

**Garcia v Otto Martin Maschinbau GMBH & Co.**

2017 NY Slip Op 30180(U)

January 23, 2017

Supreme Court, Suffolk County

Docket Number: 11-11881

Judge: Joseph C. Pastorella

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INDEX No. 11-11881  
CAL. No. 15-01735OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

MOTION DATE 2-16-16 (003)  
MOTION DATE 2-19-16 (004)  
MOTION DATE 4-27-16 (005)  
ADJ. DATE 6-29-16  
Mot. Seq. #003 - MG #005 - XMD  
#004 - MG

-----X  
CARLOS GARCIA,

Plaintiff,

- against -

OTTO MARTIN MASCHINBAU GMBH & CO,  
KG MARTIN WOODWORKING MACHINES  
CORPORATION, NOT JUST MICA  
INTERNATIONAL LTD, MODERN  
FURNITURE MANUFACTURING  
COMPANY, LLC, as successors-in-interest to  
NOT JUST MICA INTERNATIONAL LTD,  
RIEBLING MACHINERY, INC., as successors-  
in-interest to ERIC RIEBLING CO., INC., and  
YUENGER WOODWORKING CORP,

Defendants.  
-----X

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Upon the following papers numbered 1 to 69 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14, 15-22; Notice of Cross Motion and supporting papers 23-38; Answering Affidavits and supporting papers 39-48, 49-56, 57-58, 59-61; Replying Affidavits and supporting papers 62-63, 63-65, 66-69; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that these motions are consolidated for the purposes of this determination; and it is further

**ORDERED** that the motion by defendant Riebling Machinery, Inc., sued herein as successors-in-interest to Eric Riebling Co., Inc., for summary judgment in its favor dismissing the complaint and all cross claim asserted against it is granted; and it is further

**ORDERED** that the motion by defendant Modern Furniture Manufacturing Company, LLC, sued herein as successors-in-interest to Not Just Mica International, Ltd, for summary judgment in its favor dismissing the complaint and all cross claims asserted against it is granted; and it is further

**ORDERED** that the cross motion by defendants Otto Martin Maschinebau GMBH & Co. and Martin Woodworking Machines Corporation for summary judgment dismissing the complaint and all cross claims against them is denied.

This action arises out of an accident which occurred on July 1, 2010, at the place of business of Modern Furniture Manufacturing Company, LLC ("Modern Furniture") which is being sued as successors-in-interest to Not Just Mica International, Ltd. ("Not Just Mica"). The accident occurred when plaintiff, working as an employee of Modern Furniture, was operating a Martin table saw, and said table saw came into contact with plaintiff's wrist, resulting in personal injuries to plaintiff. The second amended complaint contains eighteen causes of action. The first three causes of action allege negligence, breach of warranty and strict tort liability as against defendant Otto Martin Maschinebau GMBH & Co. ("Otto Martin"). The fourth through sixth causes of action allege negligence, breach of warranty and strict tort liability as against defendant Martin Woodworking Machines Corporation ("Martin Woodworking"). The seventh through ninth causes of action allege negligence, breach of warranty and strict tort liability as against defendant Not Just Mica. The tenth through twelfth causes of action allege negligence, breach of warranty and strict tort liability as against defendant Modern Furniture. The thirteenth through fifteenth causes of action allege negligence, breach of warranty and strict tort liability as against defendant Riebling Machinery, Inc. ("Riebling Machinery") as successor-in-interest to Eric Riebling Co., Inc. ("Eric Riebling Co."). The sixteenth through eighteenth causes of action allege negligence, breach of warranty and strict tort liability as against defendant Yuenger Woodworking Corp., ("Yuenger"). Defendants Not Just Mica and Yuenger have not answered or appeared in this matter.

