835 N.Y.S.2d 161
Supreme Court, Appellate Division, First Department, New York.

Ronald LOWE, III, etc., et al., Plaintiffs,
v.
DOLLAR TREE STORES, INC., etc., Defendant/Third-Party Plaintiff-Appellant,
v.
Mainkey Toys, Third-Party Defendant-Respondent.

May 3, 2007.

Synopsis

Background: Infant and parents brought action against store owner to recover damages for injuries allegedly sustained when using toy purchased at store. Owner brought third-party claim against distributor for indemnification. The Supreme Court, New York County, Emily Jane Goodman, J., denied store owner's motion for summary judgment on third-party claim. Owner appealed.

Holding: The Supreme Court, Appellate Division held that public policy required that store owner be indemnified by toy distributor.

Reversed.

Attorneys and Law Firms

***162** Sedgwick, Detert, Moran & Arnold LLP, New York (Scott L. Haworth of counsel), for appellant.
Querrey & Harrow, Ltd., New York (Thomas J. Bracken of counsel), for respondent.

NARDELLI, J.P., WILLIAMS, BUCKLEY, CATTERSON, McGUIRE, JJ.

Opinion

***264** Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered July 19, 2006, which, to the extent appealed from, denied defendant Dollar Tree's motion for summary judgment on its third-party claim for common-law indemnification, unanimously reversed, on the law, with costs, and conditional summary judgment granted on said claim.

The infant plaintiff was injured by a toy purchased from Dollar Tree that was supplied to it by third-party defendant Mainkey Toys. In this personal injury action, Dollar Tree sought indemnification from Mainkey and moved for summary judgment.

Dollar Tree's motion should have been granted. The record establishes that Mainkey, a large-scale distributor located in China, sold approximately 300,000 of the toys at issue to Dollar ***265** Tree, and that Mainkey purchased the toys from the manufacturer, a Chinese company. There is no evidence in the record as to any modification of the toy by Dollar Tree, nor does Mainkey specifically assert such modification or that it resulted in the infant's injury. It has been held that, as among the parties to an action, a party/ distributor lower in the chain of distribution is entitled to common-law indemnification from the one highest in the chain of distribution, due to the latter's closer, continuing relationship with the manufacturer and superior position to exert pressure to improve the safety of the product (*see Godoy v. Abamaster of Miami*, 302 A.D.2d 57, 754 N.Y.S.2d 301 [2003], *lv. dismissed* 100 N.Y.2d 614, 767 N.Y.S.2d 396, 799 N.E.2d 619 [2003]; *Sukljian v. Ross & Son Co.*, 69 N.Y.2d 89, 95, 511 N.Y.S.2d 821, 503 N.E.2d 1358 [1986]; *see also Promaulayko v. Johns Manville Sales Corp.*, 116 N.J. 505, 562 A.2d 202 [1989]). Such policy shifts risk of loss to the party who can most efficiently control risk and distribute the attendant costs.
The right to indemnification at issue includes the right to recover attorneys' fees, costs and disbursements for defending against plaintiff's action (*see Chapel v. Mitchell*, 84 N.Y.2d 345, 618 N.Y.S.2d 626, 642 N.E.2d 1082 [1994]); it was not waived, as Mainkey asserts. Finally, conditional summary judgment is appropriate here, notwithstanding the fact that a judgment has yet to be rendered or paid by Dollar Tree in the main action, since it serves the interest of justice and judicial ***163** economy in affording the indemnitee "the earliest possible determination as to the extent to which he may expect to be reimbursed" (*McCabe v. Queensboro Farm Prods.*, 22 N.Y.2d 204, 208, 292 N.Y.S.2d 400, 239 N.E.2d 340 [1968]; *see also Schwalm v. County of Monroe*, 158 A.D.2d 994, 550 N.Y.S.2d 970 [1990]).

Parallel Citations

40 A.D.3d 264, Prod.Liab.Rep. (CCH) P 17,746, 2007 N.Y. Slip Op. 03838

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