopped position, slid the glass window open, and placed his left hand inside the window to hook the thread back onto the needle. As he was rethreading the needle, the machine activated and the carriage started moving, catching his hand in between the carriage and the needle (*id.* at 36-54). Plaintiff denied that any part of his body was touching the yellow bar at the time that the machine re-activated (*id.* at 64-65).

Plaintiff testified that, prior to using these machines, he received about 20 minutes of instruction from an A&K employee, but received no documents or materials about the machine (*id.* at 25-26). Plaintiff said that he was never trained on how to rethread the machine, and that there were no signs, instructions or other materials in Spanish, his primary language, at the A&K factory (*id.* at 30, 66-67).

Jonathan Marell (Marell), the vice-president of finance for Stoll, was also deposed in this matter. Marell testified that Stoll sells, distributes and services knitting machines in North America (Marell EBT, at 10-11). According to Marell, Stoll is not involved in the design or manufacture of knitting machines; its parent company, H. Stoll GMBH, based in Germany, handles the design and manufacture of all Stoll machines (*id.* at 19-21). Further, Marell stated that no one at Stoll makes determinations as to whether the knitting machines comply with safety standards (*id.* at 123).

Stoll's function with respect to the Stoll machines is to repair and maintain the machines, at customer request, and to provide training on the use of the machines, also at customer request (*id.* at 21-22).

Since the 1990's, Stoll provided approximately 70 machines, including the same model type that is the subject of this litigation, to Machinit, a company that produces knitwear (*id.* at 24-26). Marell stated that he had never received any complaints about the safety of one of Stoll's machines prior to the date of plaintiff's accident (*id.* at 75). Marell went on to say that, if Stoll received a complaint about one of Stoll's machines, Beth Hoffer, another Stoll employee, would address the complaint (*id.* at 36-37).

Marell identified three documents relating to the machine that is the subject of this litigation: (1) a proposal to rent knitting machines to Machinit; (2) the rental agreement for the subject machine between Stoll and Machinit; and (3) the sales contract for the subject machine, executed between Stoll and Machinit. On the basis of these three documents, Marell testified that Stoll initially leased the subject machine to Machinit, and subsequently sold the machine to Machinit (*id.* at 44).

The contract of sale between Stoll and Machinit, with respect to warranties, states:

"C. Buyer will indemnify and hold Seller harmless from any and all claims arising out of any activities of the Buyer with respect to the goods, including but not limited to, installation and use of goods.

D. The warranty contained herein will inure only to the benefit of the Buyer and may not be transferred to any other person.  
E. SELLER EXPRESSLY DISCLAIMS AND MAKES NO WARRANTY, EXPRESS OR IMPLIED, THAT THE GOODS COVERED BY THIS CONTRACT ARE MERCHANTABILITY OR FIT FOR ANY PARTICULAR PURPOSE OR USE. THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, WHICH EXTEND BEYOND THE WARRANTY OF TITLE AND THE DESCRIPTION OF THE GOODS CONTAINED HEREIN. THE SELLER SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR INJURY OF ANY NATURE, WHETHER DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL OR SPECIAL, IN CONNECTION WITH, OR RESULTING FROM THE USE OF THE GOODS. IN NO EVENT SHALL BUYER BE ENTITLED TO CONSEQUENTIAL, INDIRECT AND/OR SPECIAL DAMAGES OF ANY NATURE, FOR DEFECTIVE GOODS, LATE DELIVERY, NON-DELIVERY OR OTHERWISE, AND IN NO INSTANCE MAY DAMAGES INCLUDE LOSS OF PROFIT ON CONTEMPLATED USE OR PROFIT OF ANY DESCRIPTION (Motion 004, Ex. I).

