SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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ULISES R. SANCHEZ,

Plaintiff,

-against-

SUMMIT TOYOTA LIFT, LLC and SUMMIT TOYOTA LIFT,

Defendants.

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SUMMIT TOYOTA LIFT,

Third-Party Plaintiff,

-against-

CASCADE CORPORATION,

Third-Party Defendant.

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DECISION & ORDER
Motion Sequences 002, 003

Index No. 103909/2011

Index No. 590802/2013

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this personal injury action, Defendant Summit Toyota Lift, LLC and Defendant/Third-Party Plaintiff Summit Toyota Lift (collectively "Summit") move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint of Plaintiff Ulises R. Sanchez ("Plaintiff") (sequence 002). By separate motion, Third-Party Defendant Cascade Corporation ("Cascade") moves for summary judgment dismissing the Third-Party Complaint and all claims against it (sequence 003). Both motions are consolidated for joint disposition and granted as follows.

Background Facts

The Subject Incident

Plaintiff was employed as a corrugator operator by Pratt Industries (U.S.A.) Inc. ("Pratt"), which operates a corrugated box manufacturing facility in Staten Island, New York.

On May 27, 2010, Plaintiff was injured in an incident involving the "clamp truck" – essentially a forklift with a clamp on the front designed to transport large rolls of paper; the clamp truck was manufactured by non-party Hyster Company and operated by Plaintiff's co-employee, Carol Gill ("Gill") (*Summit Exh H* [*"Pl Tr 1"*], 79-8).[1] The clamp itself was manufactured by Cascade, though it is unknown how the clamp came to be attached to the clamp truck and used at Pratt's facility (*Flak Aff*, ¶ 3).[2]

At the time of the incident, the truck was transporting two rolls, one on top of the other, each weighing about 2,750 pounds (*Summit Exh L* ["*Gill Tr*"], 15; *Summit Exh O*, ¶ 6). Ninety percent of the top roll was not within the clamp (*Gill Tr*, 17-18). Plaintiff initially saw the clamp truck, stood aside to let it pass, and was struck after he turned around, effectively wedging him against other rolls on the floor (*Pl Tr 1,* 82-84; *see also Summit Exh R*, p 8).[3]

As Plaintiff lay on the ground, Gill noticed what had occurred and left the clamp truck unattended to check on Plaintiff (*Pl Tr 1*, 86:5-19). As Gill did so, Plaintiff saw that the rolls "were starting to...turn and then they both fell off," but they did not hit Plaintiff or cause further injury (*Pl Tr 1*, 86:12-15).

An investigation report prepared by Pratt cited the "Immediate Causes" as "Carrying 2 rolls[] without supporting the top roll with the clamp. Employees were unaware of each other"

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[1] Plaintiff appeared for multiple depositions. Though both are attached as *Summit Exh H*, the first, on September 24, 2012, is cited here as *"Pl Tr 1"*, and the second, on April 2, 2014, as *"Pl Tr 2"*.

[2] Robert J. Flak ("Flak") is Cascade's expert.

[3] Though Plaintiff knew that he had been struck by some portion of the truck's clamp mechanism (as opposed to the body of the truck), he was initially unsure whether it was the clamp itself, or the clamp's cargo which actually struck him (*Pl Tr 1,* 88:23-89:15). In his second deposition, Plaintiff clarified that he was told by a witness, James Valencia, that the clamp struck him (*Pl Tr 2*, 12:1-13:4).

(*Summit Exh R*).[4] According to Plaintiff's expert, however, the incident was caused by broken springs within the clamp's check valve assembly, the mechanism designed to prevent inadvertent rotation of the clamp (*Summit Exh M* ["*Pl Report*"], ¶¶ 4-6). Had the check valve assembly been properly inspected several months before the incident in response to a complaint, Plaintiff's expert argues, the incident would not have occurred (*id.* at 3). Cascade does not dispute that at least one spring was broken, but disputes the significance of the springs as they relate to the alleged mechanism of injury: the clamp's spontaneous rotation (*Cascade Reply*, p 2).

Based on these allegations, Plaintiff brought this action against Summit for negligence, which in turn brought a third-party complaint against Cascade for contribution and indemnity based on theories of product liability, breach of warranty, design defect, and failure to warn.

