

**Stiles v Cleaver-Brooks Inc.**

2015 NY Slip Op 30722(U)

May 4, 2015

Supreme Court, New York County

Docket Number: 190326/13

Judge: Peter H. Moulton

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 50

-----x  
LOUIS STILES and CORNELIA STILES

Plaintiffs,

Index No.  
190326/13

-against-

AERCO INTERNATIONAL, et al.,

Defendants.

-----x  
CLEAVER-BROOKS INC.,

Third-Party Plaintiff,

-against-

PABST BREWING COMPANY as successor in interest  
to JOS SCHLITZ BREWING COMPANY,

Third-Party Defendants.

-----x  
CLEAVER-BROOKS INC.,

Second Third-Party Plaintiff,

-against-

SBC HOLDINGS, INC. formerly known as  
STROH BREWING COMPANY,

Second Third-Party Defendants.

-----x  
**PETER H. MOULTON, J.S.C.**

Defendant/Third-Party Plaintiff/Second Third-Party Plaintiff  
Cleaver-Brooks, Inc.'s motion, pursuant to CPLR § 3215, for a  
default judgment against Second Third-Party Defendants, based on a  
third-party complaint seeking indemnity and/or contribution is  
denied with leave to renew by motion upon proper papers.

The affidavit of service attached as Exhibit E to the motion is proof of service on the third-party defendants, not the second third-party defendants. The court looked, but could not locate the relevant proof of service of the second third-party action in other e-filed documents. Moreover, the first paragraph of the second page of the Second Third Party Summons states that "This is a third-party action seeking indemnity and/or contribution in connection with plaintiff's claims for damages arising out of injuries she allegedly suffered from asbestos exposure while her husband was employed by . . . PABST BREWING COMPANY as successor in interest to JOS SCHLITZ BREWING COMPANY." Thus, it is not clear whether the Second Third Party Summons gave the second third party defendants notice of this action.

Upon renewal, the movant should address these defects. Cleaver-Brooks Inc. ("Cleaver Brooks") should additionally cite to specific facts in support of a prima facie case for a default judgment against the second third-party defendants, who allegedly employed plaintiff. Cleaver-Brooks cites generally to the testimony of plaintiff's co-worker Grady Draughn. He testified that plaintiff started working for "Schlitz" in 1971 or 1972 in Winston-Salem North Carolina in "powerhouse maintenance" until about 1990. Draughn also testified that "Stroh's" bought Schlitz "maybe ten years" before the facility closed in 1999.

In indemnification cases "a party held legally liable to

plaintiff shifts the entire loss to another. The right to do so may be based upon an express contract, but more commonly the indemnity obligation is implied" (*Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 [1990]). Indemnity has been implied in situations involving vicarious liability; where there was "a separate duty owed the indemnitee by the indemnitor," or, where the "tort-feasor [found] liable for damages arising for breach of a particular duty owed to the injured plaintiff . . . seek[s] indemnity over from another who has breached a related duty owed to the injured plaintiff" (*id.* at 689-690). Thus, the key element "is not a duty running from the indemnitor to the injured party, but rather is 'a separate duty owed the indemnitee by the indemnitor.'" (*Raquet v. Braun*, 90 NY2d 177, 183 [1997]).

Moreover, "[s]ince the predicate for common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Trump Vil. Section 3 v. New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept. 2003]).

Here, Cleaver-Brooks has not met its burden of establishing that it is entitled to common law indemnity. Further, under the facts as alleged, it could never prove that it is so entitled. However, Cleaver-Brooks might be entitled to contribution (see *Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559 [1987]).

With respect to contribution “[g]enerally, apportionment among tort-feasors, rather than a shifting of the entire loss through indemnification, is the proper rule when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe[ ] to the injured person” (*Guzman*, 69 NY2d at 568 [internal quotations omitted]; *D'Ambrosio v City of New York*, 55 NY2d 454, 462 [1982]). Accordingly, in *Guzman*, the court found that a property owner was not entitled to indemnification, but rather contribution, because it failed to perform a duty that it owed to the plaintiff.

It is axiomatic that “a contribution claim can be made even when the contributor has no duty to the injured plaintiff” (*Raquet*, 90 NY2d at 182). A “critical requirement” for apportionment by contribution is that “the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought” (*id.* at 183, quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]; *Trump Vil. Section 3*, 307 AD2d 891 at 896 [contribution is an available remedy “when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe to the injured person”]).

Upon renewal Cleaver-Brooks must demonstrate facts sufficient to support a judgment that it would be entitled to contribution if it is held liable for plaintiff’s injuries i.e., that the second

third-party defendants breached a duty of care to plaintiff. Cleaver-Brooks must further explain the relationship and liabilities of the third-party and second third-party defendants.

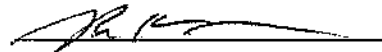
Accordingly, it is hereby

ORDERED that Defendant/Third-Party Plaintiff/Second Third-Party Plaintiff Cleaver-Brooks, Inc.'s motion, pursuant to CPLR § 3215, for a default judgment against the Second Third-Party Defendants based on a third-party complaint seeking indemnity and/or contribution is denied with leave to renew by motion upon proper papers.

**This Constitutes the Decision and Order of the Court.**

Dated: May 4, 2015

ENTER:

  
J.S.C.

**HON. PETER H. MOULTON**