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SHORT FORM ORDER

INDEX No. 09-12068

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 1-29-10 (#001)
MOTION DATE 1-20-11 (#002)
MOTION DATE 8-18-11 (#003)
ADJ. DATE 10-13-11
Mot. Seq. # 001 - MD
002 - XMD
003 - XMD

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PETER TITONE,

Plaintiff,

- against -

LUFTHANSA CARGO AG, DWIGHT DOMAN, SERVICE MINDED CORP. and ALEXXP CORP. d/b/a SERVICE MINDED CORP.,

Defendants.

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Upon the following papers numbered 1 to 46 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Answering Affidavits and supporting papers 14 - 15; 32 - 33; 36 - 38; 39 - 42 ; Replying Affidavits and supporting papers 16 - 17; 43 - 44; 45 - 46 ; Notice of Cross Motion and supporting papers 18 - 31; 34 - 35 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212 granting partial summary judgment in his favor against the defendants on the issue of liability is denied; and it is further

ORDERED that the cross motion by defendants Dwight Doman, Service Minded Corp., and Alexxp Corp. d/b/a Service Minded Corp. for an order pursuant to CPLR 3212 granting summary

judgment dismissing the complaint and all cross claims against them, and in their favor on their cross claims for contractual and common-law indemnification and contribution against defendant Lufthansa Cargo AG, is denied; and it is further

ORDERED that the cross motion by defendant Lufthansa Cargo AG for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it, and in its favor on its cross claims for contractual and common-law indemnification against defendant Alexx Corp. d/b/a Service Minded Corp., is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff on February 21, 2009 at approximately 11:58 p.m. at the cargo loading area of Building No. 23 at JFK International Airport, Queens, New York when he was making a delivery to Lufthansa Cargo AG ("Lufthansa"). According to the plaintiff, a forklift, which was unloading cargo, drove forward into a cargo pallet, pushing it into another cargo pallet which slid into the plaintiff, pinning him between the pallet and the desk where he was standing. The plaintiff commenced this action against Lufthansa, the lessee of the forklift and the warehouse at JFK Airport where the accident occurred, Dwight Doman, the operator of the forklift, Service Minded Corp. ("Service"), the independent contractor who supplied warehouse help (including Mr. Doman) to Lufthansa, and Alexxp Corp. d/b/a Service Minded Corp. ("Alexxp").

In his bill of particulars, the plaintiff alleges that the defendants were negligent in, *inter alia*, controlling and supervising the subject premises and the work being performed, operating the forklift, and failing to observe the plaintiff.

In their respective answers, the defendants assert cross claims against each other for contribution and common-law and contractual indemnification.

Thomas Quinn, a foreman employed by Lufthansa, testified at his deposition that one of his responsibilities as foreman includes supervising forklift operators. While he was standing next to the plaintiff in front of the desk in the cubicle where paperwork is completed, there were two wooden pallets with cargo on them stacked on top of one another. He saw the pallets moving towards the plaintiff and he yelled out "Stop," but he could not make eye contact with the forklift driver or see the forklift from where he was standing. He saw the pallet hit the front of the plaintiff's body and push his lower back against the desk. He helped the plaintiff get out from between the desk and the pallet. Following the accident, Mr. Doman, who was operating the forklift, told him that he was trying to move a single pallet which was in front of the double pallet and that he did not know that anyone was behind the double pallet.

Mr. Doman testified at his deposition that while he was operating the forklift, he placed a set of pallets down two feet away from the cubicle. At that time, he could see Mr. Quinn standing near the cubicle but he did not see the plaintiff. After he retrieved another set of pallets, he placed them down in front of the first set of pallets and while he did so, he did not look to see if anyone was standing behind the first set of pallets. When he placed the second set of pallets down next to the first set, they tapped the first set and the first set slid forward and hit the cubicle on which the plaintiff was leaning.

The plaintiff now moves for partial summary judgment on the issue of liability. Mr. Doman, Service, and Alexxp cross-move for summary judgment dismissing the complaint and all cross claims against them, and in their favor on their cross claims against Lufthansa. Lufthansa also cross-moves for summary judgment dismissing the complaint and all cross claims against it, and in its favor on its cross claims for common-law and contractual indemnification against Service and Alexxp.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

Here, the Court finds an issue of fact, sufficient to defeat the plaintiff's motion for summary judgment, as to whether there was an area in the warehouse where truckers were not permitted and whether the plaintiff was comparatively negligent by standing in that prohibited area at the time of the accident (*see* ***Sale v Lee***, 49 AD3d 854, 853 NYS2d 888 [2d Dept 2008]). Mr. Doman and Mr. Quinn both testified at their depositions that truck drivers were not permitted to stand on the storage side of the warehouse which was past the yellow line on the warehouse floor. Maria Schmucker, the general manager of operations for Lufthansa, stated in her affidavit that the purpose of the yellow line painted on the floor was to delineate secured and unsecured areas, and only those individuals with Port Authority identification or escorted by someone with Port Authority identification were permitted inside the secured area. Mr. Doman further testified that the plaintiff was standing past the yellow line on the warehouse floor and was on the storage side of the warehouse.

