

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTOR ACCETTURI, :
Plaintiff, :
 :
v. :
 :
DELMAR DUVALL and HUSTON ADAMS, : CIVIL ACTION
Defendants, :
 :
and : No. 96-8058
 :
MAPLE SPRINGS FENCE CO. and :
MAPLE SPRINGS FARMS, INC., :
Defendants and :
Third-Party Plaintiffs, :
 :
v. :
 :
RUSSIN LUMBER COMPANY, :
Third-Party Defendant. :
 :

MEMORANDUM AND ORDER

VanArtsdalen, S.J.

January 15, 1998

Defendants and Third-Party Plaintiffs Maple Springs Fence Co. and Maple Springs Farms, Inc. (collectively "Maple Springs") have filed a third-party action against Russin Lumber Company ("Russin") based on negligence seeking contribution and/or indemnity for injuries suffered by Russin's employee, Plaintiff Victor Accetturi, while lumber was unloaded on Maple Springs' premises (filed document #6). Third-Party Defendant Russin has filed a Motion for Summary Judgment (filed document #22) claiming immunity from suit under Pennsylvania law. Defendant and Third-Party Plaintiff Maple Springs has filed a memorandum of law in response to Russin's motion claiming that New York, rather than Pennsylvania, law applies in this case, and that under New York

law, Russin is not entitled to immunity (filed document #23). For the reasons set forth below, the Motion for Summary Judgment filed by Third-Party Defendant Russin will be denied.

I. Factual Background

Plaintiff Victor Accetturi, a resident of the state of New York¹, was employed by Third-Party Defendant Russin Lumber Company, a New York corporation, as a driver to deliver lumber products out of its New York location to points both in and out of state. He alleges that on December 8, 1994, while delivering lumber to Maple Springs' yard in West Grove, Pennsylvania, he suffered fractures to his heel due to the negligence of Maple Springs in the unloading of his truck. Plaintiff states that he was up on the truck behind the load of lumber when it was being lifted by Maple Springs' forklift operator, and that the load of lumber tipped over forcing him to jump off the truck to avoid being hit by the falling lumber. As he hit the ground, Plaintiff alleges that he fractured his right heel bone.

Plaintiff applied for and received workers' compensation benefits under the New York workers' compensation law. He also initiated the present action against Maple Springs based on Maple Springs' negligence, and the negligence of the forklift operator, in unloading the lumber. Maple Springs subsequently filed a third-party suit against Russin, Plaintiff's employer, seeking contribution and indemnity claiming that Russin's negligence in

¹The record indicates that Plaintiff has since relocated to Gainesville, Florida.

loading the lumber on Plaintiff's truck before Plaintiff made his delivery to Maple Springs, contributed to Plaintiff's injuries.

Russin has filed a Motion for Summary Judgment (filed document #22). In its motion, Russin contends that it is immune from suit for contribution and indemnity by a third-party plaintiff under Pennsylvania law. Specifically, Russin contends that Pennsylvania's choice of law principles apply, and that it is immune under Pennsylvania's Workman's Compensation Act. Maple Springs, in its response, contends that while it agrees that Pennsylvania's choice of law rules do apply in this case, Pennsylvania's choice of law rule requires application of New York law to determine the issue of immunity from suit by a third-party for contribution and indemnity (filed document #23).

II. Legal Analysis

A. Choice of Law

In a diversity action, the "choice of law rules of the forum state determine which state's laws will be applied." Shuder v. McDonald's Corp., 859 F.2d 266, 269 (3d Cir. 1988), citing Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020 (1941). Pennsylvania choice of law principles, therefore, will determine which state's law will apply to the substantive issues in this case.