Defendant Riebling Machinery now moves for summary judgment dismissing the complaint and all cross claims asserted against it. In support of the motion it submits, *inter alia*, copies of the pleadings, the deposition transcripts of plaintiff, Stephen Riebling, and Michael Mueldorfer, and entity information from the New York State, Division of State, Division of Corporation, for Eric Riebling Co. and Riebling Machinery. Defendant Modern Furniture also moves for for summary judgment dismissing the complaint and all cross claims asserted against it. In support of the motion it submits, *inter alia*, copies

of the pleadings, and the deposition transcripts of plaintiff, and William Kearney. Defendants Otto Martin and Martin Woodworking cross-move for summary judgment dismissing the complaint and all cross claims asserted against them. In support of their motion they submit, *inter alia*, copies of the pleadings, the deposition transcripts of plaintiff and Michael Mueldorfer, operating instructions for the Martin T-71 table saw, a copy of a contract between Otto Martin and Eric Riebling Co., dated January 14, 1981, and an affidavit dated September 20, 2015. Plaintiff has filed affirmations in opposition to each of the motions

Plaintiff testified that he had been working, primarily as a carpenter, since he arrived in the United States approximately 15 years ago. He testified that his first job was furniture cleaning for a company in the Ronkonkoma area. He testified that his next job was in Hauppauge, cutting cartons with heavy machinery that had a blade. Plaintiff testified that after that he worked for a company in Bay Shore called Elron, where he performed carpentry, assembling furniture, and used a table saw, jack saw, and other tools. He testified that Elron provided training on how to use a table saw, the risks involved and the potential for injury. He testified that the table saws he worked on did not have any guarding on them. Plaintiff testified that he next worked for four years at Leo's Woodworking in Bay Shore, where he assembled and laminated furniture, again working with table saws and jack saws, which did have a protective base. His next job was with defendant Modern Furniture. Plaintiff testified that he told this employer that he had experience with table saws and worked with them every day. He testified that he had been working with table saws at Modern Furniture for about a year and three months before the accident occurred. Plaintiff testified that on the day of the accident, July 1, 2010, he arrived at work between 8:20 and 8:25 a.m., and immediately began cutting wood with the subject table saw. He testified that he had been working for approximately 20 minutes and had cut 12 to 15 pieces of wood prior to the accident. He was cutting another piece of wood with the table saw, which he described as "warped," when the accident occurred. Plaintiff testified that he was holding down the piece of wood, with his left hand in front of the blade, when the machine "kicked back," and he saw his left hand on the floor. Plaintiff testified that he was flown to Stony Brook Hospital, where the hand was reattached, and that he has regained some use of the hand. Plaintiff testified that he was currently receiving Workers' Compensation benefits as a result of his accident in the amount of \$480.00 every two weeks.

Stephen Riebling, the president of defendant Riebling Machinery, testified that he formed a separate and distinct company under the name Riebling Machinery, Inc. He testified that Eric Riebling Co. had no interest or input and/or management over Riebling Machinery. He testified that when Riebling Machinery was formed in 2006, it initially operated its business from a UPS Store, and in 2007 leased warehouse space at 65 South End Plaza in New Milford, Connecticut. He testified that Riebling Machinery was in the business of service, sales, and spare parts for woodworking machinery, including table saws. Mr. Riebling testified that other than himself, the corporation has no employees. He further testified that Eric Riebling Co. commenced business in 1965 and ceased operations in 2007, due to Eric Riebling's poor health, and that such company was officially dissolved in 2009, after the inventory was sold and the company's debt was paid. Mr. Riebling testified that the building located at 106 Miller Place, Mount Vernon, New York was owned by Eric Riebling's wife Josephine Riebling. In 2007, the building was sold and the proceeds paid to Mrs. Riebling, who passed away in 2012. He testified that Riebling Machinery never conducted any business at the 106 Miller Place, Mount Vernon address. He