Maintenance of the Clamp Truck

Prior to the subject incident, Pratt hired Summit Toyota pursuant to a Periodic Maintenance Agreement, which included both a checklist of routine maintenance to be performed every 60 days, as well as "additional repairs performed at prevailing prices upon authorization (*Summit Exh P* [the "Maintenance Agreement"]; *Exh Q*).[5] According to Summit's vice president and general manager Paul Weymann ("Weymann"), routine maintenance included the hydraulic "clamp assembly" (*Summit Exh K* ["Weymann Tr"], 42:4-44:18).[6] At least one instance of non-routine maintenance involving the clamp took place prior to the subject incident:

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[4] Plaintiff himself admitted to, on prior occasions, moving more than one paper roll at a time without clamping the second roll at all (*Pl Tr 1* 60:22-62:7).

[5] The Maintenance Agreement references lubrication and inspections performed as shown on the attached checklist," but the exhibit itself does not attach a checklist. Summit's Exhibit Q is a collection of service records including several "Planned Maintenance Report[s]" pertaining to "performance and operational checks," "lube and service," and "visual inspection."

[6] Indeed, the "Planned Maintenance Report" checklist does contain a "Hydraulic System" field (*see e.g., Pl Exh Q*, p 1).

Summit service records indicate that on March 30, 2010, about two months before the subject incident, the clamp and hoses were removed in response to a complaint about leaking oil (*Summit Exh Q*, p 12).

The particular valve assembly at issue here – where, in other words, the springs are located – is "enclosed," and therefore allegedly "not something [Summit] would check" because disassembly would be required (*id.* at 43:17-20). Summit argues, therefore, that it could not have had notice of a dangerous condition related to the check valve box because it was not part of normal preventative maintenance, and because there is no other evidence demonstrating that Summit performed, or should have performed, any maintenance to the check valve box.

Based on this argument, and in support of summary judgment, Summit contends that Plaintiff cannot establish the specific cause of his injury, and that Plaintiff's expert's opinions are based on speculation.

In its cross-motion, Cascade argues that summary judgment in its favor is appropriate because: first, Plaintiff cannot establish the mechanism of the accident; and second, multiple Cascade experts demonstrate, through affidavits and technical submissions, including a DVD demonstrating the operation of a similar clamp truck, that the subject incident could not have resulted from a defective clamp. More specifically, Cascade argues that even the complete absence of the springs could not have resulted in Plaintiff's injury without added operator error.

In a consolidated opposition to both motions, Plaintiff attaches his own expert report and argues that he has presented sufficient evidence to raise an issue of fact to overcome Defendants' motions. Specifically, Plaintiff contends: first, that there is evidence that Plaintiff was hit by the clamp, which rotated suddenly without operator control, not the second roll of paper being carried improperly; second, that Summit failed, two months before Plaintiff's incident, to

examine and correct unintended clamp rotation; third, that operator misuse and/or error does not insulate the Defendants from liability because it is unrelated to the cause of plaintiff's injury (*i.e.*, the clamp's sudden rotation); and fourth, that Defendants' expert affidavits are inadmissible as procedurally defective, and insufficient to meet their burden of proof.

In reply, Summit argues that Plaintiff's opposition is insufficient to defeat summary judgment because Plaintiff's claim that the clamp, rotated on its own and caused the rolls to fall, is contrary to his deposition testimony and unsupported by the record.

In its own reply, Cascade submits supplemental affidavits from its experts which challenge the factual findings and conclusions of Plaintiff's expert report. Cascade also asserts that the original expert affidavits are admissible as properly notarized and non-prejudicial. According to Cascade, the subject clamp was not defective, Cascade was not negligent in producing the clamp, and the clamp conformed with the state of the art conditions and complied with applicable industry standards.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action ... has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320,

501 NE2d 572 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Powers ex.rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose" (*Kosovsky v Park South Tenants Corp.*, 45 Misc3d 1216(A), 2014 WL 5859387 [Sup Ct, NY County 2014], *citing Zuckerman*, 49 NY2d at 562).

The opponent "must assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial... and it is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] *lv den*, 24 NY3d 917 [2015] *citing Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). In other words, the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

Cascade's Motion for Summary Judgment

At the outset, as to plaintiff's claim that Cascade's expert affidavits executed in Oregon are inadmissible for failing to bear the proper Certification pursuant to CPLR 2309(c), as noted by Cascade, the failure to attach a certificate of conformity to an affidavit is not fatal (*Deutsche Bank Nat. Trust Co. v Naughton*, 137 AD3d 1199, 1200 [2d Dept 2016], *citing* CPLR 2001). Moreover, courts may disregard such defects unless an objecting party demonstrates that a

substantial right has been prejudiced (CPLR 2001; *Redlich v Stone*, 51 Misc 3d 1213(A) [Sup Ct, NY County 2016], *citing Moccia v. Carrier Car Rental, Inc* ., 40 AD3d 504 [1st Dept 2007]). Because Plaintiff has not demonstrated any prejudice, the Court considers Cascade's original and supplemental expert affidavits.

Cascade's argument (which is also made by Summit) that Plaintiff's theory of injury is conjectural because it does not specify whether Plaintiff was injured by the clamp or a paper roll is unsupported by the record. First, Defendants' reliance on Plaintiff's testimony that he was unsure whether the clamp or paper roll contacted him (*Pl Tr*, 83:5-8) is misplaced, because the source of injury, as alleged by Plaintiff and his expert, is neither the clamp nor the paper specifically; rather, it is the *rotation* of the clamp, allegedly caused by broken springs which should have been ascertained and repaired, which caused some portion of the clamp or its cargo to contact Plaintiff and cause his fall. Whether it was the clamp or paper that ultimately made Plaintiff fall is irrelevant because, viewing the facts in the light most favorable to Plaintiff, Plaintiff's contact with either could have resulted from the clamp's spontaneous rotation. This distinguishes this scenario from situations cited by Defendants where the source of the injury, and more importantly how that source relates to a defendant's liability, is unknown. For example, *Tardella v RJR Nabisco, Inc.*, (178 AD2d 737 [3d Dept. 1991]), presents a plaintiff who could not explain the provenance of a pin in a candy bar ingested by a child, and *Mandel v 370 Lexington Ave., LLC*, (2 AD3d 302 [1st Dept 2006]), presents a plaintiff who could not identify how a glass table which cut her arm had broken and caused her injuries. Being unable to identify *any* negligence is distinguishable, in other words, from an inability to identify the precise result of specific negligence.

Turning to Cascade's substantive arguments regarding Plaintiff's allegations, Cascade

submitted the affidavits of mechanical engineer John E. Johnson ("Johnson Aff") and Cascade Manager of Corporate Technical Analysis ("Flak Aff"). Because of the technical nature of the engineering specifications relevant to this action and these motions, the Court relies on both of Cascade's affidavits extensively, and weighs them against those submitted by the other parties (*Viacom Intern., Inc. v Midtown Realty Co.*, 193 AD2d 45, 55 [1st Dept 1993] ["where a factual issue transcends the realm of knowledge that lay persons possess, expert testimony is required"]).

Flak disputes the conclusion contained in Plaintiff's earlier expert disclosure (*Cascade Exh M*), noting that a single spring, not two, was broken (*Flak Aff* ¶ 5, *citing Rodriguez Tr Exhs 1, 2*). Flak testifies that the valve assembly, which contains the broken spring, is itself just one of "a total of 17 separate components which, collectively, act to prevent rotation of the clamp without operator input" (*id.* at ¶ 6).

Importantly, Flak concludes that "the broken spring *or even the total absence of the spring will not lead to rotation of the clamp without operator input*" (*id.* [emphasis added]). To support this assertion, Flak and Johnson obtained an identical clamp and valve and a single paper roll approximating (indeed, slightly exceeding) the size of the two paper rolls held by the clamp on the date of the subject incident (*id.* at ¶ 7). Holding the roll at its lower end, with the clamp rotated at a 15-degree off-set from vertical, the clamp did not rotate without operator input when driven in reverse or forward and with (1) the clockwise spring removed; (2) the counter-clockwise spring removed; (3) both springs removed; (4) a spring cut to appear like the broken spring found by Rodriguez inserted into the clockwise channel; and (5) the same cut spring

inserted into the clock-wise channel (*id.*).[7] None of the scenarios caused any spontaneous rotation without operator input (*id.*).

Based on these findings, Flak concludes that Plaintiff's injuries occurred due to operator misuse, not unintentional clamp rotation (*id.* at ¶ 8). The misuse may include, Flak concludes, failure to use a split-arm clamp for transporting multiple rolls of paper at once, as recommended by Cascade's operator's guide (*id.*, *citing Exh C*). Overall, Flak concludes that the Cascade clamp was free from defects in design or manufacture that caused or contributed to the accident, and was designed, manufactured, and sold consistent with the applicable standards of care (*id.* at ¶ 9). Johnson supports Flak's conclusions, as does Summit's expert engineer, William Meyer (¶ 4 ["it is inconsistent with engineering principles that the broken conical springs, purportedly found upon disassembly of the rotator motor check valve block after the accident, would cause an unintentional clamp rotation. Efforts by the technicians to duplicate the alleged condition proved fruitless"]).

