

Jaspaul v Toyota Lift of N.Y.
2013 NY Slip Op 33585(U)
January 28, 2013
Supreme Court, Queens County
Docket Number: 1944/2011
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

DEO JASPAUL,
Plaintiff,

Index
No. 1944 2011

- against -

Motion
Date October 29, 2013

TOYOTA LIFT OF NEW YORK, etc., et al.,
Defendants.

Motion
Cal. No. 80

MOBIL AIR TRANSPORT, INC., et ano.,
Third-Party Plaintiffs,

Motion
Seq. No. 9

-against-

KAWAL TRUCKING, INC.,
Third-Party Defendant,

HI-LIFT OF NEW YORK, INC., etc., et ano.,
Second Third-Party Plaintiffs,

-against-

SUMMIT HANDLING SYSTEMS, INC.,
Second Third-Party Defendants.

The following papers numbered 1 to 11 read on this motion by third-party defendant Kawal Trucking, Inc. (Kawal) pursuant to CPLR 2221 for leave to reargue and renew that branch of its prior motion which was for summary judgment dismissing the third-party claims for common-law contribution and indemnification asserted against it by third-party plaintiffs Mobile Air Transport, Inc. (Mobile Air) and The Air Group, Inc. (The Air Group) in the third-party complaint, which had been denied in an order entered on April 25, 2013, and upon reargument and renewal, for summary judgment dismissing the third-party claims for

common-law contribution and indemnification asserted against it in the third-party complaint by third-party plaintiffs Mobile Air and Air Group.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	1-5
Answering Affirmations - Exhibits.....	6-11

Upon the foregoing papers it is ordered that the motion is determined as follows:

Third-party defendant Kawal previously moved pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint insofar as asserted against it by third-party plaintiffs Mobil Air and The Air Group on the grounds it is not a proper party to the action and has a defense founded upon documentary evidence, and that the third-party complaint fails to state a cause of action, and for an award of attorneys' fees pursuant to 22 NYCRR 130-1.1. Third-party defendant Kawal asserted in its answer that the third-party action of third-party plaintiffs Mobil Air and The Air Group was barred by the Workers Compensation Law. In support of its prior motion, third-party defendant Kawal asserted that plaintiff was compensated under its workers' compensation insurance policy, but did not sustain a "grave injury" within the meaning of Workers' Compensation Law § 11. By order entered on April 25, 2013, the motion was granted only to the extent of granting third-party defendant Kawal summary judgment dismissing the third-party claim for contractual indemnification asserted against it by third-party plaintiffs Mobil Air and The Air Group, and was denied in all other respects. The court found that third-party defendant Kawal had failed to meet its prima facie burden of showing entitlement to summary judgment dismissing the third-party claims for common-law contribution and indemnification by establishing that plaintiff's alleged injury was not a grave injury as defined in Workers' Compensation Law § 11. The court noted that third-party defendant Kawal had failed to provide the court with a copy of plaintiff's bill of particulars or the transcript of plaintiff's deposition testimony, and therefore the court could not determine whether the submissions of third-party defendant Kawal (which included medical reports and copies of medical and hospital records) were sufficient to show plaintiff did not sustain a grave injury.

Third-party defendant Kawal moves for leave to reargue and renew that branch of its prior motion which was for summary judgment dismissing the third-party claims asserted against it for common-law contribution and indemnification. Third-party plaintiffs Mobil Air and The Air Group, and second third-party defendant Summit Handling Systems, Inc., oppose the motion.

To the extent third-party defendant Kawal seeks leave to reargue that branch of the prior motion for summary judgment dismissing the third-party claims for contribution and common-law indemnification asserted against it by third-party plaintiffs Mobile Air and The Air Group, that branch of its instant motion is untimely because it was made more than 30 days after service of a copy of the order with notice of entry upon plaintiff, and third-party plaintiffs Mobil Air, Air Group, Hi-Lift of New York, Inc. d/b/a Toyota Lift of New York and Fork Lift Headquarters, on May 3, 2013 (CPLR 2221 [d] [3]; *Selletti v Liotti*, 45 AD3d 668 [2d Dept 2007], lv to appeal dismissed 11 NY3d 773 [2008]). Although the Supreme Court has jurisdiction to reconsider its prior order “regardless of statutory time limits concerning motions to reargue” (*Itzkowitz v King Kullen Grocery Co., Inc.*, 22 AD3d 636 [2d Dept 2005]), third-party defendant Kawal has failed to demonstrate that the court overlooked or misapprehended any relevant facts or law, or that it misapplied any controlling principles of law (CPLR 2221 [d]). The branch of the motion by third-party defendant Kawal for leave to reargue is denied.

With respect to the that branch of the instant motion by third-party defendant Kawal seeking leave to renew that branch of the prior motion for summary judgment dismissing the third-party claims for contribution and common-law indemnification asserted against it by third-party plaintiffs Mobile Air and Air Group, a motion for leave to renew is addressed to the sound discretion of the court (*see Derby v Bitan*, 112 AD3d 881 [2d Dept 2013]; *Matheus v Weiss*, 20 AD3d 454, 454–455 [2d Dept 2005]), and must be supported by new or additional facts “not offered on the prior motion that would change the prior determination” (CPLR 2221 [e] [2]), and “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [3]). In support of the instant motion, third-party defendant Kawal offers a copy of plaintiff’s amended bill of particulars dated January 3, 2013, and the transcript of plaintiff’s examination before trial held on May 21, 2012, as additional evidence to demonstrate plaintiff did not sustain a “grave injury” pursuant to Workers’ Compensation Law § 11. Third-party defendant Kawal has demonstrated a reasonable justification for its failure to present such evidence in relation to the prior motion (*see Derby v Bitan, supra*), and therefore, in an exercise of discretion, that branch of the motion for leave to renew is granted.

Workers’ Compensation Law § 11 prohibits any contribution and indemnity claims against a plaintiff’s employer unless that plaintiff sustained a “grave injury” (*see Majewski v Broadalbin–Perth Cent. School Dist.*, 91 NY2d 577 [1998]). Grave injuries are those injuries that are listed in the statute and are determined to be permanent (*see Blackburn v Wysong & Miles Co.*, 11 AD3d 421, 422 [2d Dept 2004]; *Ibarra v Equipment Control*, 268 AD2d 13 [2d Dept 2000]). Among the grave injuries listed in the statute is the amputation or the “total loss of use . . . of [a] . . . leg . . . or foot” (Workers’ Compensation Law § 11). Anything less than a “total” loss of use of such appendages will not qualify as a grave injury

under the statute (Workers' Compensation Law § 11; *see e.g. Kraker v. Consolidated Edison Co.*, 23 AD3d 531 [2d Dept 2005]; *Aguirre v Castle Am. Constr.*, 307 AD2d 901 [2d Dept 2003], lv denied 1 NY3d 501 [2003]). Where, however, a plaintiff retains only "passive movement" in them, that may qualify as a total loss of use of the leg or foot (*see Millard v Alliance Laundry Sys.*, 28 AD3d 1145, 1147 [3d Dept 2006]; *Balaskonis v HRH Constr. Corp.*, 1 AD3d 120, 120 [1st Dept 2003]; *Sexton v Cincinnati Inc.*, 2 AD3d 1408 [4th Dept 2003]).

In the amended bill of particulars dated January 3, 2013, it is alleged that plaintiff sustained various injuries, including fractures and other injuries to the left foot and ankle. However, it is not alleged plaintiff sustained an amputation; the allegation of a fractured ankle or foot, or the degloving of the foot, is not an injury listed in the statute (*see Rego v 55 Leone Lane, LLC*, 56 AD3d 748 [2d Dept 2008]). The only allegation in plaintiff's amended bill of a "total loss" relates to the "use of a foot" (*see Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203 [3d Dept 2008]). Plaintiff testified at his examination before trial that he uses crutches most of the time he is outside of his house, but admitted he walks with the use of a cane and a "walking boot" on his foot while inside his house (*cf. Benedetto v Carrera Realty Corp.*, 32 AD3d 874 [2d Dept 2006]; *Millard v Alliance Laundry Sys.*, 28 AD3d 1145, 1147 [3d Dept 2006]). Plaintiff also admitted that he does not use a wheelchair. Thus, it cannot be said plaintiff has lost "total use" of his foot, or retained only "passive movement" in it (*cf. Benedetto v Carrera Realty Corp.*, 32 AD3d 874; *Millard v Alliance Laundry Sys.*, 28 AD3d at 1147 [3d Dept 2006]). Under such circumstances, third-party defendant Kawal has met its prima facie burden, by competent admissible evidence, of showing that plaintiff's injury did not rise to the level of a grave injury because he has some use of his left foot (*see Maxwell v Rockland County Community College*, 78 AD3d 793 [2d Dept 2010]).

In opposition, third-party plaintiffs Mobil Air and The Air Group offer the medical report of Leonard R. Harrison, M.D., affirmed under the penalty of perjury which indicates plaintiff "has a significant permanent disability with total loss of use of the left foot related to the accident of 2/19/08." However, the report does not set forth in detail the complete lack of any functional use of the foot, but rather states that plaintiff "walked with an antalgic limp on the left." In addition, to the extent the report states "[p]rolonged standing and walking [by plaintiff] aggravate the pain," and that "[i]t is unlikely [plaintiff] will return to heavy type work which involves standing or sizeable walking," these statements do not negate that plaintiff has some partial use of the foot and is able to walk or stand on it for some period of time (*see Vincenty v Cincinnati Inc.*, 14 AD3d 392 [1st Dept 2005]). Consequently, such report is insufficient to raise a triable issue of fact as to whether plaintiff sustained a qualifying grave injury (*see Del Vecchio v Danielle Associates, LLC*, 108 AD3d 583 [2d Dept 2013]; *Kitkas v Windsor Place Corp.*, 72 AD3d 649 [2d Dept 2010]; *Goodleaf v Tzivos Hashem, Inc.*, 68 AD3d 817 [2d Dept 2009]).

Accordingly, the motion by third-party defendant Kawal for summary judgment dismissing the third-party claims for common-law contribution and indemnification asserted against it by third-party plaintiffs Mobil Air and The Air Group in the third-party complaint is granted. The third-party complaint against defendant Kawal Trucking, Inc., is dismissed.

Dated: January 28, 2013

J.S.C.