

<b>Slonim v Altman Stage Light. Co.</b>
2019 NY Slip Op 33710(U)
December 18, 2019
Supreme Court, New York County
Docket Number: 190339/2017
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

ERIC SLONIM, as Administrator of the Estate of CHRISTINE SLONIM, and ERIC SLONIM, Individually,

Plaintiffs,

INDEX NO. 190339/2017

- against -

MOTION DATE 12/11/2019

ALTMAN STAGE LIGHTING COMPANY, et al.,

MOTION SEQ. NO. 009

Defendants.

MOTION CAL. NO.

J & R FILM CO. and MAGNASYNC/MOVIOLA, CORPORATION,

Third-Party Plaintiffs,

- against -

STEENBECK B.V., et al.,

Third-Party Defendants.

The following papers, numbered 1 to 7 were read on third-party defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.'s motion pursuant to CPLR §3211 to dismiss the third-party claims asserted against them, alternatively pursuant to CPLR §603 or CPLR §1010 to sever the third-party action:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [ ] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that Third-Party Defendants, Johnson & Johnson and Johnson & Johnson Consumer Inc., f/k/a Johnson Consumer Companies, Inc.'s (hereinafter jointly referred to as "J&J") motion pursuant to CPLR §3211(a)(5) and §3211(a)(7) to dismiss the Third-Party Plaintiffs, J & R Film Co. (hereinafter individually "J&R") and Magnasync/Moviola Corporation's (hereinafter individually "M/M Corp.") claims asserted against J&J, alternatively, pursuant to CPLR §603 or CPLR §1010 to sever the Third-Party action from the underlying action, is granted only to the extent of dismissing the Third-Party claims for Common Law Indemnification. The remainder of the relief sought is denied.

On October 20, 2017, Plaintiffs, Eric Slonim and Christine Slonim, commenced this action alleging that Christine Slonim's mesothelioma was caused by exposure to asbestos in the defendants' products (Mot. Exh. 1). Third-Party Plaintiff, J&R was named as a party defendant in the underlying complaint, but service was made on "Prentice Hall Corporation, 521 Fifth Ave., New York, NY 10017" (Mot. Exh. 1). J&J was also named as a party Defendant in the underlying action and service was made on their attorneys (Mot. Exhs. 1 and 2). The Summons and Complaint were subsequently amended approximately five times to substitute the estate and add additional defendants.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

On January 23, 2018, J&J sought to enter into an Unopposed Summary Judgment Motion and Order with the plaintiff before any depositions were conducted. Plaintiff agreed and executed the Unopposed Summary Judgment Motion and Order dismissing all claims and cross-claims against J&J. On January 23, 2018, J&J served a copy of the Unopposed Summary Judgment Motion executed by the plaintiff, before it was "So Ordered," on the remaining defendants. J&R was served at "Prentice Hall Corporation, 521 Fifth Ave., New York, NY 10017." On February 20, 2018, Justice Lucy Billings "So Ordered" the document (Mot. Exhs. 4, 5 and 6). J&J served the Order granting Unopposed Summary Judgment with a Notice of Entry by uploading it to NYSCEF on April 2, 2018 (Mot. Exh. 7).

On February 5, 2018, Defendant/Third-Party Plaintiff, J&R was served with the Third Amended Complaint and Supplemental Summons in the underlying action, by service on its Operations Officer at a business address, "1015 N. Hollywood Way, Burbank, California 91505" (Mot. Exh. 3). J&R claims it had no prior notice of the underlying action. On May 1, 2018 J&R, appeared for the first time in this action and served its Answer (Mot. Exh. 9, Parts 1 and 2). On August 9, 2018 M/M Corp. was added to the action and served with the Fifth Amended Complaint (NYSCEF Doc. # 262). On August 28, 2018 M/M Corp. served its Answer (Mot. Exh. 10, Parts 1 and 2).

On May 5, 2019 defendants J&R and M/M Corp., sought to commence a Third-Party action against Third-Party Defendants, Steenbeck B.V., Ross-Gafney, Inc. and Reading International, Inc.. Their motion was unopposed and this Court's May 30, 2019 Decision and Order, filed under Motion Sequence 003, granted the relief sought. On June 6, 2019 the Third-Party Summons and Complaint were filed (Mot. Exhs. 14 and 15). Third-Party Defendants Ross-Gafney, Inc. and Reading International, Inc. were served on June 10, 2019 (NYSCEF Docs. # 205 and 206). Service on Steenbeck, a Dutch company, is proceeding in accordance with the Hague Convention. Reading International Inc. appeared and served a Verified Answer to the Third-Party Complaint on July 10, 2019 (NYSCEF Doc. # 207).

Plaintiff Christine Slonim died on November 26, 2017, before she could be deposed (NYSCEF Doc. # 139). Plaintiff Eric Slonim was deposed over the course of four days, on January 31, 2018, February 1, 2019, March 3, 2019 and March 28, 2019. M/M Corp. deposed Mr. Slonim separately on April 9, 2019. Third-Party Plaintiffs state that over the course of his deposition, Mr. Slonim testified that his wife used J&J's powder products on their daughter at least five times a day from birth until possibly ten years old (1968-1978). Mr. Slonim further testified he believed his wife was exposed to asbestos through the use of J&J powder (Opp. Exh. G, pgs. 214-224 and 600-601).

