Kish v City of New York
2012 NY Slip Op 32664(U)
October 3, 2012
Sup Ct, Richmond County
Docket Number: 101726/09
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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CHARLES KISH and GAIL KISH,

Plaintiffs,

-against-

THE CITY OF NEW YORK and H.O. PENN MACHINERY, INC.,

Defendants.

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Part C-2

Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 101726/09

Motion Nos. 995-003
1547-004

The following papers numbered 1 to 6 were marked fully submitted on the 1st day of August, 2012.

	Papers Numbered
Notice of Motion by Plaintiffs for Summary Judgment, with Supporting Papers, Exhibits and Memorandum of Law (dated March 27, 2012)	1
Notice of Motion by Defendant City of New York for Summary Judgment, with Supporting Papers and Exhibits (dated May 16,2012)	2
Affirmation in Opposition by Plaintiffs (dated June 4, 2012)	3
Affirmation in Opposition by City of New York with Supporting Papers (dated, June 3,2012)	4
Reply Affirmation by Plaintiffs (dated July 24, 2012)	5
Reply Affirmation by Defendant City of New York (dated July 24, 2012)	6

Upon the foregoing papers, (1) plaintiffs' motion (No. 995-003)m *inter alia*, for summary judgment and (2) the (cross) motion (No. 1547-004) for like relief by defendant City of New York (hereinafter the "City") are decided as follows.

KISH v THE CITY OF NEW YORK, et al.

This is a personal injury action arising from an accident which occurred on January, 26, 2009, wherein plaintiff Charles Kish (hereinafter "plaintiff"), a bulldozer operator for the City's Department of Sanitation was seriously injured upon exiting its cab. According to plaintiff, as he dismounted onto the tracks of the bulldozer, it unexpectedly began to roll forward and down the hill on which it was parked. Plaintiff allegedly lost his balance and fell off the machine, which proceeded to run over and crush both of plaintiff's feet. The bulldozer continued down the hill until coming into contact with a barrier wall. In his motion, plaintiff is seeking (1) summary judgment on the issue of liability; (2) an order granting the application of the doctrine of res ipsa loquitur as against the City; and (3) order striking the City's answer based upon the purported spoliation of evidence or, in the alternative, an order precluding the City from presenting any evidence at trial on the issue of liability based on the alleged post-accident servicing of the subject bulldozer. For its part, the City has cross-moved for summary judgment on the issue of liability and/or dismissal of the complaint.

The cross motions for summary judgment on the issue of liability are denied.

At his Examination before Trial, plaintiff testified that just prior to the accident, he had parked the Caterpillar D6 model bulldozer on a downward slope (*see* Plaintiff's Exhibit "C", p 46),

and placed both the emergency brake and blade in the "down" position (*id.* at 42). However, he does not recall if he turned the ignition "off" (*id.* at 43). While both parties have submitted voluminous deposition testimony from various individuals who either witnessed the accident or who arrived upon the scene shortly thereafter, the substance of their testimony is conflicting on the factual issues of greatest relevance, including, who, in fact, was the first person to examine the bulldozer after the accident, and whether he or she could substantiate plaintiff's deposition testimony that the emergency brake was actually in the down or "locked" position.

According to plaintiff, another bulldozer operator, Michael Maklari, "was the first person to go to the bulldozer and open the door leading to the cabin. [He purportedly arrived] along with a safety officer who reportedly took pictures" of the cab's interior (*see* Plaintiff's Exhibit "L" pp 64,66-67,69). Although these pictures tend to confirm plaintiff's testimony that the safety brake was in the "locked down" position (*see* Plaintiff's Exhibit "G"), there is no community of agreement as to whether these pictures were taken immediately after the accident. For his part, Mr. Maklari testified that he would not have noticed whether the safety brake was "up" or "down" when he first opened the door to the cab (*see* Plaintiff's Exhibit "L" p 79) and, accordingly, had no recollection of the position of the emergency brake (*see* City's Exhibit "I" p 78). In contrast, Charles Thompson, a mechanic who

testified on behalf of the City, stated that he had been asked immediately after the accident by John Pappalardo, the Chief of Operations, to inspect the vehicle, and believed that he was the first person to actually operate the machine after plaintiff was injured. According to Mr. Thompson, he found the machine idling in neutral with the safety brake in the "up" or unlocked position. However, since he also testified that the door to the cab was open when he arrived at the bulldozer (*see* City's Exhibit "K" pp 33-36), the possibility exists that someone had entered the cab previously.

In the complaint, plaintiff alleges that the City was negligent in the exercise of its duty to maintain the bulldozer in proper working order, and further alleges in the Verified Bill of Particulars that it had both actual and constructive notice that the brakes on this machine were defective (*see* Plaintiff's Exhibits "D" and "F"). He testified to this deficiency at his deposition, and has submitted in support of his claims the affidavits of three experts, Kevin R. Theriault, Ronald Spear and Matthew Lykins (*see* Plaintiff's Exhibits "S", "T" and "U", respectively). In relevant part, Mr. Theriault, a crash and safety consultant, opined that given the circumstances of the accident, it would have been impossible for plaintiff to have exited the cab without first engaging (*i.e.*, locking down) the emergency brake. Plaintiff's second expert, Mr. Spear, a mechanical engineer and former employee of the manufacturer (Caterpillar) concluded that at the time of his

inspection, the brakes on the subject bulldozer had neither been properly maintained nor adjusted, as a result of which they would have offered only "marginally sufficient" resistance to movement even if fully engaged. As for plaintiff's third expert (Matthew Lykins), an Aviation and Mechanical expert, it was his opinion that the City had failed to adequately test the transmission oil in the vehicle during the nearly three years prior and subsequent to the accident. In addition, he averred that the fact that the vehicle started-up quickly and ran smoothly during his inspection some 30 months after the accident was evidence that the bulldozer had been tampered with. This, according to another of plaintiff's witnesses, James Lloyd, a technical services and training manager for H.O. Penn Machine, Inc. (*see* Plaintiff's Exhibit "Q", p 28), was relevant to any subsequent inspection of the machine, since the ability to test the condition of the oil and other fluids after an accident can indicate whether or not its internal components had been subjected to any unusual wear and tear.

In opposition to plaintiff's motion and in support of its own motion for summary judgment, the City asserts that by it has established its prima facie entitlement to judgment as a matter of law. Alternatively, the City argues that even if the emergency brake was not functioning properly, it did not have actual or constructive notice of the defect (*see* Johnson v Nouveau El. Indus., Inc., 38 AD3d 611, 612). In support, the City relies, in

principal part, on the deposition testimony of Michael Parisi, the Supervisor of Mechanics for the Department of Sanitation (*see* City's Exhibit "N"), as well as its Maintenance Supervisor (*see* City's Exhibit "M"). According to this witness, the bulldozer in question received preventive maintenance for every 250 hours of use in accordance with the Caterpillar's instructions. In addition, he testified that a pre-accident inspection approximately six weeks earlier, *i.e.,* on December 16, 2008, revealed no defects regarding any aspect of the bulldozer's braking mechanism. Finally, on the issue of notice, the City argues that none of the proof submitted by either party contains a scintilla of evidence indicating that any complaint was ever registered or a similar fault detected in the bulldozer's braking mechanism in the history of the machine.

In view of the foregoing conflicting evidence regarding, *e.g.*, the details of any the immediate post-accident inspection and whether or not the City had actual or constructive notice of any defect in the bulldozer's braking mechanism, material issues of fact exist which preclude summary judgment on the issue of liability.

In this regard, the Court rejects plaintiff's attempt to invoke an adverse inference against the City under the doctrine of res ipsa loquitur. Res ipsa loquitur is a form of circumstantial evidence sufficient to create a permissible inference of negligence that may be accepted or rejected by the finder of the facts (*see*

Tora v GVP AG, 31 AD3d 341, 342). It may also be established as a matter of law "when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*see* Morejon v Rais Constr. Co., 7 NY3d 203, 209). The case at bar is not of this ilk.

In order for the doctrine to be properly invoked, the following three prerequisites must exist (1) the event in question is one that would not ordinarily occur in the absence of someone's negligence; (2) its cause is an agency or instrumentality within the exclusive control of the defendant; and (3) plaintiff's conduct neither caused nor contributed thereto (*see* Kambat v St. Francis Hosp., 89 NY2d 489, 494). Here, there is no dispute that an unattended bulldozer rolling down a slope after the brake had ostensibly been engaged, is not the type of accident (*i.e.*, "event") that would occur ordinarily in the absence of neglect. However, while plaintiff argues that "the bulldozer, its safety brake and other hydraulic mechanics and the maintenance of the various components that caused the accident and injuries [were] in [defendant's] control", he has failed to establish that the bulldozer was within the *exclusive* control of the City or its mechanics immediately prior to and/or at the time of the subject accident. Accordingly, the second requirement is critically lacking.

It is uncontroverted that plaintiff at bar, a highly experienced tractor operator, was solely responsible for choosing where to park the bulldozer, deciding whether or not to leave the engine running, and lowering the blade and engaging the safety brake prior to dismounting. Since quality of his performance of these tasks remains in issue, plaintiff has failed to establish that defendant's control was "sufficient[ly] exclusiv[e] to fairly rule out the chance that [the accident was] caused by some agency other than defendant's negligence" (*see* Dermatossian v New York City Tr. Auth., 67 NY2d 219, 228).

Finally, with respect to that portion of plaintiff's motion which seeks to strike defendant's answer or, in the alternative, preclude the City from presenting any evidence at trial on the issue of liability based upon its purported "contamination" of relevant evidence, it is clear that the Court retains broad discretion to determine the appropriate sanction for any spoliation of evidence which may be satisfactorily proved (*see* Scarano v. Bribitzer, 56 AD3d 750). However, in order to support the imposition of sanctions pursuant to CPLR 3126, it is the moving party which bears the burden of demonstrating that the party responsible for the loss of the allegedly relevant evidence acted willfully, contumaciously or in bad faith (*see* Denoyelles v Gallagher, 40 AD3d 1027). Here, despite plaintiff's experts' suspicion that the bulldozer's transmission oil had been tampered with (*i.e.*, "changed"), and that this fact could

affect the ability to properly analyze its hydraulics at the time of plaintiff's injury, the moving papers are devoid of any substantial showing that any key evidence was intentionally or negligently lost or destroyed by the City. To the contrary, the City fully complied with plaintiff's April 17, 2009 and May 17, 2011 discovery orders (*see* City's Exhibit "C"), as well as making this specific bulldozer available for two on-site inspections at plaintiff's behest. It is also noteworthy that plaintiff's original April 17, 2009 Order to Show Cause for discovery made no specific request for either the sampling or preservation of the transmission oil, hydraulic or other fluids within the subject bulldozer.

Accordingly, it is hereby

ORDERED that the motions are denied in their entirety.

E N T E R,

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/s/
HON. THOMAS P. ALIOTTA, JSC

Dated: OCTOBER 3, 2012
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