This sales contract also states, with respect to indemnification, the following:

- "A. Buyer shall strictly comply with and observe all instructions, directions concerning safety and quality control which are furnished or recommended by Seller.
- B. Buyer expressly assumes all risks and liabilities which may result by reason of the possession, handling, storage, or use of the goods whether singly or in combination with other goods or substances and agrees to hold Seller harmless from any and all claims, demands, rights, and actions whatsoever arising from the possession, handling, storage or use by Buyer or by third parties of these goods.
- C. Buyer shall maintain comprehensive general liability insurance to cover all goods sold by Seller, including product liability insurance, specifically insuring against injury resulting directly or indirectly from the use of the products, and naming the Seller as an insured" (*id.*).

Marell further testified that Stoll provides a service manual and a parts manual, both of which are written by Stoll's parent company (Marell EBT, at 52).

Markus Kirwald (Kirwald), formerly of H. Stoll GMBH, Stoll's parent company, and current product development manager for Stoll, was also deposed. Kirwald testified that he trained customers in the operation of the same knitting machine model that is the subject of this litigation, although he never trained Machinit or A&K about the machine (Kirwald EBT, at 11-13,

18, 114). Kirwald further stated that the machine in question is designed and manufactured by H. Stoll GMBH in Germany, and that, prior to the current litigation, he was unaware of any similar incidents involving this model machine (*id.* at 107, 46).

Anthony Vilela (Vilela), the manager of A&K, was also deposed in this matter. According to Vilela, A&K is a subsidiary of Machinit (Vilela EBT, at 11). Vilela said that A&K knits fabrics, which are then sent to Machinit to be finished as sweaters (*id.* at 15-16). Vilela said that A&K has approximately 20 identical model machines in operation, and that the machine in issue had been in use at A&K for approximately two years prior to plaintiff's accident (*id.* at 31-33). Vilela stated that he never observed any problems or malfunctions with this machine, and did not recall any repairs having been made on this machine (*id.* at 111).

Vilela admitted that he received a service and parts manual each time A&K received a new machine from Stoll, and that he did receive a service manual and a parts manual for the subject model machine involved in plaintiff's accident (*id.* at 44-46). Vilela said that A&K did its own maintenance, with its own mechanics, on the Stoll machines (*id.* at 37-38, 110-111). Vilela also averred that he reviewed Stoll service reports for the subject machine prior to the day of plaintiff's accident, and that none of the service performed on that machine had anything to do with the operation of the machine (*id.* at 114, 119).

Edward Grcic (Grcic), production manager at both Machinit and A&K, was deposed on January 5, 2010. Grcic testified that John Maaseide and Tony Kusturic are the joint owners of Machinit, and that Tony Kusturic is the sole owner of A&K (Grcic EBT, at 10-12). At the time of the occurrence, Machinit, not A&K, owned about 70 Stoll machines, all of which are manufactured in Germany (*id.* at 22-23, 25). According to Grcic, the machine involved in plaintiff's accident was leased from Stoll in June of 2004, and later purchased by Machinit (*id.* at 30-32). Grcic stated that Stoll installed the machines, but that Stoll did not make any repairs or modifications with respect to the safety of the machine, any such repairs and modifications

being taken care of by A&K's own mechanics after the machines are installed (*id.* at 32-36).

Specifically, A&K mechanics would clean and lube the machines on a daily basis, and check components for damage (*id.* at 37). Grcic averred that Machinit, as the owner of the machines, expected A&K to train its staff on the safe operation of the machines (*id.* at 137-138).

Stoll contends that, based on the foregoing, it should be awarded summary judgment on the issue of contractual and common-law indemnification and contribution against Machinit.

In opposition to Stoll's motion, Machinit contends that there is absolutely no evidence of any negligence on the part of Machinit, which would thereby defeat Stoll's claim for common-law indemnification. Furthermore, since plaintiff's complaint asserted as against Machinit sounds in negligent manufacturing, strict products liability, and breach of warranty of merchantability and fitness, Machinit contends that the contractual indemnification provisions of the agreement between Stoll and Machinit are inapplicable.

In motion sequence number 005, Machinit contends that, as the owner of the machine in question, it cannot be held liable to plaintiff based on the theories asserted against it in plaintiff's complaint, which sound in negligent manufacturing, strict products liability, and breach of warranty of merchantability and fitness, since Machinit did not manufacture, design, maintain, inspect, repair or alter the machine in question.

In opposition to Machinit's motion, plaintiff argues that Machinit is not entitled to summary judgment dismissing the complaint asserted as against it because, according to plaintiff, Machinit negligently entrusted the subject machine to A&K, despite Machinit's actual knowledge that the training that A&K provided to its employees on the use of the knitting machines was inadequate.

Stoll has also submitted an opposition to Machinit's motion. Stoll's contention is based on the wording of the indemnification provisions of the agreement between Stoll and Machinit, reproduced above, which, states Stoll, explicitly establishes the parties' intent that Machinit

indemnify Stoll for any and all claims arising out of activities of Machinit with respect to the goods, including, but not limited to, use of the goods and "possession" of the machine, as well as claims based on a theory of products liability.

In reply, Machinit argues that plaintiff, in his opposition to the instant motion, cannot now assert a claim for negligent entrustment since that claim was never pleaded by plaintiff in the complaint. Machinit state that:

"the first claim for relief alleged that Machinit was 'reckless, careless, and negligent in controlling, operating, inspecting, maintaining, repairing and/or modifying a machine which was defective; in failing to properly test the machine; in failing to provide a safe means of rethreading the loom; in failing to provide proper guards and warnings; in failing to provide proper safeguards and cut-off switches; in creating a trap; hazard and a nuisance.'

"In the second cause of action, plaintiff brought a claim sounding in strict products liability alleging that the 'loom was purchased by the defendant and placed in the stream of commerce.' ... In the plaintiff's third cause of action, the plaintiff brought a claim sounding in breach of warranty of merchantability and warranty of fitness" (Machinit Reply, at 2).

Nowhere, according to Machinit, does plaintiff's complaint or responses to interrogatories allege a cause of action sounding in negligent entrustment. Hence, states Machinit, any such claim introduced into the proceedings at this juncture is improper. Further, avers Machinit, even if the Court were to entertain such a cause of action, there is no evidence that demonstrates or suggests a theory of negligent entrustment on the part of Machinit.

#### STANDARD OF LAW

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as

a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

#### DISCUSSION

That portion of Stoll's motion seeking contractual indemnification and attorney's fees from Machinit is conditionally granted.

Questions of contract interpretation present questions of law for the court to determine (see *Thomas Crimmins Contracting Co., Inc. v City of New York*, 138 AD2d 138 [1st Dept 1988], *affd* 74 NY2d 166 [1989]). In the case at bar, the intent of Stoll and Machinit, as expressed in their contract for the sale of the knitting machine, evidences a clear intention that Machinit indemnify Stoll for claims arising out of a cause of action based on product liability.

"A contract that provides for indemnification will be enforced as

long as the intent to assume such a role is 'sufficiently clear and unambiguous.' . . . When the intent is clear, an indemnification agreement will be enforced even if it provides indemnity for one's own or a third party's negligence" (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274-275 [2007] [internal citations omitted]).

In the *Bradley* case, the Court of Appeals found that those parties intended to provide for indemnification for products liability claims because the contractual provision in question specifically referred to claims based on products liability. In the case at bar, as the basis for its contention that it is not contractually obligated to Stoll for the products liability claims asserted by plaintiff, Machinit points to provision "B" in the contract section dealing with indemnification, which does not include any mention of products liability. However, in making this argument, Machinit totally ignores provision "C" of the indemnification section of the agreement, which specifies that Machinit is to acquire comprehensive commercial liability insurance to cover all goods sold to it by Stoll, "including product liability insurance."

"A contract should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases. A court should construe a contractual agreement so as to give full meaning and effect to its material provisions. A reading of the contract should not render any portion meaningless, and the contract should be read as a whole, with every part interpreted with reference to the whole; if possible, the contract will be interpreted as to give effect to its general purpose" (*CNR Healthcare Network, Inc. v 86 Lefferts Corp.*, 59 AD3d 486, 489 [2d Dept 2009] [internal citations omitted]; *Insurance Company of New York v Central Mutual Insurance Company*, 47 AD3d 469 [1st Dept 2008]).

The indemnification section of the contract between Stoll and Machinit contains three subdivisions (quoted above), and all three must be construed together to give meaning to the parties' intent. Whereas Machinit only focuses on one of the three subdivisions, the Court must read all three together. In so doing, it is clear that the indemnification provisions include products liability; otherwise, requiring Machinit to purchase insurance to cover Stoll for such claims would be meaningless. In addition, the Court notes that Machinit provides no judicial or

statutory support for its contentions.

Hence, based on the indemnification provisions of the agreement between Stoll and Machinit, should Stoll be found liable to plaintiff, it would be entitled to contractual indemnification from Machinit. Moreover, the right to indemnification "includes the right to recover attorneys' fees, costs and disbursements for defending against plaintiff's action" (*Lowe v Dollar Tree Stores, Inc.*, 40 AD3d 264, 265 [1st Dept 2007]). In reaching this conclusion, that portion of Stoll's motion seeking common-law indemnification is rendered moot.

For the reasons stated above, the portion of Machinit's motion seeking summary judgment on the first cause of action for contractual indemnification is denied as premature because Stoll's liability to plaintiff has not yet been established. Moreover, as with Stoll's motion, the portion of Machinit's motion seeking judgment on the cause of action of action for common-law indemnification is rendered moot.

Although not requested in the notice of motion, in its argument Stoll seeks a declaration that it is entitled to contribution from Machinit. Since it was argued by the parties, the Court will address it and in doing so, denies this relief as premature. In order to be entitled to contribution, as opposed to indemnification, two or more tortfeasors must be found to have been negligent, rather than to be found liable by operation of law. Each one's degree of culpability is then apportioned (*see Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57 [2d Dept 2003]). Since there has been no finding of negligence on the part of either Stoll or Machinit at this juncture, and since the right to contribution only accrues when actual payment has been made, the Court cannot determine any right of contribution (*see Bay Ridge Air Rights, Inc. v State of New York*, 44 NY2d 49 [1978]; *Alside, Inc. v Spancrete Northeast*, 84 AD2d 616 [3d Dept 1981]).

The portion of Machinit's motion seeking summary judgment on this cause of action for contribution is similarly denied as premature because there has not yet been a finding of

negligence on the part of either Stoll or Machinit.

Accordingly, Machinit's motion for summary judgment dismissing the second third-party complaint is denied based on the aforementioned reasons.<sup>1</sup>

In motion sequence 005, Machinit also moves for summary judgment dismissing the underlying complaint as asserted against it.

The thrust of Machinit's argument for entitlement to summary judgment is that it is merely the owner of the knitting machine and that it did not manufacture, design, maintain, inspect, repair, or alter the knitting machine; therefore, it cannot be held liable for plaintiff's injuries based on a cause of action sounding in products liability. However, as stated in plaintiff's complaint asserted as against Machinit, plaintiff alleged that Machinit, in addition to the allegations stated by Machinit in its motion, was "otherwise reckless, careless, and negligent" (Complaint, ¶ 14). In addition, plaintiff also alleged that Machinit "breached the warranty of merchantability and the warranty of fitness for a particular use" (Complaint, ¶ 25).

The evidence is uncontroverted that Machinit, the owner of the Stoll machine, supplied the machine to A&K so that A&K could produce cloth which Machinit would use to manufacture sweaters. There is no evidence as to whether Machinit loaned or leased the machines to A&K. However, even if the machines were loaned without compensation, "where the bailment benefits both parties, it constitutes a mutual benefit bailment and the bailor not only must warn the bailee of any known defects, but also represents that the chattel is reasonably fit for its intended purpose" (*Santiago v United Cerebral Palsy of Ulster County, Inc.*, 77 AD3d 1270,

---

<sup>1</sup> The Court notes that Machinit moves for summary judgment dismissing the second third-party complaint, which includes a cause of action for breach of contract. However, Machinit only briefly mentions this cause of action maintaining that there has been no evidentiary support to substantiate this claim. Machinit alleges "there has been absolutely no evidence to even suggest any form of contract breach between the two parties" (Bruno Affirmation in Support, ¶ 23). However, the Court finds that Machinit fails to meet its prima facie burden to show that it is entitled to summary judgment on the fourth cause of action for breach of contract.

1271-1272 [3d Dept 2010] [internal quotation marks and citations omitted]).

Hence, even if one is only the owner of a product that the owner did not design or manufacture, that owner represents, when supplying the product to a third party, that the product is fit for its intended use. This falls squarely within the confines of plaintiff's cause of action based on an alleged breach of an implied warranty of fitness for a particular use.

Machinit also argues that its motion should be granted because plaintiff opposed the motion by arguing a theory of negligent entrustment for the first time in his opposition to the instant motion, and, therefore, such theory should not be entertained by the Court.

Plaintiff improperly raises this new theory of liability for the first time in opposition to Machinit's motion for summary judgment (*see People v Grasso*, 54 AD3d 180 [1st Dept 2008]; *Hassan v Bellmarc Prop. Mgt. Servs., Inc.*, 12 AD3d 197 [1st Dept 2004]; *Harrington v City of New York*, 6 AD3d 662 [2d Dept 2004] ["it was improper to assert a new theory of liability for the first time in opposition to the defendant's motion for summary judgment"]). Accordingly the theory of negligent entrustment will not be considered by this Court as a basis to defeat Machinit's summary judgment motion (*see Pinn v Baker's Variety*, 32 AD3d 463 [2d Dept 2006] ["raised for the first time in opposition to the motion for summary judgment, [a new] theory [of liability] should not have been considered as a basis for defeating summary judgment"]; *Carminati v Roman Catholic Diocese of Rockville Ctr.*, 6 AD3d 481 [2d Dept 2004]).

Based on the foregoing, Machinit's motion for summary judgment dismissing the complaint is denied.

The Court notes that Stoll's cross-claims asserted against Machinit are the same claims asserted against Machinit in the second third-party action and need not be addressed separately.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of Stoll America Knitting Machinery, Inc.'s motion for summary judgment (motion sequence number 004) on its cross-claims and second third-party action granting it contractual indemnification, attorneys' fees and expenses against Machinit, Inc. is granted on the condition that Stoll America Knitting Machinery, Inc. is found liable to plaintiff for plaintiff's injuries arising from his use of computerized loom machine, bearing the Mach 0052 TYP label, Model number CMS 993, serial number 7610000097, on January 5, 2006; and it is further

ORDERED that the portion of Stoll America Knitting Machinery, Inc.'s motion for summary judgment (motion sequence number 004) on its cross-claims and third-party actions granting it common-law indemnification against Machinit, Inc. is denied as moot; and it is further

ORDERED that the portion of Stoll America Knitting Machinery, Inc.'s motion for summary judgment (motion sequence number 004) on its cross-claims and third-party actions granting it contribution against Machinit, Inc. is denied as premature; and it is further

ORDERED that the portion of Machinit, Inc.'s motion for summary judgment (motion sequence number 005) dismissing the complaint is denied; and it is further,

ORDERED that the portion of Machinit, Inc.'s motion for summary judgment (motion sequence 005) dismissing the second third-party complaint is denied.

This constitutes the Decision and Order of the Court.

Dated: 9-30-11

**FILED**  
*Paul Wooten*  
PAUL WOOTEN J.S.C.

OCT 24 2011

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
NEW YORK COUNTY CLERK'S OFFICE  
Check if appropriate: :  DO NOT POST  REFERENCE