

Cabral v Rockefeller Univ.
2022 NY Slip Op 33285(U)
September 30, 2022
Supreme Court, New York County
Docket Number: Index No. 156724/2016
Judge: Sabrina Kraus
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

CHRISTOPHER CABRAL, JAIME CABRAL,
Plaintiff,

- v -

THE ROCKEFELLER UNIVERSITY, TURNER
CONSTRUCTION COMPANY,
Defendant.

-----X

THE ROCKEFELLER UNIVERSITY, TURNER
CONSTRUCTION COMPANY
Plaintiff,

-against-

THE PRINCE MANUFACTURING COMPANY
Defendant.

-----X

THE ROCKEFELLER UNIVERSITY, TURNER
CONSTRUCTION COMPANY
Plaintiff,

-against-

NORTHERN TOOL & EQUIPMENT CATALOG COMPANY,
LLC, NORTHERN TOOL & EQUIPMENT CATALOG
HOLDINGS, INC., NORTHERN TOOL & EQUIPMENT
COMPANY, INC., NORTHERN TOOL & EQUIPMENT PARTS,
LLC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 013) 504, 505, 506, 507,
508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528,
529, 530, 531, 532, 533, 534, 535, 536, 565, 568, 571, 572, 574, 575, 576, 577, 578, 579, 580, 581, 582,
583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 594, 595, 596

were read on this motion to/for REARGUMENT/RECONSIDERATION

AMENDED
DECISION + ORDER ON
MOTION

Third-Party
Index No. 595221/2017

Second Third-Party
Index No. 595627/2021

The following e-filed documents, listed by NYSCEF document number (Motion 014) 556, 557, 567, 570, 573, 593

were read on this motion to/for

DISMISS

Defendant's Motion to Reargue is Denied

The Court held oral argument on Motion Sequence numbers 8-11 on February 8, 2022.

On February 18, 2022, the Court issued a Decision and Order: Denying the motion of Rockefeller University (RU) and Turner Construction Company (Turner)(collectively "Defendants") for partial summary judgment against Prince, finding there were issues of fact that must be determined at trial; Granting Plaintiffs' motion to Sever the Second Third-Party Complaint against Northern Tool; Granting Northern Tool's motion to dismiss the Second Third-Party Complaint as to the causes of action for contribution, common law indemnity, strict liability, and breach of implied warranty of merchantability, and denying the portions of the motion as to contractual indemnity and failure to procure insurance; Granting Plaintiff's motion for summary judgment as to Labor Law § 241(6) based upon violations of Industrial Codes 12 NYCRR §§ 23-1.5(c)(3) and 23-9.2(a); and denying Plaintiffs' motion as to Labor Law §§ 200 and 240(1).

Defendants now move for: leave to re-argue Plaintiffs' motion for summary judgment as to Plaintiffs' Labor Law 241(6) claim; leave to reargue and renew Second Third-Party Defendant Northern Tool's motion to dismiss as to Defendants' claims for contribution and indemnification; and leave to re-argue Plaintiffs' motion to sever the Second Third-Party Complaint.

The motion is denied. The court finds no issues of fact or law that were misapprehended in the underlying decision and order, and no basis for renewal.

**Northern Tool's Motion to Dismiss the Amended Second Third-Party
Complaint filed by The Rockefeller University and Turner Construction Company**

Plaintiffs filed this action against the RU and Turner on August 11, 2016 seeking recovery for injuries sustained while Plaintiff Christopher Cabral was working on a construction site for his employer, New York City Constructors (NYCC). RU and Turner later filed a Third-Party Complaint in this action against The Prince Manufacturing Company ("Third-Party Defendant") on March 21, 2017.

On July 9, 2021, RU and Turner filed a Second Third-Party Complaint against Northern Tool. Second Third-Party Defendants filed a motion to dismiss the Second Third-Party Complaint in its entirety on September 17, 2021. On February 18, 2022, this Court granted Second Third-Party Defendants' motion to dismiss as to four of the six causes of action, namely contribution, common law indemnity, strict liability, and breach of implied warranty of merchantability.

Now, RU and Turner have filed an Amended Second Third-Party Complaint with the original six causes of action, which they assert have been fortified by sufficiently specific allegations to address the prior dismissal, and Northern Tool moves for dismissal of same.

In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211 (a) (7), the sole criterion is whether the pleading states a cause of action (*see, Weiss v Cuddy & Feder*, 200 AD2d 665). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*see, Weiss v Cuddy & Feder, supra; Guggenheimer v Ginzburg*, 43 NY2d 268; *see also, Edison v Viva Intl.*, 70 AD2d 379). The court's function is to "accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts" (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509, citing *Becker v Schwartz*, 46 NY2d 401, 408; *see also, Carney v Memorial Hosp. & Nursing Home*, 64 NY2d 770; 6A Carmody-Wait 2d, NY Prac § 38:41, at 290-291).

Cooper v. 620 Properties Assocs., 242 A.D.2d 359, 360 (1997).