As to the cross motion by Mr. Doman, Service and Alexxp, the Court finds that the defendants failed to make out a *prima facie* case entitling them to summary judgment (*see* ***Alvarez v Prospect Hosp.***, *supra*). While the defendants assert that it is undisputed that the pallet did not strike the plaintiff, Mr. Quinn testified at his deposition that he saw the pallet strike the front of the plaintiff's body and push the plaintiff's back against the desk. Further, although the defendants assert that Mr. Doman was not negligent in operating the forklift and that Mr. Doman's operation of the forklift was consistent with Lufthansa's forklift operation training, Mr. Quinn testified at his deposition that his view of the forklift was blocked by the first set of pallets and that he did not know if Mr. Doman had done anything improper while operating the forklift. Furthermore, the Court finds no merit to the defendants' assertion that Mr. Doman had no duty to check and see if there was anyone standing behind the first set of pallets

before placing the second set of pallets down.

Lufthansa's cross motion also failed to establish Lufthansa's *prima facie* entitlement to summary judgment dismissing the complaint (id.). Lufthansa correctly asserts that it cannot be held liable for the plaintiff's injuries, whether pursuant to the doctrine of respondeat superior or based on Vehicle and Traffic Law § 388, since Mr. Doman was not employed by Lufthansa at the time of the accident but was an independent contractor (*see* ***Posa v Copiague Pub. School Dist.***, 84 AD3d 770, 922 NYS2d 499 [2d Dept 2011]) and since the forklift operated by Mr. Doman, which was leased to Lufthansa, was not used or operated on a public highway and, therefore, was not a motor vehicle (*see* ***Mangra v China Airlines, Ltd.***, 7 Misc 3d 499, 790 NYS2d 370 [Civ Ct, Queens County 2005]). However, Lufthansa fails to address why it cannot be held liable for its negligent operation, control, supervision, inspection, and maintenance of the warehouse as alleged by plaintiff. While Lufthansa asserts that the complaint is devoid of any allegations of its negligence concerning the operation of the premises, paragraph 16 of the complaint alleges that "said incident and severe injuries resulted solely from the negligence of the defendants [Lufthansa and Mr. Doman], their agents, servants and/or employees" and this claim is later amplified in the bill of particulars to state that Lufthansa was negligent in its "ownership, leasing, operation, control, management, supervision, inspection, and maintenance of the subject premises and the work being performed thereat."

With respect to the branch of the defendants' respective cross motions which seek an order awarding them contractual and common-law indemnification against each other, since no defendant has established its freedom from negligence, none is entitled to summary judgment on its claim for common-law indemnification (*see* ***Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.***, 10 AD3d 493, 781 NYS2d 506 [1st Dept 2004]). "[T]he right to contractual indemnification depends on the specific language of the contract" (***Gillmore v Duke/Fluor Daniel***, 221 AD2d 938, 939, 634 NYS2d 588, 590 [4th Dept 1995]). Here, the obligation to indemnify set forth in the contract between Lufthansa and Alexxp/Service states that Lufthansa will indemnify Alexxp/Service upon proof of a liability arising from injury "where the actions giving rise [thereto] were taken at the direction of or under the supervision or control of [Lufthansa] . . . and were not taken independently of and contrary to the instructions and directions of [Lufthansa] or to applicable laws or regulations or did result from the negligence or willful misconduct of [Lufthansa], its directors, officers, agents or employees." The contract further states that Alexxp/Service will indemnify Lufthansa upon proof of a liability arising from injury "where the actions giving rise thereto were taken independently of and contrary to the instructions and directions of [Lufthansa] or to applicable laws or regulations or were caused by or did result from the negligence or willful misconduct of [Alexxp/Service], its directors, officers, agents or employees." Mr. Quinn testified at his deposition that although he directed the forklift operators as to which truck to unload, he did not know if Mr. Doman was told directly by a foreman of Lufthansa to move the pallets. Since it is not clear on the record presented as to whether Mr. Doman acted independently and contrary to any instructions or directions that he received from Lufthansa when moving the pallets, and this Court has not found as a matter of law that Mr. Doman was negligent, neither Alexxp/Service nor Lufthansa is entitled to summary judgment on its claim for contractual indemnification.

Finally, Mr. Doman, Service and Alexxp are not entitled to summary judgment on their cross

claim for contribution against Lufthansa. Any determination of this cross claim would be premature at this juncture as there has been no determination as to which defendants are negligent and what percentage of fault they may bear (*see* ***La Lima v Epstein***, 143 AD2d 886, 533 NYS2d 399 [2d Dept 1988]).

Dated: 12/14/11

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**