

**Lawson v R&L Carriers, Inc.**

2013 NY Slip Op 33581(U)

November 8, 2013

Sup Ct, Queens County

Docket Number: 1207/11

Judge: Augustus C. Agate

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24  
Justice

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VINCENT LAWSON and DIANE LAWSON,

Index No: 1207/11

Plaintiffs,

Motion

Dated: August 14, 2013

-against-

m# 2,3,4

R&L CARRIERS, INC.,

Defendant.

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The following papers numbered 1 to 26 read on this motion by the plaintiff for an order precluding the Application of CPLR Article 16 and allowing entry of a judgment against the defendant (Sequence No. 2); motion by defendant for an order (i) directing the clerk to enter judgment on the verdict for the percentages of liability apportioned by the jury at trial and (ii) granting partial contractual indemnification against the third party defendant for its 60% share of any damages awarded to the plaintiff (Sequence No. 2); and motion by third party defendant for a judgment notwithstanding the verdict pursuant to CPLR 4404(a) and dismissing the third party complaint and other related relief.

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Upon the foregoing papers and the oral argument held in court on October 3, 2013 it is ordered that these three motions are jointly decided as follows:

Plaintiff allegedly sustained serious injuries while unloading cargo from a trailer during the course of his employment on April 21, 2010. At the time of the incident, plaintiff was employed by third party defendant Truck-Rite Distribution Systems Corp. ("Truck-Rite.") The trailer at issue was owned by defendant R&L Carriers, Inc. ("R&L"). Truck-Rite acted as a delivery agent of R&L pursuant to a written agreement. The agreement contained an indemnification clause requiring Truck-Rite to indemnify R&L for all claims asserted against R&L arising out of the acts, omissions or negligence of Truck-Rite's employees. Plaintiff alleged that he fell from the lift gate attached to the trailer when the ramp extension of the lift gate broke off. A trial on liability began in this matter on May 10, 2013. On May 30, 2013, the jury returned a verdict and found defendant R&L 35% liable, third party defendant Truck Rite 60% liable and the plaintiff 5% liable. Prior to commencement of the damages trial, these post-trial motions ensued. A trial on damages is currently scheduled in this Part for November 18, 2013.

Plaintiff moves for an order directing that Article 16 of the CPLR does not apply to this case and, thus, defendant R&L is liable to the plaintiff for 95% of the damages to be awarded. In support of his motion, plaintiff argues that the plain words of CPLR Article 16 demonstrate that it does not apply to this case. According to plaintiff, since the parties agree that the plaintiff did not sustain a grave injury under the Workers' Compensation Law, the culpable conduct of plaintiff's employer, Truck-Rite, cannot be taken into account, and, thus, defendant R&L is the only tortfeasor subject to liability. Plaintiff further argues that the contractual indemnification agreement between R&L and Truck-Rite has no effect on this result. Plaintiff also contends that the application of CPLR 1601 is barred by the motor vehicle exemption set forth in CPLR 1602.

Defendant R&L, by separate motion, seeks contractual indemnification against third party defendant Truck Rite. R&L argues that the terms of the contract unambiguously provide that Truck-Rite is required to indemnify R&L for the full 60% share of liability that was apportioned to Truck-Rite by the jury.

Third party defendant Truck-Rite, by separate motion, seeks a judgment notwithstanding the verdict and dismissing the third party complaint. In support of its motion, third party defendant Truck Rite argues that the jury verdict against it is not supported by legally sufficient evidence. Truck-Rite further asserts that the third party complaint is barred by the anti-subrogation rule. Finally, Truck-Rite contends that defendant

R&L's claim for contractual indemnification is barred as a result of a settlement agreement and mutual release between R&L and Truck-Rite.

The court will first address the motion by third party defendant Truck-Rite.

The question of whether a jury verdict should be set aside as against the weight of the evidence pursuant to CPLR 4404(a) is essentially a discretionary and factual one. (*Nicastro v Park*, 113 AD2d 129, 133 [2d Dept 1985].) A jury verdict should not be set aside as against the weight of the evidence unless the evidence so preponderates in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence. (*Cedeno v McNulty*, 39 AD3d 683, 683 [2d Dept 2007]; *Harris v Marlow*, 18 AD3d 608, 610 [2d Dept 2005]; *Torres v Esaian*, 5 AD3d 670, 671 [2d Dept 2004].) Indeed, great deference is accorded to the credibility determinations of the jury, which had the opportunity to see and hear the witnesses. (*Yau v New York City Tr. Auth.*, 10 AD3d 654, 655 [2d Dept 2004].)