On June 7, 2019, after the plaintiff's deposition, Third-Party Plaintiffs J&R and M/M Corp. sought permission from the Special Master, Shelley Rossoff-Olsen to Amend the Third-Party Summons and Complaint to add a claim for indemnification and contribution against J&J. The Special Master allowed the amendment to the Third-Party pleadings and kept the case in the October 2018 in Extremis Trial Cluster (Mot. Exhs. 12 and 16).

Third-Party Plaintiffs made a motion for an Order pursuant to CPLR §3025 (a) and (b) to amend the Third-Party Complaint to assert claims against J&J for common law indemnification and contribution. The motion was unopposed by the plaintiff in the underlying action, only J&J filed opposition papers (Mot. Exhs. 17, 18 and 19). This Court's September 9, 2019 Decision and Order granted the Third-Party Plaintiffs' motion, filed under Motion Sequence 005, finding that pursuant to CPLR §3025(a), the Third-Party pleadings could be amended as of right. The September 9, 2019 Decision and Order addressed the arguments raised by J&J in the opposition papers: (a) that pursuant CPLR §3025(b) there would be potential

prejudice to the plaintiffs in the underlying action, (b) seeking Res Judicata, and (c) seeking to sever the Third-Party action pursuant to CPLR §603 and §1010, found them pointless and denied the motion (Mot. Exh. 20). On September 18, 2019 the Amended Third-Party Complaint was served on J&J (Mot. Exh. 22).

J&J did not seek to reargue the September 9, 2019 Decision and Order. On October 11, 2019, J&J filed this motion seeking an Order pursuant to CPLR §3211(a)(5) and CPLR §3211(a)(7) dismissing the claims asserted against them in the Third-Party Complaint under Res Judicata and for failure to state a cause of action, alternatively, pursuant to CPLR §603 or CPLR §1010 to sever the Third-Party action.

J&J argues that it is not collaterally estopped from again raising Res Judicata and pursuant to CPLR §603 or CPLR §1010 seeking to sever the third-party action, because those parts of the September 9, 2019 Decision and Order were dicta. J&J ignores that this Court addressed all of the arguments J&J presented as opposition to the motion, in detail, and denied this relief. Collateral estoppel applies to preclude a party from relitigating an issue that was clearly raised previously and decided against them (Ryan v. New York Telephone co., 62 NY 2d 494, 467 NE 2d 487, 478 NYS 2d 823 [1984]). J&J is using this motion to dismiss, to reargue that part of the September 9, 2019 Decision and Order which denied relief pursuant to CPLR §603 or CPLR §1010. J&J is collaterally estopped from obtaining the relief sought under CPLR §603 or CPLR §1010 in this motion.

Res Judicata bars successive litigation on the same transaction if: "(I) there is a judgment on the merits rendered by a court of competent jurisdiction and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was." (People ex rel. Spitzer v. Applied Card Systems, Inc., 11 NY 3d 105, 894 NE 2d 1, 863 NYS 2d 615 [2008] and In re Hunter, 4 NY3d 260, 794 NYS2d 286, 827 NE2d 269 [2005]).

J&J argues that it is entitled to dismissal of the Third-Party claims asserted against them pursuant to CPLR §3211(a)(5) because Res Judicata applies. Third-Party Plaintiff J&R was listed as a defendant in the underlying action at the time J&J entered into the Unopposed Summary Judgment Motion and Order. J&J argues that Third-Party Plaintiff J&R was given ample notice by mail and an opportunity to object, but failed to do so before the Unopposed Summary Judgment Motion was "So Ordered."

J&R was not a party to this action until February 5, 2018 when it was served in the underlying action at its corporate offices in California. Third-Party Plaintiff J&R was not served with the pleadings and was not a party to the underlying action when J&J filed the executed Unopposed Summary Judgment Motion. J&J served the Unopposed Summary Judgment Motion on J&R at the same erroneous New York address that was initially used by plaintiffs in the underlying action. Since J&R was not a party to the underlying action at the time J&J was dismissed from the case by plaintiffs, J&J is not entitled to have the Third-Party action dismissed for Res Judicata; therefore, their motion to dismiss pursuant to CPLR §3211(a)(5) is denied.

J&J states that M/M Corp., was acquired by J&R about December of 1984 as stated in the Third-Party Complaint and the Third-Party Plaintiffs were in privity at all relevant times (Mot. Exh. 22, para. 47). J&J argues that Res Judicata should also apply to Third-Party Plaintiff M/M Corp.'s claims. To the extent there is privity, J&R was not yet a party to the underlying action at the time J&J obtained and served the executed Unopposed Summary Judgment Motion, and there is no basis to apply Res Judicata to Third-Party Plaintiff M/M Corp.'s claims.

