MICHAEL WILLIAMS v. TWIN PONDS GOLF ASSOCIATES

260 N.Y.S.2d 225 (1965) | Cited 0 times | New York Supreme Court | May 13, 1965

Memorandum: Under the allegations of paragraphs 9, 10, 10g, 11, and 11e of the complaint, which have not been limited by a bill of particulars, proof might be received to establish passive negligence of appellant and active negligence of respondent. There is, therefore, a possibility that the trial of the main action will establish that an action over exists. In such case the cross claim should not be dismissed (3 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 3019.22). "Since the co-defendant is already a party, the court ought to be even more reluctant to dismiss the cross-complaint than it would be to dismiss a third-party action." (2 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 1007.04.) The determination of the question should therefore await the resolution of the factual issues on the trial. (See Brady v. Weiss & Sons, 6 A.D.2d 241; Braun v. City of New York, 17 A.D.2d 264, 267.)

Disposition

Order unanimously reversed, with costs, and motion denied, with $10 costs.