Pennsylvania has long abandoned the strict *lex loci delicti*, or place of the injury, rule which simply applied the law of the place where the injury occurred. Griffith v. United Airlines, Inc., 416 Pa. 1, 23, 203 A.2d 796, 805 (1964). Pennsylvania

courts have adopted "a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court." Griffith, 416 Pa. at 22, 203 A.2d at 806. Under this approach, the state having the most interest in the problem is given control over the legal issues and the forum is permitted to apply the policy of the jurisdiction "most intimately concerned with the outcome of [the] particular litigation." Id. (quoting Auten v. Auten, 308 N.Y. 155, 161, 124 N.E.2d 99, 102 (1954)).

It appears that the state of New York is more intimately concerned with this case and has more interest in its outcome than does the state of Pennsylvania. As a result of his injuries, Plaintiff was paid workers' compensation benefits by the state of New York pursuant to its state laws. New York, therefore, has a significant interest, the critical issue of workers' compensation payments made to Plaintiff as a result of his injury.

Additionally, Russin, is a New York corporation, and at the time of his accident, Plaintiff was a resident of New York, working for Russin in the state on a regular basis even though he also regularly worked out of state. Besides the mere fact that Plaintiff's alleged injury occurred in Pennsylvania, Pennsylvania has no significant interest in this case. Specifically, Pennsylvania has no interest in the crucial issue of workers' compensation. Therefore, Pennsylvania's choice of law principles suggest that New York law should be applied to the substantive

issues of this third-party action.

B. New York Law

Prior to September 10, 1996, New York courts consistently held that an employer of an injured worker is subject to being joined by an alleged third-party tortfeasor for contribution and/or indemnity in an action filed against that tortfeasor by the injured employee, even if the employer is liable to pay workers' compensation benefits to an employee, and although the employer is immune from a common law action by the injured employee. See Dole v. Dow Chemical Co., 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1982).

In 1996, New York amended its workers' compensation statute to restrict the circumstances under which an employer may be joined by a third-party tortfeasor seeking contribution and/or indemnity. New York's amended statute reads as follows:

An employer **shall not be liable** [emphasis added] 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** [emphasis added] 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, 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.

N.Y. Work. Comp. § 11 (McKinney 1997).

Prior to the amendment of New York's workers' compensation statute, a third party such as Maple Springs could have properly

joined Russin in this action for contribution and/or indemnity in New York, whereas that same party would have been barred from such action in Pennsylvania. The Pennsylvania Workers' Compensation Act provides the exclusive remedy in that state for an injured employee against an employer.² Furthermore, "[a] third[]party who is responsible in part or in whole for an injury suffered by an employee protected by the Workmen's Compensation Act, may not join the employer in the employee's action against him."³ See, e.g., Kennedy v. Shuwa Investments Corp., 825 F. Supp. 712, 713 (E.D. Pa. 1993), citing Heckendorn v. consolidated Rail Corp., 502 Pa. 101, 465 A.2d 609, 611 (1983). "Nor may the third party seek contribution or indemnification from the

²The Pennsylvania Workers' Compensation Act reads in part: The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employe[els], his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in Section 301(c)(1) and (2) or occupational disease as defined in Section 108.
77 P.S. § 481(a).

³The Pennsylvania Workers' Compensation Act continues as follows:
In the event injury or death to an employee is caused by a third party, then such employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages by reason thereof, may bring their action at law against such third party, but the employer, his insurance carrier, their servants and agents, employe[els], representatives acting on their behalf, or at their request shall not be liable to a third party for damages, contribution, or indemnity in any action at law, or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in written contract entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action.
77 P.S. § 481(b).

employer, even though the employer's negligence may have been the primary cause of the injury." Id.

The amended statute has brought New York in line with the law in Pennsylvania, with very limited exceptions. Now in New York, an employer may not be sued by a third party for contribution and/or indemnity for injury to an employee unless the third party can prove with competent medical evidence that the employee has sustained what the statute calls a "grave injury." N.Y. Work. Comp. § 11 (McKinney 1997). "Grave injury" is defined narrowly to include only those injuries listed within the language of the statute stated above. Id.