testified that he was not aware of any other entity operating as Riebling Machinery prior to 2006. He testified that after he graduated college in 1970, he went to work for Eric Riebling Co. and continued working there until 2007. Mr. Reibling testified that at some point Eric Riebling transferred some of his shares to him and his sister. He testified that he believed he and his sister had a 35 to 40 percent interest in the business, with Eric Riebling retaining a 60 percent interest. Mr. Riebling testified that when Eric Riebling passed away, the shareholders decided to close down Eric Riebling Co., because it was deeply in debt. He testified that, pursuant to a written agreement, the company's inventory would be sold to pay all outstanding debts. Mr. Riebling testified that he handled the sale of the Eric Riebling Co. inventory to pay off the company's debt, and that, after inventory and assets were sold, there was about \$7,000.00 left, which was divided among the surviving shareholders, including Josephine Riebling, who had inherited Eric Riebling's shares. He testified that he was not aware of any of any books or records of Eric Riebling Co. that currently exist. Mr. Riebling testified that there were no business transactions between Eric Riebling Co. and Riebling Machinery during the dissolution process to purchase inventory, assets, equipment, materials or manuals from the dissolving company, nor did Riebling Machinery take over its customer's list.

Mr. Riebling testified that Riebling Machinery began to generate business by attending trade shows and placing advertisements in trade journals, as well as by creating a web site. He testified that neither the advertisements nor the web site made any reference to Eric Riebling Co., but that he managed to independently attract at least 50 former Eric Riebling Co. customers to his business. He testified that for a short period of time from November 2006 to early 2007, both Eric Riebling Co. and Riebling Machinery were in existence. Mr. Riebling testified that he was familiar with an entity named Otto Martin ("Martin"), which is a manufacturer of woodworking machinery, located in Germany and in North Carolina, but that Riebling Machinery had never sold any machines from Martin, although he conceded that he may have serviced Martin machines. He testified that he had sold parts for Martin machines and had ordered parts from Martin, but never sold Martin Machinery. He testified that he did not maintain any Martin service manuals and had never been to school on Martin's line of machinery. Mr. Riebling testified that Eric Riebling Co. was incorporated in 1965, and was in the business of distributing woodworking machinery, spare parts, and service. Mr. Riebling testified that Eric Riebling Co. was the exclusive distributor for Otto Martin table saws in the United States from 1965 until 2000, when Martin Woodworking opened their offices in North Carolina and became the exclusive distributor for Otto Martin. Mr. Riebling testified that if anyone wanted to purchase a table saw from 1965 to 2000, they would have to go through Eric Riebling Co. to do so. Mr. Riebling testified that Eric Riebling Co. would also supply spare parts, operation manuals and service manuals. Mr. Riebling testified that Eric Riebling Co. had liability insurance, but he believed that Riebling Machinery had obtained its liability coverage from a different insurance company. Mr. Riebling testified that Eric Riebling Co. had two full time employees, as well as his sister, who did the bookkeeping. It is noted that at Mr. Riebling's deposition, plaintiff's counsel produced a New York State, Division of State, Division of Corporation document showing that a Riebling Machinery Inc was incorporated in 1976 with an address at 106 Miller Place, Mount Vernon, New York. However, plaintiff's counsel also pointed out that such corporation had been dissolved in 1991. Mr. Riebling testified that he was unaware of any corporate filing under that name prior to his filing in 2006.

