

Stevens v Dick's Sporting Goods

2019 NY Slip Op 34460(U)

September 6, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 614299/2017

Judge: Sanford Neil Berland

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SHORT FORM ORDER

INDEX NO.: 614299/2017

**SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY**

PRESENT:

Hon. Sanford Neil Berland, A.J.S.C.

JEFFREY STEVENS and DOROTHY STEVENS,

Plaintiffs,

-against-

DICK'S SPORTING GOODS, INC., ADVANCED
FIXTURES, INC., i3LLC, and EASTMAN, COOKE &
ASSOCIATES, LLC,

Defendants.

ADVANCED FIXTURES, INC. and i3LLC.

Third-Party Plaintiffs,

-against-

TRILLIUM CONSTRUCTION SERVICES,

Third-Party Defendant.

ORIG. RETURN DATE: July 24, 2018
FINAL RETURN DATE: April 2, 2019
MOT. SEQ #: 002 MG

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by third-

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party defendant Midwest Construction Services, Inc. d/b/a Trillium Construction Services dated July 3, 2018, and supporting papers; (2) Affirmation In Opposition by third-party plaintiffs Advanced Fixtures, Inc. and i3LLC dated November 1, 2018, and supporting papers; and (3) Reply Affirmation by third-party defendant Midwest Construction Services, Inc. d/b/a Trillium Construction Services dated December 17, 2018, it is

ORDERED, that third-party defendant Midwest Construction Services, Inc. d/b/a Trillium Construction Services' motion for summary judgment dismissing the complaint and all cross-claims against it, pursuant to CPLR § 3212, is **GRANTED**.

This is an action to recover damages for personal injuries sustained by plaintiff Jeffrey Stevens on August 1, 2014, when his foot fell through cardboard covering a pallet while working on a project at a premises in Patchogue, New York which was owned or leased by defendant Dick's Sporting Goods, Inc. Plaintiff alleges that his foot caught in the pallet's slats, causing him to sustain injuries to his right foot and ankle. Plaintiff commenced an action against defendants sounding in negligence together with claims that defendants violated New York Labor Law §§ 200, 240[1] and 240[6]. Defendants-third-party plaintiffs Advanced Fixtures, Inc. and i3LLC commenced a third-party action against plaintiff's employer, Midwest Construction Services, Inc. d/b/a Trillium Construction Services ("Trillium"). Trillium now moves for summary judgment dismissing the third-party complaint and all cross-claims against it on the grounds that plaintiff did not sustain a "grave injury" as defined in Worker's Compensation Law § 11 and that there was no written agreement for Trillium to provide contribution or indemnity to third-party plaintiffs.

In support of its motion, Trillium proffers, *inter alia*, copies of the pleadings, a copy of a third-party contract between Trillium and i3LLC, plaintiff's bills of particulars, and an affidavit by James Reid, the Director of Risk Management for Trillium.

Third-party plaintiffs oppose the motion on the grounds that, according to third-party plaintiffs, Trillium has failed to include the amended complaint as an exhibit to its motion¹, discovery is not complete and that there are material triable issues of facts warranting denial of the motion. In opposition to the motion, third-party plaintiffs offer a copy of the court's order dated September 25, 2018 and the deposition testimony of plaintiff.

It is well 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. Before summary judgment may be granted, it must clearly

¹This assertion is erroneous. The amended complaint is part of Exhibit E to Trillium's motion.

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appear that no material and triable issue of fact is presented (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]; *see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court’s function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn from them are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O’Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The Workers’ Compensation Law prohibits third-party claims for contribution or indemnification against an employer for injuries sustained by an employee acting within the scope of employment except where the employee has sustained a “grave injury” or when there is 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” (WCL § 11; *see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 365, 795 NYS2d 491 [2005]). Here, there is no dispute that plaintiff Jeffrey Stevens was a Trillium employee on assignment to i3LLC at the time of the subject accident pursuant to a Staffing Services Agreement (“the Agreement”) between Trillium and i3LLC. There is also no dispute that Jeffrey Stevens was paid Worker’s Compensation benefits through Trillium’s Workers’ Compensation carrier for losses that he sustained as a result of his injuries. Under the Agreement, i3LLC agreed that except for any workers’ compensation claims of Trillium employees, it would indemnify, defend and hold Trillium harmless, “[t]o the fullest extent allowed by law,” for “any third party claims, liabilities, demands or losses arising out of the worksite activities of [Trillium] employees under the supervision of [i3LLC]” Since there was no written agreement by which Trillium expressly agreed to provide contribution or indemnification to the third-party plaintiffs for injuries suffered by Trillium employees, the only remaining basis for a third-party claim for indemnification against Trillium would be if plaintiff sustained a “grave injury” as that term is defined by the Workers’ Compensation Law.

Section 11 of the New York Worker’s Compensation Law provides, in relevant part:

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

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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.

New York Worker's Compensation Law § 11.

According to plaintiff's bill of particulars, plaintiff sustained the following injuries as a result of the subject accident: "trauma to the right foot and ankle resulting in right foot and ankle sprain and strain; tarsal sprain and strain; posterior tibial tear at the level of the talar head; posterior tibial tendinopathy; posterior tibial tenosynovitis; posterior tibial tendon dysfunction; subcutaneous edema; talocalcaneal osseous impingement; exacerbation and aggravation of pes planovalgus deformity; osteoarthritis; exacerbation and aggravation of degenerative and/or pre-existing conditions in the right foot and ankle; tight heel cord; antalgic gait; tingling and numbness in the right foot; right foot and ankle pain; difficulty ambulating; and restricted range of motion involving the right foot and ankle." None of the injuries claimed by plaintiff in his bill of particulars fits within the definition of "grave injury" found in the Workers' Compensation Law. Thus, Trillium has sufficiently made a *prima facie* showing of entitlement to judgment as a matter of law on the issue of whether a third-party claim may be maintained against it.

The burden thus shifted to third-party plaintiffs to raise a triable issue of fact as to whether plaintiff has sustained a grave injury. Third-party plaintiffs have proffered plaintiff's deposition testimony in which he testified that he was receiving social security disability benefits as a result of the subject accident. Third-party plaintiffs claim that plaintiff testified that he cannot use his feet at all. However, no such contention can be found in the transcript of plaintiff's testimony. Plaintiff did testify that he has trouble walking up and down stairs and cannot walk or stand on uneven ground. He testified that he ambulates using an orthotic, and can drive an automobile. Even accepting all of these facts as true, they fail to establish that plaintiff sustained a grave injury as a result of the subject accident.


In light of the foregoing, the court finds that there is no triable issue of fact on the issue of whether the third-party claims that have been asserted against Trillium may be maintained and that Trillium is entitled to summary judgment in its favor dismissing those claims and the third-party complaint. Accordingly, Trillium's motion for summary judgment dismissing the complaint and all cross-claims against it is granted.

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The court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein.

The foregoing constitutes the decision and order of the court.

Dated: 9/6/2019
Riverhead, New York


HON. SANFORD NEIL BERLAND, A.J.S.C.

 FINAL DISPOSITION

 XX NON-FINAL DISPOSITION