In this case, therefore, Russin, as the Third-Party Plaintiff, would be required to prove that Plaintiff's injury was a "grave injury", meaning it has resulted in permanent and total loss of use of his heel, and presumably his foot as well. Additionally, Russin must prove that this loss of use has resulted in a total and permanent disability.

I need not deal with the issue of retroactivity of New York's statute as it has been amended, because the crucial date in this case is the date on which Maple Springs filed suit to join Russin as a Third-Party Defendant, and not the date of Plaintiff's alleged injury. Maple Springs filed suit on January 29, 1997 (filed document #6) well after the amendment of New York's statute in 1996. Therefore, the amended statute was in effect at the time the third-party action was filed by Maple Springs.

Even if the 1996 amendment were held to be inapplicable in this case, Maple Springs still could maintain its third-party action against Russin under the pre-amendment New York law. I believe, nevertheless, that the amended New York statute does apply, and as a result, Maple Springs may maintain its third-party action, but must prove at trial that Plaintiff suffered a "grave injury" as defined by the statute.

C. Summary Judgment

The Federal Rules of Civil Procedure provide that summary judgment is appropriate "if the pleading, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A "genuine issue of material fact exists where a reasonable jury could return a verdict in favor of the nonmoving party. See Anderson, 477 U.S. at 248. A court must consider the evidence, and all inferences drawn therefrom, in the light most favorable to the nonmoving party. Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3d Cir. 1987).

There is a genuine issue of material fact as to whether the injury to Plaintiff's heel and foot constitutes a "grave injury"

for the purposes of New York law. Under New York law, an employer may 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 employment if the third person proves through competent medical evidence that such employee has sustained a "grave injury." N.Y. Work. Comp. Law § 11 (McKinney 1997). "Grave injury" has been defined narrowly to include only those injuries expressly listed within the statute. Id. It encompasses, among other specific injuries, amputations and total loss of use of limbs and digits which result in total and permanent disability. Id.

Thus, Plaintiff would be required to prove that the injury has resulted in a permanent and total loss of use of his heel and foot and that this loss has rendered him totally and permanently disabled.

Plaintiff has been "judged totally disabled by the Social Security Administration based on an inability to perform any competitive work existing in the local, regional, or national economies compatible with his educational and experiential background." (Filed document #23, Exhibit F, Report of Dr. Robert P. Wolf). Plaintiff also has submitted reports of a medical expert asserting that he is totally disabled (filed document #23, Exhibit F, Letter from Dr. Cherise M. Dyal). A vocational expert report states that he has no post-injury earning capacity, as his "pre-injury vocational horizon has been totally restricted resulting in a 100 percent vocational

disability." (Filed document #23, Exhibit F, Report of Dr. Robert P. Wolf). The expert reports further that Plaintiff "has acquired a total vocational disability," and that "[a]bsent a significant improvement in his functional capabilities, he will remain a noncompetitive entity." (Filed document #23, Exhibit F, Report of Dr. Robert P. Wolf).

It appears, therefore, that there is some evidence which might suggest that Plaintiff has suffered a "grave injury" in that he has no use of his foot and that this loss has left him permanently and totally disabled. A jury, however, could possibly find to the contrary. Therefore, this is a factual matter best left to a jury's determination at trial.

III. Conclusion

Pennsylvania's choice of law principles require the application of New York law to the substantive issues in this case. Under New York law, an employer may be joined in a third-party civil action for contribution and/or indemnity in very limited circumstances where an employee has sustained a "grave injury." In this case, there is a genuine issue as to whether Plaintiff's heel and foot injury are indeed "grave." Therefore, summary judgment is not appropriate, and for the foregoing reasons, the Motion for Summary Judgment filed by Third-Party Defendant Russin will be denied.

An appropriate order follows.

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ORDER

For the reasons set forth in the accompanying Memorandum, it is ORDERED that Third-Party Defendant Russin Lumber Company's Motion for Summary Judgment is DENIED.

BY THE COURT,

Donald W. VanArtsdalen, S.J.

January 15, 1998