Ramirez v Guapo Bodega LLC
2014 NY Slip Op 33977(U)
December 17, 2014
Supreme Court, New York County
Docket Number: 111871/11
Judge: Doris Ling-Cohan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
COUNTY OF NEW YORK: PART 36

----------x

ISMAEL RAMIREZ,

Index No.: 111871/11

Plaintiff,

-against-

Motion Seq. No.: 002

GUAPO BODEGA LLC d/b/a BEAUTY & ESSEX,

Defendant.

----------x

GUAPO BODEGA LLC d/b/a BEAUTY & ESSEX,

Third-Party Index No.: 590340/12

Third-Party Plaintiff,

-against-

ROTO-ROOTER SERVICES COMPANY, INC. and RR PLUMBING SERVICES CORPORATION,

Third-Party Defendants.

----------x

Ling-Cohan, J.:

This is an action to recover damages for injuries sustained by a plumber when a trap cover fell on his back and head while he was unclogging a grease trap at a restaurant located at 146 Essex Street, New York, New York (the restaurant) on September 3, 2011.

Third-party defendants Roto-Rooter Services Company, Inc. and RR Plumbing Services Corporation (together, Roto-Rooter) move, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint against it.

Plaintiff cross-moves for leave to serve an amended complaint to add a Labor Law § 240 (1) cause of action against defendant Guapo Bodega LLC d/b/a Beauty & Essex (Beauty & Essex).

BACKGROUND

On the day of the accident, defendant Beauty & Essex owned the restaurant where the accident took place. On or before the day of the accident, a grease trap (the trap) in the kitchen of the restaurant became clogged, and Roto-Rooter was summoned to come and clear the line. Shortly thereafter, Joseph Cunningham, an employee of Roto-Rooter, arrived and attempted to clear the line. In order to do so, Cunningham removed the trap's cover (the cover). When it became clear that he could not clear the trap on his own, Cunningham contacted Roto-Rooter and requested that another employee be dispatched to assist him. Roto-Rooter then sent plaintiff to the restaurant to assist Cunningham.

Plaintiff's Deposition Testimony

Plaintiff testified that, when he arrived at the restaurant, he attempted to clear the trap by bending over, reaching down into the trap and pulling out grease, rags and straws. Specifically, plaintiff described the events leading up to the accident, as follows:

> "I was cleaning the grease trap. I was in a kneeling position with my arm on the floor, my right arm. From my waist up, I was leaning into the grease trap as I was cleaning it . . .. I'm trying to pull the stuff up so that I can get it . . .. And while I was doing that, boom, I got hit on the head . . .. By the steel plate from the grease trap"

(Roto-Rooter's notice of motion, exhibit F, plaintiff's tr at 66-67). The cover, which weighed approximately 24.5 pounds and was approximately three feet in diameter, had been leaning against a table. Plaintiff explained that one of the restaurant employees knocked the cover over while looking for something in his book bag.

Plaintiff further testified that, after the accident, he did not lose consciousness, although he did feel "very dizzy," and he had a "big lump" on his head (*id.* at 71). Plaintiff sat down on

the floor for a while before continuing his work. He then finished cleaning out the trap, removing the hose from the trap and covering the hole. Plaintiff also tested the line to make sure that "everything was going down fine" (*id.* at 74). When he was finished at the job site, plaintiff reviewed his work ticket, gave it to the manager to sign and then went on "to another job" (*id.* at 92).

Plaintiff did not receive any medical care on the day of the accident. However, over the course of the next week, he began to feel pain in various parts of his body. Eventually, plaintiff sought medical care, as well as workers' compensation benefits.

Plaintiff's Bill of Particulars

In plaintiff's bill of particulars, dated November 16, 2012, plaintiff alleges that, as a result of the accident, he sustained injuries to the cervical, lumbar and thoracic spine, nerve damage, pain and numbness in his wrists and derangement and impingement of his left shoulder. In addition, plaintiff alleges that he suffers permanent "traumatic brain injury," resulting in "[o]ngoing dizziness; [l]oss of balance; [h]eadaches; [b]lurry vision; [m]emory impariment; . . . [d]isorientation; [and] [c]ognitive deficits" (Roto-Rooter's notice of motion, exhibit C, bill of particulars). As a result of his injuries, plaintiff alleges that his "enjoyment of life has been permanently impaired, impeded and/or destroyed" (*id.*).