William Kearney testified that he currently serves as a consultant for Modern Furniture, and previously, he was a partner. He testified that he became a partner in 2005, when the company was formed, and remained one until 2014. During that time he had three partners, Anthony Sollicito, Martin Cohn and David Cohn. He testified that he originally had a 75 percent interest in the company, but that changed, first to 42 percent, then to 16 percent and then, in 2014 to zero percent. He testified that at that point, Martin and David Cohn had a 100 percent interest in the company. He testified that in 2005 the business was started by purchasing the assets of an existing furniture company named Modern Response Corp., which ceased operations after the purchase. Mr. Kearney testified that he had no experience in the furniture business prior to 2005. He testified that he was aware that plaintiff's accident occurred on July 1, 2010, at which time the company was located at 181 East Industry Court in Deer Park. Mr. Kearney testified that the company purchased some assets from Not Just Mica in 2006, including the table saw which is the subject of this action as well as some hand tools, carts and an old box truck. He testified that Not Just Mica remained in business for approximately six to eight months after that purchase. He testified that he knew that the table saw was manufactured by Otto Martin, but little else., and that he learned the saw was for sale through a mutual customer. The table saw was used to cut materials, plastic or wood. He testified that he could not recall if he received any manuals for the saw, but that an employee of Not Just Mica was hired at the time to familiarize Anthony Sollicito and himself how with the operation of the table saw. He testified that this employee only worked for Modern Furniture for a short time, and left because of the length of the driving commute. Mr. Kearney testified that two other laid off employees from Not Just Mica were hired, and they, likewise, left shortly afterward due to the length of the commute, and neither of these employees worked with the table saw. He testified that Not Just Mica asked Modern Furniture to do some jobs for customers from which the company already had deposits. Mr. Kearney testified that Modern Furniture did not make any modifications to the table saw from the way it was received from Not Just Mica.

In addition, Mr. Kearney testified that after the plaintiff's accident, he filled out and filed the necessary forms for plaintiff's Workers' Compensation claim. Personnel from the Occupational Safety and Safety Administration ("OSHA") arrived at the workplace on the day of the accident, and as result Modern Furniture was fined, because the table saw did not have a blade guard and did not have a splitter device which prevents the saw from kicking back. He testified that some time thereafter he went to OSHA's office in Westbury to show that Modern Furniture had complied with the requirements for a blade guard and splitter. He testified that the manufacturer did not make a blade guard and that the guard had to be obtained from another company. However, Martin Woodworking informed his partner, Anthony Sollicito that, while they did not manufacture a blade guard, they could provide a splitter. Mr. Kearney testified that Otto Martin did not provide a place to mount the saw guard, there were no drill holes or bolt holes, and that they to drill into the saw to retrofit the guard. He testified that no one else has been injured using the table saw since plaintiff's accident.

Michael Mueldorfer testified as a witness for Otto Martin, where he is employed as the marketing manager. He testified that Otto Martin is in the business of manufacturing, producing and selling woodworking machinery. He agreed, based upon documents, that the T-71 table saw which is the subject of this action was produced in 1984. He testified that when he was hired by Otto Martin in 1999, the company no longer produced the T-71 table saw. Mr. Mueldorfer was shown a copy of a contract dated

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January 14, 1981 between Otto Martin and Eric Riebling Company. He agreed that the contract made Eric Riebling Co. the exclusive distributor of Otto Martin saws and products, including parts, in the United States. He testified that the contract was in effect until 1999 or 2000, at which time Martin Woodworking was established. Mr. Mueldorfer was shown a copy of an invoice for the sale of the subject table saw from Otto Martin to Eric Riebling Co., dated April 16, 1984, but could only give a few details. He testified that the table saw was shipped fully assembled and would have had warning stickers placed upon it. He testified that, based upon Otto Martin documents, the table saw was shipped without an anti-kickback device and without a guard for the saw blade. He testified that the consideration of safety issues was to be done by Eric Riebling Co., because special equipment was required in the United States for safety issues. He testified that saws distributed by Martin Woodworking do meet United States safety standards. The table saws currently manufactured by Otto Martin are equipped with anti-kickback devices and blade guards.

The affidavit submitted by Carl Stout, the president of Martin Woodworking, states the company was incorporated and in business since 1999, and is the sole distributor of Otto Martin machinery. It further states that Martin Woodworking is not involved in the design or manufacture of Otto Martin table saws, and that Martin Woodworking has not had any involvement with the table saw that was the alleged cause of plaintiff's accident.

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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320, *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395). 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.*, 64 NY2d 851). 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]; *Zuckerman v City of New York*, 49 NY2d 557). 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 are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, *O'Neill v Town of Fishkill*, 134 AD2d 487).