The Motion to Dismiss the Cause of Action for Common Law Contribution is Granted

It is well settled in this action that Prince was the manufacturer of the alleged defective equipment and that Northern Tool is only a distributor. In fact, the expert retained by RU and Turner has submitted a report detailing the alleged deficiencies in Prince's work in this regard (see eg NYSCEF Doc No. 277).

The newly added allegations to the complaint pretend that RU and Turner are not aware of this well established fact, by claiming for example that Northern Tool "defectively designed such product as they failed to make the hydraulic cylinder or piston reasonably safe for its intended purpose or for other foreseeable uses of the product, despite knowing or having reason to know how the product would be used."

Any liability by Northern Tool in this case will therefore not be based on negligence but by imputation of law and for that reason no cause of action for contribution lies against Northern Tool. "Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' (23 N.Y. Jur 2d, Contributions, Indemnity and Subrogation § 24; see CPLR 1402). Where, as here, liability is not based upon culpability, the appropriate concept is indemnification, rather than contribution." *Godoy v. Abamaster of Miami, Inc.*, 302 A.D.2d 57, 61-62 (2003).

The Cause of Action for Common Law Indemnity is Dismissed

(T)he key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is "a separate duty owed the indemnitee by the indemnitor" (*Mas v. Two Bridges Assocs.*, 75 N.Y.2d 680, 690, 555 N.Y.S.2d 669, 554 N.E.2d 1257). The duty that forms the basis for the liability arises from the principle that "every one is responsible for the consequences of his own negligence, and if another person has been compelled to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him" (*Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 468, 31 N.E. 987; see, *McDermott v. City of New York*, 50 N.Y.2d 211, 216-217, 428 N.Y.S.2d 643, 406 N.E.2d 460). *Raquet v. Braun*, 90 N.Y.2d 177, 183 (1997).

This court has already awarded plaintiff summary judgment as to liability pursuant to Labor Law Section 241(6). RU and Turner argue such finding does not mean that there was any wrongdoing on their part. The court disagrees, unlike a 240(1) claim which imposes strict liability regardless of fault, a 241(6) claim does require a finding of wrongdoing.

In this case, the Court held in pertinent part that the testimony of Robert Wargo and Glenn Dickerson established that defendants violated the applicable code provisions related to inspection, maintenance and safeguarding load bearing and power operated equipment. The Court held that "No one inspected the machinery prior to use, and no one denied, after the fact, that the machine as operated, was not in good and safe working condition."

Based on the foregoing the motion to dismiss the cause of action for common law indemnity is granted.

The Third and Fourth Causes of Action for Strict Liability and Breach of Implied Warranty are Time Barred

"Pursuant to CPLR 214(5), a personal injury action must be commenced within three years of its accrual, and '[a] cause of action accrues for purposes of CPLR 214' when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court." *Torres v Greyhound Bus Lines, Inc.*, 48 A.D.3d 1264, 1265 (4th Dep't 2008) "As a rule, the date of injury is the benchmark for determining the accrual of a cause of action." *Id.* Plaintiff's injuries occurred on August 8, 2016. RU and Turner filed their Second Third-Party Complaint on July 9, 2021. A personal injury action against Northern Tool cannot be commenced now, more than three years later. Considering the foregoing, the cause of action for strict liability is time-barred as a matter of law.

"Under UCC § 2-725, an action for breach of implied warranty must be commenced within four years from the date that the defendant tenders delivery of the product." *Vanata v. Delta Int'l Mach. Corp.*, 269 A.D.2d 175, 176 (1st Dep't 2000). "The cause of action accrues upon tender of delivery despite the aggrieved party's lack of knowledge of the breach (UCC § 2-725 [2])." *Id.* "This rule is equally applicable to suits by a party not in privity with the manufacturer, such as the plaintiffs in the case at bar." *Id.* Here, Northern Tool necessarily tendered delivery of the product at issue to NYCC prior to the accident on August 8, 2016. RU and Turner filed their Second Third-Party Complaint on July 9, 2021. Tender of delivery occurred more than four years ago, thus the fourth cause of action for breach of implied warranty of merchantability fails. RU and Turner's arguments that this misconstrues what is intended by the third and fourth causes of action, and that said causes of action are for indemnity and contribution rather than strict liability and breach of implied warranty of merchantability are belied by a plain reading of the complaint. Based on the foregoing the third and fourth causes of action are dismissed.

This Court has already held that the Second Third-Party Complaint Properly States Causes of Action for Breach of Contract and Failure to Procure Insurance Against Northern Tool. There is no change to these causes of action in the amended complaint. The motion to dismiss these causes of action is denied for the reasons previously stated in the court's prior decision.

WHEREFOERE it is hereby:

ORDERED that Motion Seq No 13 seeking re-argument is denied; and it is further


ORDERED that Motion Seq No 14 is granted to the extent of dismissing the first, second, third and fourth causes of action of the Amended Second Third-Party Complaint; and it is further

ORDERED that, within 20 days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

9/30/2022		
DATE		SABRINA KRAUS, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE