Robinson v Friedman Mgt. Corp.
2014 NY Slip Op 31752(U)
July 7, 2014
Sup Ct, New York County
Docket Number: 120495/03
Judge: Paul Wooten
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SCANNED ON 7/8/2014

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

PRESENT: HON. PAUL WOOTEN, Justice — PART 7

E.C. ROBINSON, III,

Plaintiff,

-against-

FRIEDMAN MANAGEMENT CORP., 281 WEST 11TH OWNERS CORP., PENMARK REALTY CORPORATION, SIRA PROPERTIES, an Unincorporated Entity, JUDITH BLOOMFIELD, ADELE COHEN, MAY COHEN, THOMAS A. POLLAK, BRYAN CANIFF, DENISE CANIFF & JONATHAN GLYNN,

Defendants.

INDEX NO. 120495/03

MOTION SEQ. NO. 007

FRIEDMAN MANAGEMENT CORP., 281 WEST 11TH OWNERS CORP., PENMARK REALTY CORPORATION, SIRA PROPERTIES, An Unincorporated Business Entity,

Third-Party Plaintiffs,

-against-

THOMAS A. POLLAK,

Third-Party Defendant,

THIRD-PARTY INDEX NO. 590815/03

FILED
JUL 08 2014
NEW YORK
COUNTY CLERK'S OFFICE

FRIEDMAN MANAGEMENT CO., 281 WEST 11TH STREET OWNERS CORP., PENMARK REALTY CORP., SIRA PROPERTIES, An Unincorporated Business Entity,

Second Third-Party Plaintiffs,

-against-

MILLIKEN & COMPANY,

Second Third-Party Defendant,

SECOND THIRD-PARTY INDEX NO. 590710/13

The following papers were read on this motion by the second third-party defendant Milliken & Company to dismiss the second third-party -party plaintiffs' complaint for contractual contribution and indemnification pursuant to Workers' Compensation Law § 11.

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	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ■ **Yes** ☐ **No**

The defendants/third-party plaintiffs/second third-party plaintiffs Friedman Management Co., 281 West 11th Street Owners Corp., Penmark Realty Corp., SIRA Properties (hereinafter collectively, the Friedman plaintiffs) commenced the herein action against the second third-party defendant Milliken & Company (hereinafter, Milliken) for indemnification and contribution pursuant to Workers' Compensation Law (WCL) § 11, as a result of the alleged independent negligence in exposing the plaintiff, E.C. Robinson, III (hereinafter, plaintiff Robinson) to formaldehyde and other chemicals used in the manufacture of Milliken's products, chemical ingredients in its products, or cleaning agents in its office, during the period of plaintiff Robinson's employment with Milliken.

Before the Court is a motion by Milliken for an Order dismissing the second third-party action for indemnification and contribution with prejudice pursuant to CPLR 3211(a)(3) and (a)(7). The Friedman plaintiffs submitted an affirmation in opposition to Milliken's motion. Milliken submitted an Affirmation in Reply.

BACKGROUND

This underlying action is for bodily injury arising from an incident that occurred on December 5, 2000, in the primary residence of plaintiff Robinson. In his complaint plaintiff Robinson alleges that his fourth floor apartment within the building located on 281 West 11th Street, New York, New York, was covered with construction dust and debris due to renovation of the Apartment "L-C" in the building. The dust and debris contained particulate matter, which emanated from the renovated apartment and infiltrated plaintiff Robinson's primary residence,

particularly the bathroom and kitchen, through the ventilation system, and came into contact with his person and body. Plaintiff Robinson maintains that multiple contaminations occurred in his apartment from 2000 to 2005. Plaintiff Robinson contends further that in December 2000, he developed rashes on various parts of his body, including his face and arms.

On the date of the incident, plaintiff Robinson was employed by Milliken. From 1975 to 2006, he worked as the market manager for Milliken's woven apparel business. Milliken is a textile company that manufactures, among other products, chemicals, carpeting, and clothing. Plaintiff Robinson testified that for two years during his employment he performed testing on fabric flammability, color retention, and fabric strength. Plaintiff Robinson also testified that he worked for two years in a developmental capacity for the menswear, pocketing, and workwear products by helping to engineer fabrics and by devising new combinations of polyester, and cotton and wool. Furthermore, he stated that he visited various manufacturing plants during the time of his employment.

Plaintiff Robinson testified that during the course of his employment he was exposed to a variety of chemicals, including formaldehyde. In addition, plaintiff Robinson testified that while employed by Milliken, he was exposed to cleaning products used in the office, which caused a rash on his face and skin irritation on his ears:

> Q. Let me ask you this: Was there a time during your work at Milliken that you felt that there was something in your office workspace that was causing you to have a reaction?
>
> A. I had a reaction in the office, yes.
>
> Q. And what did you have a reaction to?
>
> A. They cleaned the V-shaped light sockets, the long white sockets, above my desk while I was at lunch, left the dust and debris on my desk and my phone. And I didn't know that it got on my face and my ears all got it.
>
> Q. What happened to your face and your ears?