In opposition, Plaintiff submits the affidavit of engineer Steven R. Thomas ("Thomas Aff"). Thomas challenges the methodology of Cascade's experts, arguing that they removed only the counter and counter-clockwise check valve springs, not the "*bypass* valve springs" which he determined to be the problem (*Thomas Aff*, ¶ 6). Thomas also argues that simply removing a spring for demonstration purposes does not accurately demonstrate the effect of a broken spring left undetected over a period of time (*id.* at ¶ 7). Finally, Thomas argues that the Cascade DVD demonstration did not adequately reproduce the conditions of Plaintiff's incident (*id.* at ¶ 8).

In reply, Flak and Johnson both provide supplemental affidavits which illustrate that

[7] A DVD of this demonstration was reviewed by the Court and appears to depict exactly what Flak describes in his affidavit.

Thomas's conclusions are mistaken ("*Flak Supp Aff*"; "*Johnson Supp Aff*"). Flak provides, for example, a parts manual for the subject clamp containing an exploded view of the check valve assembly which identifies the bypass valve springs as conical and check valve springs as cylindrical (*Flak Supp Aff*, ¶ 4, *citing Cascade Reply Exh E*). This is significant because the single spring identified as broken (not two, as argued by Thomas) was identified by Rodriguez and the Cascade Experts as cylindrical (*Johnson Supp Aff*, ¶ 7; *Flak Supp Aff*, ¶¶ 5-6, *Cascade Reply Exhs D, E*). In other words, the broken spring was a check valve spring, as argued by Cascade.

And, as to Thomas's assertion that the use of a single, large roll, rather than the two involved in the subject incident, does not adequately reproduce the subject incident, Flak notes that the use of a single, heavier roll, induces a higher load, and that they still observed no spontaneous rotation without operator input (*Flak Supp Aff* ¶ 8).

Together, the affidavits and supplemental affidavits satisfy Cascade's burden on summary judgment and lead the Court to conclude, as a matter of law, that the broken spring in the check valve assembly could not have caused spontaneous rotation without operator input or negligence. Moreover, there is no evidence in the record indicating that Cascade was responsible for any defect in design or manufacturing.

Plaintiff's opposition is insufficient to raise a triable issue of fact. Thomas does not attest to the basis for his conclusions and, as discussed above, is plainly contradicted by the evidence on crucial matters such as the identification of important mechanical components.[8] Thomas does

[8] Because Cascade has successfully demonstrated that the condition alleged to be defective could not have been the proximate cause of Plaintiff's injuries, actual notice is irrelevant because Defendants' knowledge of the defect pertains only to their duty of care. Thus, testimony by Kenneth Hampton ("Hampton"), Pratt's maintenance supervisor, that Gill complained, "two months or less" before the subject incident, that the clamp was rotating without driver input is irrelevant (*Summit Exh S* ["*Hampton Tr*"], 41:13-47:15; *id.* at 11:10-19 ["...it would turn on its own, not on a daily basis, every once in a while"]). Hampton allegedly advised Andres Rodriguez, Summit's

not explain the significance, for example, of the "two broken bypass valve springs," and how defects in those springs, rather than those identified by Cascade, would have altered the functioning of the clamp and caused spontaneous rotation. Moreover, Summit does not offer any opposition to Cascade's motion for summary judgment, and replied only to Plaintiff's opposition.

Thus, because Cascade has demonstrated, thoroughly and through exhaustive technical demonstrations and sworn affidavits, that the alleged defect (the broken springs) could not possibly have caused the clamp to rotate spontaneously and injure Plaintiff, Summit's third party claims against Cascade must be dismissed. Because Plaintiff's allegations against Summit rest on the same foundation – that Summit's failure to locate and diagnose the broken spring led to the spring causing Plaintiff's injuries – those allegations must also be dismissed based on the conclusion that the springs could not have caused spontaneous rotation.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of Defendant Summit Toyota Lift, LLC and Defendant/Third-Party Plaintiff Summit Toyota Lift for summary judgment dismissing Plaintiff's Complaint (motion sequence 002) is granted, and the Complaint is dismissed; and it is further

ORDERED that the motion of Third-Party Defendant Cascade Corporation for summary judgment dismissing the Third-Party Complaint of Summit Toyota Lift (motion sequence 003) is granted, and the Third-Party Complaint is dismissed; and it is further

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footnote 8, cont'd.

repair technician (the "Summit Technician") of the condition, and Andres performed a drift test on the unit (*Hampton Tr*, 46:3-47:11).

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that Defendant Summit Toyota Lift, LLC shall, within 20 days of entry, serve a copy of this order with notice of entry upon all parties.

This constitutes the decision and order of the Court.

Dated: January 5, 2017

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.