Medical Report of Dr. Anne F. Ambrose

In her report, dated June 11, 2013, Dr. Anne Ambrose stated that, during her examination of plaintiff, plaintiff complained of various cognitive and physical impairments, which were caused as a result of the accident. Dr. Ambrose spent 50 % of her time with plaintiff counseling him in regard to brain rehabilitation issues. She noted that plaintiff would "[c]ont[inue] being

out of work for [the] next 3 months. Unable to work in any capacity. Prognosis for recovery is guarded" (plaintiff's opposition to Roto-Rooter's motion, exhibit A, Report of Dr. Anne F. Ambrose, at 10). Dr. Ambrose requested that plaintiff "[f]ollow up with [her] in three months" (*id.*).

Medical Report of Dr. Igor Rubinshteyn, Orthopedic Surgeon

In his medical report, which followed his review of plaintiff's medical records, as well as his examination of plaintiff on June 14, 2013, Dr. Igor Rubinshteyn, an orthopedic surgeon, concluded that all of plaintiff's spine, wrist and shoulder issues had resolved, and that plaintiff had no orthopedic disability.

Medical Report of Dr. Daniel Feuer, Neuropsychologist

On May 6, 2013, plaintiff underwent a neurological examination by Dr. Daniel Feuer. In his report following the examination, Dr. Feuer stated that plaintiff "does not demonstrate any objective neurological disability or neurological permanency, which is causally related to the accident of September 3, 2011" (Roto-Rooter's notice of motion, exhibit N, Report of Dr. Daniel Feuer). In addition, Dr. Feuer noted that plaintiff "is neurologically stable to engage in full active employment, as well as the full activities of daily living without restriction" (*id.*).

Medical Report of Dr. Lawrence Abelove

Plaintiff also underwent a psychological/neuropsychological examination by Dr. Lawrence Abelove on July 11, 2011. After interviewing plaintiff and performing a battery of tests, Dr. Abelove concluded that plaintiff has "no neuropsychological or psychological problems as a result of his injuries" (Roto-Rooter's notice of motion, exhibit O, Report of Dr. Lawrence Abelove). He concluded that "[t]here are no restrictions or limitation in terms of his ability to

work or perform activities of daily living from a neuropsychological or psychological perspective in relation to [the accident]" (*id.*).

Report of Dr. Stephen Lastig

In his June 4, 2013 report, Dr. Stephen Lastig stated that his review of plaintiff's brain scan revealed "no findings . . . which are causally related to the accident of 9/3/11" (Roto-Rooter's notice of motion, exhibit P, Dr. Stephen Lastig's report).

DISCUSSION

"'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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). "If there is any doubt as to the existence of a triable fact," the motion for summary judgment must be denied (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Third-party defendant Roto-Rooter moves for summary judgment dismissing third-party plaintiff Beauty & Essex's third-party claims against it for contribution, common-law indemnification and contractual indemnification. As Beauty & Essex does not oppose that part of Roto-Rooter's motion to dismiss the third-party contractual indemnification claim against it,

Roto-Rooter is entitled to dismissal of this claim.

Beauty & Essex's Third-Party Claims for Contribution and Common-Law Indemnification Against Roto-Rooter

"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 [internal quotation marks and citations omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]).

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 (1994).

Section 11 of the Workers' Compensation Law prescribes, in pertinent part, as follows:

> "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 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 . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3

NY3d 408, 412-413 [2004]). "[T]he moving party bears the burden of establishing an absence of grave injury; it is not the burden of the party moved against to show the presence of a grave injury" (*Way v Grantling*, 289 AD2d 790, 793 [3d Dept 2001]).

Here, Roto-Rooter argues that it is entitled to dismissal of the third-party contribution and common-law indemnification claims against it, because plaintiff did not suffer a "grave injury" within the meaning of the Workers' Compensation Law. Beauty & Essex asserts that Roto-Rooter's motion should be denied, because, as plaintiff alleges that he sustained a brain injury that permanently prevents him from performing his daily activities or working in any capacity, at least a question of fact exists as to this issue.