> A. The tops of my ears basically fell off. All the skin fell off; it was just raw. The bottom of my ears -- you have photographs -- these pieces twisted up like this (affirmation of Friedman plaintiffs' counsel, exhibit E at 269-270)

In their affirmation in opposition to Milliken's motion, the Friedman plaintiffs adduced an unsworn medical report of plaintiff Robinson's dermatologist, Dr. Jerome L. Shupack (Dr. Shupack), dated May 9, 2006. In his report, Dr. Shupack described plaintiff Robinson's medical condition as follows:

> "Mr. Robinson has been diagnosed with 'widespread primary contact dermatitis, allergic dermatitis, and chemical sensitivities to volatile chemical compounds with a general sensitization to any number of substances.' The primary sensitization appeared to be to formaldehyde.
>
> . . .
>
> In the late 2005/early 2006, Mr. Robinson was taking both immune suppressants with no beneficial effects. At that point, it also became apparent that the use of steroids would no longer be an option due to an indication of pre-diabetes, the beginnings of glaucoma and as found over the past few weeks, the initial "hazing" associated with cataracts – all conditions that can be related back to the use of steroids. The failure of Mr. Robinson to respond to potent topical and systematic therapy leaves environmental isolation as his only alternative.
>
> . . .
>
> His condition . . . is considered to be a chronic disabling illness that he will have to contend with for the rest of his life. . . . There is no cure or further treatments available for his condition at this time. . . .There is no question as to Mr. Robinson's total, permanent disability" (affirmation of the Friedman plaintiffs' counsel, exhibit D at 1-2).

In addition, the Friedman plaintiffs proffered plaintiff Robinson 's Verified Bill of Particulars (BP), which states in the relevant parts as follows:

> "As a result of the exposure to dust and its residue that is alleged to have infiltrated the Plaintiff's residence, he was caused to have rashes over various parts of his body, including his face and arms. As a result of these skin irritations, he was continuously bothered by itching and other uncomfortable conditions.
>
> . . .
>
> <u>SEQUELLA:</u> The above has caused the Plaintiff to complain and

> suffer pain in those areas surrounding the injured tissue and affecting the full, normal and free function of the injured region(s), all of which still have residual conditions which still exist and which, upon information and belief, except for those of a superficial nature, will be permanent" (affirmation of the Friedman plaintiffs' counsel, exhibit B at 8).

The Friedman plaintiffs do not claim that Milliken was a party to any contract whereby Milliken was to indemnify anyone for injuries resulting from the work herein described. The Friedman plaintiffs' basis for impleading Milliken is that plaintiff Robinson sustained a "grave injury" pursuant to WCL § 11.

STANDARDS OF LAW

Motion to Dismiss

CPLR 3211(a) provides that:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> 3. the party asserting the cause of action has not legal capacity to sue; or
> 7. the pleading fails to state a cause of action [.]

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp*, 96 NY2d at 414).

Upon a CPLR 3211 (a)(7) motion to dismiss for failure to state a cause of action, "[t]he question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]).

"However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino*, 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). Moreover, "we look to the substance [of the pleading] rather than to the form (*id.* at 64). However, even if on a motion to dismiss for failure to state a cause of action the Court accepts all pleaded facts as true, "bare and conclusory allegations" are insufficient to state a cause of action (*Stoller v Factor*, 272 AD2d 83, 83 [1st Dept 2000]).

The defense that a party lacks capacity to sue is waived if not raised in a pre-answer motion or in a responsive pleadings (*see Lance Intern, Inc. v First Nat. City Bank*, 86 AD3d 479 [1st Dept 2011]; CPLR 3211[e]). A motion to dismiss, pursuant to CPLR 3211(a)(3), will be granted when the movant establishes that the party asserting the claim lacks the legal capacity to sue. "The issue of lack of capacity does not implicate the jurisdiction of the court; it is merely a ground for dismissal if timely raised as a defense" (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006] [international citation omitted]). The doctrine of legal capacity "concerns a litigant's power to appear and bring its grievance before the court" (*id.* at 279).

<u>WCL § 11</u>

Although an employer's liability is generally limited exclusively to worker's compensation benefits for work-related injuries of its employees regardless of fault, where an employee suffers a "grave injury", as enumerated in WCL § 11, the employer may be liable to third parties for indemnification or contribution (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408 [2004]; *Cocom-Tambriz v Surita Demolition Contr., Inc.*, 84 AD3d 1300, 1301 [2d Dept 2011]).