A review of the testimony in this case demonstrates that a fair basis existed for the verdict reached by the jury against third party defendant Truck-Rite. Indeed, ample evidence was presented to support a finding of negligence by Truck-Rite and that such negligence was a substantial factor in causing the incident herein. In any event, the court notes that after the jury rendered its verdict, counsel for Truck-Rite made an oral motion to set aside the verdict, which was denied by this court on the record.

Truck-Rite's argument that this action is barred by the anti-subrogation rule is without merit. Under the anti-subrogation rule, an insurer cannot be a subrogee against its insured on the claim for which the insured was covered. (*Jefferson Ins. Co. of N.Y. v Travelers Indemn. Co.*, 92 NY2d 363, 373 [1998].) This rule prevents an insurer from passing the loss on to its own insured. (*Jefferson Ins. Co. of N.Y. v Travelers Indemn. Co.*, 92 NY2d at 373.) Truck-Rite maintains that, as a permissive user of the trailer, it would be covered under the anti-subrogation rule. However, this court need not reach the merits of this argument. Truck-Rite failed to raise the anti-subrogation rule argument at all during the trial, nor did Truck-Rite make any motions on this ground prior to trial. Thus, any arguments pertaining to the anti-subrogation rule have been waived.

Truck Rite also contends that the anti-subrogation rule is a

conclusive defense and, thus, can be raised at any time prior to final judgment. The cases cited by Truck-Rite to support this position, however, involved the Workers' Compensation Law, not the anti-subrogation rule. In any event, the cited cases are inapplicable to the instant case. For example, in *Murray v City of N.Y.* (43 NY2d 400 [1977]), defendant City of New York was permitted to conform the pleadings to the proof to assert the defense of the exclusivity of the Workers' Compensation Law after the trial. It was clear, based upon the evidence in *Murray*, that the Workers' Compensation Law applied. Here, the proof adduced at trial does not at all establish that the anti-subrogation rule is even applicable to the facts of this case.

Truck-Rite further asserts that R&L's claim against it is barred by a prior Settlement Agreement and Mutual Release in an action in the United States District Court for the Southern District of Ohio on April 21, 2011. However, this court has already ruled that the subject release was inapplicable to the case at bar. Thus, Truck-Rite may not, once again, raise the issue.

The court will next address the motion by defendant R&L for partial contractual indemnification against Truck-Rite.

A party is entitled to contractual indemnification where "the intention to indemnify can be clearly implied from the language" of the agreement. (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987].) Indeed, contracts for partial contractual indemnification have been upheld. (see *Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 209 [2008]; *Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675-676 [1st Dept 2010].)

In the case at bar, Truck-Rite acted as a delivery agent for R&L pursuant to a written agreement. Paragraph 3 of the Agreement provides, in pertinent part, that Truck-Rite "shall be responsible for the actions or injuries caused to or by its employees, agents and servants" and Truck-Rite "holds and indemnifies" R&L "against any and all claims asserted against" R&L "arising from the actions, omissions or negligence" of Truck-Rite's "employees, agents or servants." Thus, based upon the clear language in the contract, Truck-Rite is obligated to indemnify R&L for the 60% share of liability that was apportioned against it by the jury. Truck-Rite has not set forth any legal basis to deny R&L's motion.

The court will now address the motion by the plaintiff to preclude the application of CPLR Article 16 to the instant case.

CPLR 1601 provides, in pertinent part, that:

"[W]hen a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable ... and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant ... for non-economic loss shall not exceed that defendant's equitable share ... provided that the culpable conduct of any person shall not be considered in determining any equitable share herein to the extent that action against such person is barred because the claimant has not sustained a 'grave injury' as defined in section eleven of the workers' compensation law."

CPLR Article 16 was enacted in 1986 to modify the common law rule of joint and several liability, which permitted a plaintiff to recover the entire amount of damages awarded to him from any one of several joint tortfeasors. (*Morales v County of Nassau*, 94 NY2d 218, 223 [1999]; *Shaw v Coach*, 82 AD3d 98, 103 [2d Dept 2011].) The goal was to "remedy the inequities created by joint and several liability on low-fault, 'deep pocket' defendants." (*Rangolan v County of Nassau*, 96 NY2d 42, 46 [2001].) Thus, under CPLR 1601, where a defendant's apportioned culpability is 50% or less, that defendant's exposure for non-economic damages is limited proportionately to his share of the fault. (*Rangolan v County of Nassau*, 96 NY2d at 46; *Kharmah v Metropolitan Chiropractic Ctr.*, 288 AD2d 94, 95 [1st Dept 2001].)