The evidence put forth in this case clearly demonstrates that plaintiff did not sustain a "grave injury" within the meaning of Workers' Compensation Law section 11. Initially, a review of plaintiff's bill of particulars reveals that only plaintiff's allegation of traumatic brain injury potentially rises to the level of "grave injury" under section 11. Significantly, in the case of *Rubeis v Aqua Club, Inc.*(3 NY3d 408), the Court of Appeals indicated that, as the Workers' Compensation Law deals with employment benefits, and the term "disability" generally refers to an inability to work, "a brain injury results in 'permanent total disability' under section 11 when the evidence establishes that the injured worker is no longer employable in any capacity" (*Rubeis v Aqua Club, Inc.*, 3 NY3d at 413; *Chelli v Banle Assoc., LLC*, 22 AD3d 781, 783 [2d Dept 2005] [Court considered that "permanent total disability" envisioned by Legislature relates to the injured party's employability and not to his or her ability to otherwise care for himself or herself and function in a modern society]; *Way v Grantling*, 289 AD2d at 792).

Here, plaintiff's medical records contain no evidence to support a finding that plaintiff

has suffered a brain injury resulting in "permanent total disability," rendering him unable to work in any capacity. In fact, in their reports, Dr. Feuer, Dr. Abelove and Dr. Lastig all conclude that plaintiff does not suffer from any permanent neurological disability, which is causally related to the accident, and which precludes him from becoming employed in some capacity. It should also be noted that plaintiff testified that he is able to run errands and go out with his children.

While in their oppositions, plaintiff and Beauty & Essex put forth the report of Dr. Ambrose, wherein she states that plaintiff is "[u]nable to work in any capacity," a complete reading of said report reveals that this statement was made in reference to plaintiff's ability to work during the limited period of "[the] next 3 months" (plaintiff's opposition to Roto-Rooter's motion, exhibit A, Report of Dr. Anne F. Ambrose, at 10).

Thus, as the submissions establish that plaintiff did not sustain a "grave injury" within the meaning of Workers' Compensation Law section 11, Roto-Rooter is entitled to dismissal of the third-party claims against it for contribution and common-law indemnification.

Plaintiff's Cross Motion For Leave To Amend The Complaint

Plaintiff cross-moves for leave to amend the complaint to add a Labor Law § 240 (1) cause of action against defendant/third-party plaintiff Beauty & Essex. "'[L]eave to amend a pleading under CPLR 3025 (b) is freely given in the exercise of the trial court's discretion, provided there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit'" (*Matter of Miller v Goord*, 1 AD3d 647, 648 [3d Dept 2003], quoting *New York State Health Facilities Assn., Inc. v Axelrod*, 229 AD2d 864, 866 [3d Dept 1996]; *see also Brooks v Robinson*, 56 AD3d 406, 406 [2d Dept 2008]; *Aronov v Regency Gardens Apt. Corp.*, 15 AD3d 513, 514 [2d Dept 2005]). In addition, absent prejudice or surprise, it is an abuse of discretion,

as a matter of law, for the trial court to deny leave to amend (*Watts v Wing*, 308 AD2d 391, 392 [1st Dept 2003] [leave to amend granted inasmuch as proposed amendment did not add new factual allegations]; *Smith v Pizza Hut of Am.*, 289 AD2d 48, 50 [1st Dept 2001]). However, pursuant to CPLR 2215, "a cross motion is an improper vehicle for seeking relief from a non-moving party" (*Kershaw v Hosp. For Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013] citing *Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843, 844 [2d Dept 1986]). As Beauty & Essex is a non-moving party, plaintiff's cross motion is denied.

CONCLUSION AND ORDER

For the forgoing reasons, it is

ORDERED that third-party defendants Roto-Rooter Services Company, Inc. and RR Plumbing Services Corporation's motion, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint against them is granted, and the third-party complaint is dismissed, with costs and disbursements to third-party defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of third-party defendants; and it is further

ORDERED that plaintiff Ismael Ramirez's cross motion is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that within 30 days of entry of this order, third-party defendant shall serve a copy upon all parties, with notice of entry.

DATED: 12/17/14

Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Ramirez v Guapo Bodega LLC. m Kucsma.wpd