WCL § 11, provides that:

> "For purposes of this section the terms 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or

> indemnification of the claimant or person asserting the cause of action for the type of loss suffered.
> 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*: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, *loss of ear, permanent and severe facial disfigurement*, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (emphasis added).

Time and again, the courts precisely and narrowly construed the above list as not merely illustrative, but exhaustive, and "not intended to be extended absent further legislative action" (*Fleming v Graham*, 10 NY3d 296, 300-301 [2008]; *Rubeis v Aqua Club Inc.*, 3 NY3d 408, 416 [2004]; *Castro v United Container Mach. Group*, 96 NY2d 398, 402 [2001]). The well-established canon of interpretation of this statutory text resorts to "'the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning'" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998], quoting *Tompkins v Hunter*, 149 NY 117, 122–123 [1896]).

DISCUSSION

Plaintiff Robinson alleges that he suffers from chronic contact dermatitis and chemical sensitivities, with primary sensitivity to formaldehyde, causing ongoing rashes on his face that permanently and severely disfigured his outward appearance. As will be discussed in greater detail below, the Court finds that the record contains no evidence that plaintiff Robinson's chronic illness caused him to sustain an injury that permanently creates severe facial disfigurement that rises to the level of "grave injury", as defined in section 11 of WCL. Hence, Milliken is entitled to dismissal with prejudice of the Friedman plaintiffs' claims for contribution

and indemnification.

I. *Proffered Medical Evidence*

Pursuant to WCL § 11, the Friedman plaintiffs are required to come forward with competent medical evidence demonstrating that plaintiff Robinson has sustained a "grave injury." To that end, the Friedman plaintiffs submitted an unsworn medical report of Dr. Shupack, wherein he diagnosed plaintiff Robinson with contact and allergic dermatitis, a chronic and permanent disabling illness. However, the medical report is silent on the issue of disfigurement. Chronic illnesses that do not cause permanent and severe facial disfigurement are omitted in the statute and the Legislature expressed it clearly that strict application of section 11 is required (*see Rubeis v Aqua Club Inc.*, 3 NY3d 408 [2004]).

The Court finds, as Milliken correctly contends, that the Friedman plaintiffs have submitted an unsworn medical report prepared by Dr. Shupack, and as such, the report is inadmissible (*see Fernandez v Shields*, 637 NYS2d 185 [2d Dept 1996]). However, upon review of plaintiff Robinson's BP, deposition transcripts, and photographs, the Court concludes that while plaintiff Robinson's injury is serious, it does not fall into any of the categories listed under WCL § 11 and is not a grave injury.

II. *WCL § 11 Definition of "Grave Injury"*

"'[P]ermanent and severe facial disfigurement' is unlike most of the other enumerated 'grave' injuries" and "the specification of 'severe' in the statute points to the greater end of the disfigurement spectrum" (*Fleming v Graham*, 10 NY3d at 300-301). Hence, "[t]he term grave injury has been defined as a 'statutorily defined threshold for catastrophic injuries'" and for only those injuries that are permanent (*Curran v Auto Lab Serv. Ctr., Inc.*, 280 AD2d 636 [2d Dept 2001], quoting *Ibarra v Equipment Control*, 268 AD2d 13, 17-18 [2d Dept 2000]). As for "severe", it can be defined as something "causing sharp discomfort or distress", or something "extremely intense", or something "of a great degree" (*Fleming v Graham*, 10 NY3d 296 at 301).

As for "disfigurement," on the other hand, it "impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen or imperfect or deforms in some manner" (*id.*). Therefore, "[i]n finding that a disfigurement is severe, plaintiff's injury must greatly alter the appearance of the face from its appearance before the accident" (*id.* at 301). In addition, this standard "removes the inquiry from plaintiff's subjective self-assessment" and ordinarily is one for the court as a matter of law (*id.*). Yet, any "proffered expert medical evidence is relevant on the issue of permanence, but not severity" (*Krollman v Food Automation Serv. Techniques, Inc.*, 13 AD3d 1209, 1210 [4th Dept 2004]). Further, whether a plaintiff has sustained a severe facial disfigurement may be properly determined by the courts as a matter of law if "a reasonable person viewing the plaintiff's face in its altered state would regard the condition as abhorrently distressing, highly objectionable, shocking or extremely unsightly" (*Fleming v Graham*, 10 NY3d at 300).

As a matter of law, facial scarring generally has not been held to constitute a grave injury within the meaning of WCL § 11 (*Rosen v Nygren Dahly Co.*, 1 AD3d 998, 999 [4th Dept 2003]; see *Pilato v Nigel Enters, Inc.*, 48 AD3d 1133, 1135 [4th Dept 2008] [court held that loss of an eye which was replaced with a slightly darker prostetic eye, and where the other eye appeared to be slightly more open, did not constitute facial disfigurement requiring indemnification]; *Krollman v Food Automation Serv. Techniques, Inc.*, 13 AD3d 1209, 1210 [4th Dept 2004] [a three-millimeter scar above plaintiff's left eyebrow and some mottling of the cheeks caused by burns were not akin to permanent and severe facial disfigurement as a matter of law]).

Here, plaintiff Robinson's BP identifies his injury as rashes over various parts of his body, including his face. Speculating that the areas surrounding the injured tissue will have residual conditions that are permanent in nature, the BP fails to identify both these areas and these conditions. Moreover, the BP is silent on the question of whether such permanent

conditions would deform plaintiff Robinson's face in some manner. Likewise, the photographs proffered by the Friedman plaintiffs fail to show any permanent scarring or demonstrate that the appearance of plaintiff Robinson's face in its altered state is abhorrently distressing, shocking, or extremely unsightly. As in *Krollman*, plaintiff Robinson's photographs depict some mottling of his right cheek. Similarly to *Pilato*, plaintiff Robinson's right eye appears to be slightly more closed. In addition, the photographs show swelling and redness of the right side of plaintiff Robinson's face covered with the rash, which appears to be a condition that may progress into full recovery.

Notwithstanding the foregoing, the Friedman plaintiffs maintain that plaintiff Robinson's rashes caused him severe disfigurement and are permanent as they cannot be prevented by any medical treatment. In looking to the substance of the pleadings (*see Foley v D'Agostino*, 21 AD2d at 64), the Court concludes that the Friedman plaintiffs' papers contain merely conclusory assertions tailored to meet the statutory requirements and are insufficient to establish "grave injury". "[B]are and conclusory allegations" are insufficient to state a cause of action (*Stroller v Factor*, 272 AD2d 83, 83 [1st Dept 2000]).

Furthermore, in his deposition, plaintiff Robinson testified about his allergic reaction to cleaning products in his office. Although a loss of an ear is not alleged, this Court will address the issue. Namely, even if plaintiff Robinson's injury was a partial loss of an ear, "[j]ust as '[t]he term 'loss of multiple fingers' cannot sensibly be read to mean partial loss of multiple fingers', so too, a loss of part of an ear is distinguishable from the loss of an ear" and does not constitute "grave injury" (*Hansen v 510 Manhattan Affordable Hous.*, 2 AD3d 274 [1st Dept 2003], quoting *Castro v United Container Mach. Group*, 96 NY2d 398, 401 [2001]).

III. WCL § 11 Safe Harbor

WCL § 11 bars common law third-party actions against employers for indemnification or contribution if the plaintiff has not sustained a "grave injury," unless "the third-party action is for

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contractual indemnification pursuant to a written contract in which the employer 'expressly agreed' to indemnify the claimant" (*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *see also O'Berg v MacManus Group, Inc.*, 33 AD3d 599 [2d Dept 2006]). There are no allegations that Milliken entered into a written indemnification agreement with the Friedman plaintiffs prior to the incident in December of 2000. Therefore, Milliken is entitled to the WCL § 11 safe harbor and as such the second third-party complaint is dismissed. As the Court finds the dismissal of the second third-party complaint appropriate on this basis, the Court need not discuss the other portions of Milliken's motion. Nevertheless, the Court has considered the parties' remaining arguments and finds them unavailing.

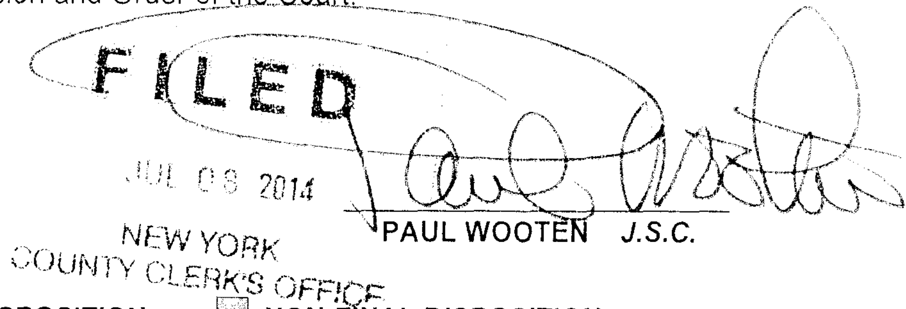
CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that Milliken' motion to dismiss the second third-party plaintiffs' complaint pursuant to CPLR 3211(a)(3) and (a)(7), is granted, and the second third-party plaintiffs' complaint is hereby dismissed in its entirety; and it is further,

ORDERED that Milliken shall serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.



Dated: 7-7-14

PAUL WOOTEN J.S.C.

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