J&J moves to dismiss the Third-Party Plaintiffs' claim seeking common law indemnification pursuant to CPLR §3211(a)(7), for failure to state a cause of action. J&J states that common law indemnification requires a theory of vicarious liability that is separate from the claimants own wrongdoing. J&J argues that the underlying plaintiffs' claims of asbestos exposure from their talc powder products are distinct from those claims asserted against the Third-Party Plaintiffs that allegedly controlled and manufactured asbestos containing Moviola machines and related parts.

Dismissal pursuant to CPLR §3211(a)(7) requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim. (Leon v. Martinez, 84 NY 2d 83, 638 NE 2d 511, 614 NYS 2d 972 [1994]). The plaintiff is afforded the benefit of every possible favorable inference on a motion to dismiss (Sokoloff v. Harriman Estates Development Corp., 96 NY 2d 409, 754 NE 2d 184, 729 NYS 2d 425 [2001]). Pleadings that consist of bare legal conclusions will not be presumed to be true and are susceptible to dismissal (Dragon Head LLC v. Elkman, 102 AD 3d 552, 958 NYS 2d 134 [1<sup>st</sup> Dept.,2013]).

The Third-Party Plaintiffs argue that the underlying action does not distinguish between each defendants' liability for any portion of plaintiff, Christine Slonim's, asbestos related disease and seeks to hold all defendants liable, therefore vicarious liability applies and a claim of Common Law Indemnification is stated. They argue that affording the benefit of every favorable inference requires denial of the relief sought by J&J on this motion, at least until summary judgment.

Common Law Indemnification applies to those that share responsibility for causing the harm to the plaintiff. It can only be sustained if the Third-Party Plaintiffs and the Third-Party Defendants (J&J) have breached a duty to the plaintiffs in the underlying action, and also if some duty exists between them. "A strict products liability action is not analogous to vicarious liability, resulting in the imposition of liability without regard to fault." (Rosado v. Proctor & Schwartz, Inc., 66 NY 2d 21, 484 NE 2d 1354, 494 NYS 2d 851 [1985]). Common Law Indemnification is derivative, permitting the shifting of loss to avoid unjust enrichment of one party at the expense of the other. It does not apply when multiple defendants should be held liable for their own separate negligent act or omission as to their product, under those circumstances a claim for contribution applies (McCarthy v. Turner Const., Inc., 17 NY 3d 369, 953 NE 2d 794, 929 NYS 2d 556 [2011] citing to Rosado v. Proctor & Schwartz, Inc., 66 NY 2d 21, supra and Williams v. New York City Transit Authority, 9 AD 3d 308, 780 NYS 2d 580 [1<sup>st</sup> Dept. 2004]).

The liability of the Third-Party Plaintiffs in the underlying action, if any, would be based on their actual wrongdoing that resulted in their products exposing plaintiff, Christine Slonim, to asbestos, not their vicarious liability for J&J's alleged asbestos containing products. Affording the Third-Party Plaintiffs the benefit of every favorable inference, the claim for Common Law Indemnification is conclusory and fails to state a cause of action, warranting it be dismissed.

Accordingly, it is ORDERED, that Third-Party Defendants' Johnson & Johnson and Johnson & Johnson Consumer Inc., f/k/a Johnson Consumer Companies, Inc.'s motion pursuant to CPLR §3211(a)(5) and §3211(a)(7) to dismiss the Third-Party Plaintiffs' J & R Film Co., and Magnasync/Moviola Corporation's claims asserted against J&J, alternatively, pursuant to CPLR §603 or CPLR §1010 to sever the Third-Party action from the underlying action, is granted only to the extent of dismissing the Third-Party claims for Common Law Indemnification, and it is further,

**ORDERED that Third-Party Plaintiffs, J & R Film Co., and Magnasync/Moviola Corporation's claims for Common Law Indemnification asserted against Johnson & Johnson and Johnson & Johnson Consumer Inc., f/k/a Johnson Consumer Companies, Inc. are severed and dismissed, and it is further,**

**ORDERED that the remainder of the Third-Party claims asserted against Johnson & Johnson and Johnson & Johnson Consumer Inc., f/k/a Johnson Consumer Companies, Inc., for contribution remain in effect, and it is further,**

**ORDERED that Third-Party Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc., f/k/a Johnson Consumer Companies, Inc., are directed to serve a copy of this Order with Notice of Entry on the named parties in the underlying action, Third-Party Plaintiffs, J & R Film Co. and Magnasync/Moviola Corporation and the remaining parties in the Third-Party Action, and it is further,**

**ORDERED that Third-Party Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc., f/k/a Johnson Consumer Companies, Inc. are directed to serve a copy of this Order with Notice of Entry on on the Trial Support Clerk and the County Clerk who are directed to mark their records accordingly, and it is further,**

**ORDERED that the Clerk of the Court enter judgment accordingly.**

**ENTER:**

**Dated: December 18, 2019**

  
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**MANUEL J. MENDEZ**  
**J.S.C.**

**MANUEL J. MENDEZ**  
**J.S.C.**

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