Defendant Riebling Machinery has established its prima facie entitlement to summary judgment dismissing the complaint by submitting proof that it is not the successor in interest to Eric Riebling Company. Under well-settled New York law, a corporation that acquires the assets of another may be held liable for the torts of its predecessor as a successor-in-interest if it: (1) impliedly assumed the predecessor's tort liability; (2) there was a consolidation or merger of seller and purchaser; (3) the purchasing corporation was a mere continuation of the selling corporation; or (4) the transaction was entered into fraudulently to escape such obligations (*Schumaker v Richards Shear Co.*, 59 NY2d 239, 245; *see also Oorah, Inc. v Covista Communications, Inc.*, 139 AD3d 444; *Cole, Schotz, Meisel, Forman & Leonard, P.A. v Stanton Crenshaw Communications, LLC*, 128 AD3d 604; *Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167; *Broadway 26 Waterview, LLC v Bainton, McCarthy & Siegel, LLC*, 94 AD3d 506). Factors to determine whether a "de facto merger" has occurred, so as to impose

liability for torts of predecessor corporation upon successor, include: continuity of ownership; cessation of ordinary business and dissolution of predecessor as soon as practically and legally possible; assumption by successor of liabilities ordinarily necessary for uninterrupted continuation of business of predecessor; and continuity of management, personnel, physical location, assets, and general business operation (*see Sweatland v Park Corp.*, 181 AD2d 243).

Testimony and documents submitted establish that Eric Riebling Co. did business at 106 Miller Place, Mount Vernon, New York, and was the exclusive distributor for Otto Martin table saws in the United States from 1965 until 2000, when Martin Woodworking opened their offices in North Carolina and became the exclusive distributor for Otto Martin. Testimony establishes that when Riebling Machinery was formed in 2006, it initially operated its business from a UPS Store, and in 2007 leased warehouse space at 65 South End Plaza in New Milford, Connecticut, and that Riebling Machinery was in the business of service, sales, and spare parts for woodworking machinery, including table saws. Eric Riebling Co. ceased operations in 2007, due to Eric Riebling's poor health, and the company was officially dissolved in 2009, after the inventory and assets were sold and the company's debts were paid. The building where the company did business at 106 Miller Place, Mount Vernon, New York, which was owned by Eric Riebling's wife Josephine Riebling, was sold in 2007, and the proceeds paid to Mrs. Riebling. Mr. Riebling's testimony establishes that there were no business transactions between Eric Riebling Co. and Riebling Machinery during the dissolution process to purchase inventory, assets, equipment, materials or manuals from the dissolving company, nor did Riebling Machinery take over its customer's list. Mr. Riebling's testimony establishes that that Riebling Machinery began to generate business by attending trade shows and placing advertisements in trade journals, as well as creating a web site, and that, while neither the advertisements or the web site made any reference to Eric Riebling Co., he managed to independently attract at least 50 former Eric Riebling Co. customers to his business. Finally, it was established that for a brief period of time, both corporations were in business at the same time. Riebling Machinery thus has established that it was not a mere continuation of Eric Riebling Co., in that did not assume the liabilities ordinarily necessary for uninterrupted continuation of the business of predecessor, and there was no continuity of management, personnel, physical location, assets, and general business operation (*see Schumaker v Richards Shear Co.*, *supra*; *Sweatland v Park Corp.*, *supra*). In opposition, plaintiff has failed to submit evidence sufficient to raise an issue of fact.

Defendant Modern Furniture has also established its prima facie entitlement to summary judgment dismissing the complaint by submitting proof that plaintiff's action is barred by the Workers' Compensation Law, that it did not assume the obligations and liabilities of Not Just Mica, and that it is not the successor in interest to Not Just Mica. Workers' Compensation benefits are the sole and exclusive remedy of an employee against his employer for injuries in the course of employment; as a result, this precludes suits against an employer for injuries in the course of employment (*Weiner v City of New York*, 19 NY3d 852; *see Mateo v 1875 Lexington LLC.*, 134 AD3d 107; *De Los Santos v Butkovich*, 126 AD3d 845).