The last sentence of CPLR 1601, however, also provides that a plaintiff's employer's culpable conduct is not to be taken into consideration in determining the equitable shares of the defendants where the plaintiff has not suffered a grave injury pursuant to the Workers' Compensation Law. (Vincent C. Alexander, Practice Commentaries, McKinney's Cons laws of NY, Book 7B, CPLR C1601:4; see *Cunha v City of N.Y.*, 12 NY3d 504, 510 [2009]; *Kim v 40<sup>th</sup> Assocs.*, 306 AD2d 220, 221 [1st Dept 2003].) This provision was added to the statute in 1996 as part of legislation that substantially limited claims for contribution and indemnity against employers whose workers are injured on the job. As part of the 1996 amendments, Workers' Compensation Law § 11 was amended to provide that in the absence of a pre-accident agreement stating otherwise, an employer shall not be liable for contribution or indemnity to any third person based upon the

injuries suffered by an employee in the course of employment unless the employee sustained a "grave injury."

In the instant case, it is undisputed that plaintiff did not sustain a "grave injury" as that term is defined in the Workers' Compensation Law. Plaintiff, thus, argues that pursuant to the last sentence of CPLR 1601, the culpable conduct of Truck-Rite, plaintiff's employer, cannot be considered. As a result, plaintiff maintains that defendant R&L remains jointly and severally liable to the plaintiff, and plaintiff can recover 95% of the judgment from R&L. Plaintiff further asserts that the contractual indemnification agreement between R&L and Truck-Rite has no impact on the outcome of the litigation between plaintiff and R&L.

The court disagrees with plaintiff's position. A plain reading of CPLR 1601 indicates that it merely bars consideration of an employer's culpable conduct where the plaintiff has not suffered a grave injury. Nowhere does it state that the limitations of CPLR 1601 will not apply. Indeed, CPLR 1602, which lists all the exemptions to the Article 16 limitations, does not contain any type of exception where, as here, a defendant has impleaded a plaintiff's employer on a claim for contractual indemnification. CPLR 1602(4) specifically deals with claims under the Workers' Compensation Law, and there is no exception for a scenario such as the one presented here.

Furthermore, at the jury charge conference, the parties all agreed to place third party defendant Truck-Rite on the verdict sheet and have its liability apportioned along with the plaintiff and defendant R&L. Indeed, plaintiff states that it was "necessary and advisable" and "made absolute sense" to place Truck-Rite on the verdict sheet because of R&L's claim for partial contractual indemnification against it. Notwithstanding the language in the last sentence of CPLR 1601, the fact remains that the issue of Truck-Rite's liability was placed before the jury, which found Truck-Rite 35% liable for the accident. Although plaintiff cites an example by Professor Vincent Alexander in the commentaries to CPLR 1601, Professor Alexander also states "no apportionment is to be made with respect to the employer's conduct." (Vincent C. Alexander, Practice Commentaries, McKinney's Cons laws of NY, Book 7B, CPLR C1601:4.) Apportionment, however, was made, and the court, at this juncture, cannot "unring the bell" without causing significant prejudice to the defendant. Thus, the court finds that under the specific circumstances herein, the limitations on recovery in CPLR 1601 are not precluded by the last sentence of the statute.

Plaintiff further contends, however, that the limitations in CPLR 1601 do not apply because of the motor vehicle exemption set forth in CPLR 1602(6). CPLR 1602(6) provides that the limitations set forth in CPLR 1601 shall "not apply to any person held liable by reason of his use, operation or ownership of a motor vehicle ...". Vehicle and Traffic Law § 125 defines a "motor vehicle" as "every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power" with certain exceptions not applicable here. Moreover, under Vehicle and Traffic Law § 311, a motor vehicle includes a "trailer." Thus, the subject trailer is a motor vehicle within the meaning of CPLR 1602(6). Additionally, R&L's liability herein clearly arises out of its ownership of the trailer. Therefore, CPLR 1602(6) would apply in this case, and as a result, the limitations set forth in CPLR 1601 are not applicable. (see *Shaw v Coach*, 82 AD3d at 100.)

Accordingly, this motion by the plaintiff is granted to the extent that the application of CPLR 1601 is precluded herein. (Sequence No. 2.)

The motion by defendant R&L Carriers, Inc. is granted to the extent that defendant R&L Carriers, Inc. is awarded partial contractual indemnification against third party defendant Truck-Rite Distribution Systems Corp. for Truck-Rite's 60% share of any damages awarded to the plaintiff. (Sequence No. 3.)

The motion by third party defendant Truck-Rite Distribution Systems Corp. is denied. (Sequence No. 4.)

Date: November 8, 2013

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AUGUSTUS C. AGATE, J.S.C.