Arellano v Manhattan Laminates Ltd.
2015 NY Slip Op 32400(U)
November 24, 2015
Supreme Court, Bronx County
Docket Number: 305445/13
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 305445/13**

Luis Arellano,
Plaintiff,

-against-

DECISION and ORDER

Manhattan Laminates Ltd. et al.,

Present:

Defendant.

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of plaintiff's motion, pursuant to CPLR 3212, as to liability.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1**
Affirmation in Opposition & Exhibits	**2**
Reply Affirmation & Exhibits	**3**

The instant action arises from an accident wherein plaintiff alleges he was injured when a stack of materials fell from a pallet on a forklift onto him. Marcellis McGowan, an employee of Manhattan Laminates, was operating the forklift and was the only eyewitness, other than plaintiff, to the accident. In a decision dated May 26, 2015, this Court denied plaintiff's prior motion for summary judgment without prejudice and, "in the interests of justice," allowed defendants "one more opportunity to obtain the deposition of McGowan." Thereafter, McGowan failed to appear for a deposition scheduled for June 26, 2015. Plaintiff now renews his motion for summary judgment as to defendants' liability for the accident on the grounds that defendants were "actively negligent" and breached their duty to maintain the subject premises in a reasonably safe condition.

In support of summary judgment, plaintiff submitted, *inter alia,* his affidavit and deposition testimony and the deposition testimony of Page Schrock. In his affidavit, plaintiff stated as follows: On the day of the accident, after purchasing pieces of hardware in the showroom, plaintiff went to the Manhattan Laminates warehouse to see McGowan who had previously told him that his employers had some irregular pieces of material, i.e., formica,

laminates, melamine and medium density fiber board, that they were looking for McGowan "to dispose of." McGowan was at the warehouse and "brought out a skid containing some twelve (12) to fifteen (15) pieces of the aforesaid material to the rear of his truck using a type of forklift known as a 'Raymond.'" His vehicle was an open bed truck and he "dropped the gate at the back of the open bed to allow [McGowan] to load the pieces of material onto the open bed." After visually checking to make sure that McGowan positioned the "Raymond" and the load with his truck so as not to damage the gate of his truck, he saw McGowan, "without any warning, push the top piece of material of the stack, with his hands, in [plaintiff's] direction, instead of towards the open bed." As a result, the pallet "slid off the forks" and "crash[ed] down on top of [plaintiff]." He fell to the ground "with various pieces of material lying on top of" him. "At no time, before the accident when the boards fell on [him], did [he] ever touch the boards that fell from the 'Raymond.'" Also, "there was nothing that [he] saw securing the material to the pallet or the pallet to the "Raymond," either by way of strapping, cords, ties, ropes, or otherwise." Following the accident, McGowan apologized to him for causing the accident, stating "I'm so sorry, I'm so sorry – yeah, I'm so sorry I did this." At his deposition, plaintiff testified that the forks appeared parallel to the floor prior to and at the time of the accident. Plaintiff also testified that McGowan "shoved" the top piece on the pallet in his direction, without saying anything to him or otherwise warning him. According to plaintiff, the proper way to take the materials off the forklift is to lift the top piece up to create an air pocket between the pieces of material which would "allow the sheet to kind of glide into the area that you were gonna load it on to." As McGowan "pushed, rather than first lifting to create the air pocket, all the pieces moved as one and the pallet and the pieces fell."

At his deposition, Page Schrock testified that he is employed as Director of Systems by Simon's Hardware & Bath, a wholly-owned subsidiary of defendant Trade Supply Group. Both Trade Supply Group and Manhattan Laminates are located at 624 West 52nd Street. Manhattan Laminates is a wholly-owned subsidiary of Trade Supply Group. Schrock's office is located on the second floor of 624 West 52nd Street. The warehouse for Manhattan Laminates is located on the first floor. At the time of the accident, Schrock was on the second floor when an employee

"came upstairs and said that there had been an accident in the warehouse." Thereafter, he and Jared Barry, a salesperson employed by Manhattan Laminates, went downstairs to the warehouse. McGowan was the only employee that worked in the warehouse at that time. McGowan was terminated sometime after the accident. When he arrived inside the warehouse, Schrock saw a customer on the floor and McGowan. Schrock asked the customer "if he was okay and what happened" and the customer responded that "he was hurt, he had called an ambulance and then his wife." Schrock also testified that the forks of the forklift "extend with the cage away from the body of the Raymond and they can be tilted upward angling towards the body of the Raymond "to prevent anything from sliding forward."

In opposing summary judgment, defendants contend that based solely on plaintiff's testimony and that of Page Schrock, there are issues of fact as to how the accident happened, plaintiff's credibility and comparative fault. Defendants also contend that plaintiff "was actively involved in what transpired at the time of his accident." In support of their contentions, defendants submitted, *inter alia,* the deposition testimony of plaintiff and Schrock. At his deposition, plaintiff testified that he lined up the load by "observing and measuring . . . lining up the load and the tailgate and so forth." At the time of the accident, plaintiff was standing on the opposite side from where McGowan was operating the forklift. Plaintiff also testified that he told McGowan that the load "looked good" before McGowan "got off" the forklift. At his deposition, Schrock testified that when he arrived at the scene, plaintiff did not say how he got hurt and "just said it was a freak accident and nobody's fault."

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The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center,* 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-

moving party. See *Aasaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957). As a general rule, the question of proximate cause is to be decided by the finder of fact, aided by appropriate instructions. *See Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 414 N.E.2d 666 (1980).

Contrary to plaintiff's contention, the hearsay statement purportedly made by plaintiff to Schrock that the accident was a "freak accident" and "nobody's fault" is admissible as an admission against interest and, therefore, sufficient to defeat summary judgment. *See Candela v. City of New York,* 8 A.D.3d 45, 778 N.Y.S.2d 31 (1st Dept. 2004).

Based upon the disparate testimony of plaintiff and Page, there exist issues of fact and credibility, including but not limited to, how the accident occurred, whether defendants were negligent and whether plaintiff was comparatively negligent. Accordingly, plaintiff's motion for summary judgment, pursuant to CPLR 3212, as to liability, is **denied**.

Dated: Bronx, New York
November 24 2015

Hon. Julia I. Rodriguez, J.S.C.