Modern Furniture has presented evidence that the plaintiff was its employee at the time of the accident, that the accident occurred during the course of the plaintiff's employment, and that the plaintiff applied for, was awarded, and has received Workers' Compensation benefits under the defendant's



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Workers' Compensation policy. Plaintiff, however, argues that this case comes within the narrow exception recognized in *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, wherein it was held that an employer who independently assumed the obligations and liabilities of a third-party tortfeasor could not avail itself of the exclusivity provisions of the Workers' Compensation Law (*see also Lynn v McDonnell Douglas Corp.*, 134 AD2d 328; *Hull v Aurora Corp. of Ill.*, 89 AD2d 681; *Oliver v N.L. Indus.*, 170 AD2d 959). The record establishes that Modern Furniture purchased the table saw which is the subject of this action, some tools, carts and an old box truck from Not Just Mica, and that it agreed to complete the contracts of some of Not Just Mica's customers for which they had deposits. However, Modern Furniture did not receive Not Just Mica's customer list, and Not Just Mica remained in business for a number of months after Modern Furniture purchased the table saw. It also shows that three of Not Just Mica's employees worked for Modern Furniture for a short period of time, but such employees soon left their positions because of their long commute. None of this evidence is sufficient to establish that Modern Furniture in any way assumed the obligations and liabilities of Not Just Mica. Modern Furniture has also established that it is not the successor-in-interest of Not Just Mica, in that it did not assume the liabilities ordinarily necessary for uninterrupted continuation of the business of predecessor, and there was no continuity of management, personnel, physical location, assets, and general business operation (*see Schumaker v Richards Shear Co.*, 59 NY2d 239; *Sweatland v Park Corp.*, 181 AD2d 243).

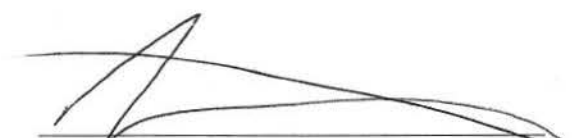
Defendants Otto Martin and Martin Woodworking argue that Modern Furniture is not entitled to summary judgment on their cross claim against it because plaintiff's injury falls within the "grave injury" exception set forth in Workers' Compensation Law §11. "Grave injury" is defined therein as "one or more 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." Plaintiff, whose severed hand was reattached, and who has regained at least partial use thereof, does not have a "grave injury" as defined in the statute (*see Vincenty v Cincinnati Inc.*, 14 AD3d 392 [claimant did not sustain a "grave injury" within the meaning of Workers' Compensation Law, as was required to assert viable third-party complaint or cross claim against employer, even though claimant's pinky and ring fingers were completely amputated in workplace accident, where the fingers were shortly after accident surgically reattached so that claimant regained their use, at least partially]; *see also McGlinchey v Vassar College*, 88 AD3d 626).

The cross motion for summary judgment by defendants Otto Martin and Martin Woodworking is denied as untimely, in this case more than 80 days after the last date to file such motion. While an untimely cross motion for summary judgment may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds, that is not the case here, where the other summary judgment motions are based on completely different grounds than those set forth in the cross motion (*see Sheng Hai Tong v K and K 7619, Inc.*, 144 AD3d 887; *Wernicki v Knipper*, 119 AD3d 775). Furthermore, these defendants have failed to demonstrate good cause for their delay in making the cross motion (*see CPLR 3212[a]*; *Vitale v Astoria Energy II, LLC*, 138 AD3d 981; *Vasquez v C2 Dev. Corp.*, 105 AD3d 729).

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Accordingly, the motion by defendant Riebling Machinery for summary judgment dismissing the complaint and all cross claims asserted against it is granted. The motion by defendant Modern Furniture for summary judgment dismissing the complaint and all cross claims asserted against it also is granted. The cross motion by defendants Otto Martin and Martin Woodworking for summary judgment in its favor dismissing the complaint and all cross claims asserted against it is denied.

Dated: January 23, 2017



HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION