Ramirez v Penske Truck Leasing Corp.
2017 NY Slip Op 30682(U)
April 4, 2017
Supreme Court, Suffolk County
Docket Number: 11-33272
Judge: James Hudson
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SHORT FORM ORDER

INDEX No. 11-33272
CAL. No. 15-02124OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 40 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 5-6-16 (002)
MOTION DATE 6-15-16 (003)
ADJ. DATE 10-19-16
Mot. Seq. # 002 - MD
003 - XMD

RODRIGO RAMIREZ,

Plaintiff,

- against -

PENSKE TRUCK LEASING CORPORATION,

Defendants.

PENSKE TRUCK LEASING CO., LP,

Third-Party Plaintiff,

- against -

DOMAIN TRANSPORTATION, INC.,

Third-Party Defendants.

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Upon the following papers numbered 1 to 28 read on this motion for summary judgment arbitrary and cross motion for sanctions; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers 19 - 25 ; Answering Affidavits and supporting papers 17 - 18 ; Replying Affidavits and supporting papers 26 - 28 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant/third-party plaintiff Penske Truck Leasing Corporation for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and granting summary judgment in its favor on its fourth and fifth causes of action against the third-party defendant Domain Transportation, Inc. is denied; and it is further

ORDERED that the cross motion by the plaintiff for an order pursuant to CPLR 3126 sanctioning the defendant Penske Truck Leasing Corporation for its spoliation of evidence in this action is denied, without prejudice to renewal at trial.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained when he caught his foot in the lift gate of a truck owned by the defendant/third-party plaintiff Penske Truck Leasing Co., LP, incorrectly sued herein as Penske Truck Leasing Corporation (Penske). At the time, the plaintiff was working for his employer, the third-party defendant Domain Transportation, Inc. (Domain), which had leased the truck from Penske. It is undisputed that Domain and Penske entered into a Vehicle Lease Service Agreement effective August 7, 2006 (the Lease), in which Penske agreed to lease various vehicles to Domain, and to repair and maintain said vehicles at Penske's own cost and expense. In his complaint, the plaintiffs alleges that Penske failed to properly inspect, maintain and repair the subject vehicle, specifically the lift gate, and failed to give proper warnings and take necessary precautions to protect him from injury. After issue was joined, Penske commenced a third-party action against Domain setting forth causes of action for common-law indemnification, contribution, contractual indemnification, and failure to procure insurance.

Penske now moves for summary judgment dismissing the complaint and granting summary judgment in its favor on two of its causes of action against Domain. In support of its motion, Penske submits, among other things, the pleadings, the Lease, the transcripts of the depositions of the plaintiff and Domain, and an affidavit of the supervisor employed by Domain at the time of this incident to oversee the plaintiff's work. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

At his deposition, the plaintiff testified that he was employed by Domain as a delivery man for nine years until December 2010, that the sizes of the vehicles or trucks he was assigned over the years varied but the lift gate controls were basically similar, and that the vehicle involved in this incident was leased from Penske. He stated that his supervisor at the time of this incident was Jim Capodeferro (Capodeferro), that Capodeferro assigned the vehicles to be used by drivers and the deliveries to be made, and that his accident occurred on March 18, 2010. He indicated that the trucks assigned are loaded before the driver arrives at work, that drivers are required to inspect their assigned vehicle every morning, and that he was first assigned the truck involved in this incident on March 17, 2010. The

plaintiff further testified that a complete inspection of the truck that morning revealed that the switch for the lift gate was not working properly, that the lift gate "wouldn't go up sometimes, it wouldn't go down sometimes," and that "once in a while it would go up and down on its own." He stated that he told Capodeferro that the lift gate was not functioning well, that Capodeferro told him that he could use the truck and to take it to Penske, and that he took the truck to the local Penske facility. He indicated that drivers are required to complete an inspection report indicating any problems with a vehicle after they do an inspection, that he handed a copy of the report for March 17, 2010 to a mechanic at Penske, and that he explained the problems that he was having with the lift gate to the mechanic. He stated that the mechanic inspected the lift gate but did not "open it completely," that the mechanic told him that he did not have the spare part to repair the problem, and that the mechanic told him that the lift gate was "fine" and could be used that way.

The plaintiff further testified that he called Capodeferro to say that, although the mechanic said the lift gate was working, he was still having problems with the lift gate, and that Capodeferro told him to use the truck despite the problems. He stated that he made seven deliveries that day and only had a problem with the lift gate at the second stop he made. He indicated that he was again assigned the subject truck the next day, March 18, 2010, that the truck was already loaded when he arrived at work, and that he inspected the truck, noted the same lift gate problems and filled out the required driver's inspection report. He declared that it was his handwriting on the inspection report dated March 17, 2010, and that he gave Capodeferro a copy of that report and the report of March 18, 2010 on the mornings of the respective inspections. He stated that he told Capodeferro the truck was still malfunctioning and unsafe on March 18, 2010, that he requested another truck, and that Capodeferro told him there was no other truck available and to bring his truck back to Penske. The plaintiff further testified that he went to Penske, that he believes he saw the same mechanic as the previous day, and that he told the mechanic that he was still having problems with the lift gate. He indicated that the mechanic did not inspect the lift gate, that the mechanic told him that, although the part had been ordered, Penske did not have a switch to replace the one on his truck, and that, despite his request, there were no other trucks available to lend to him until the replacement switch arrived. He stated that he started his delivery route that day, that he had problems with the lift gate at a couple of his delivery stops, and that he was injured on his next to last stop of the day when, while standing on the platform of the lift gate, the lift gate went down and up quickly, wedging his foot between the platform and the truck bed.

The treasurer of Domain, Roya Emrani, testified that the Lease was negotiated by her husband, David Emrani, that she handles the procuring of the necessary insurance for her company, and that Domain relies on Penske for the maintenance of the trucks leased by Domain. At his deposition, David Emrani testified that he is the president of Domain, that it is his signature on the Lease, and that, based upon Penske's obligations under the Lease, Domain relied on Penske for the maintenance and repair of the trucks that his company leased from Penske. He stated that Capodeferro scheduled the company drivers and handled maintenance issues that arose with trucks, that Capodeferro made the decision what to do about trucks that were reported to be unsafe upon the inspection of a driver, and that he had not seen the inspection reports allegedly turned in by the plaintiff on March 17, 2010 and March 18, 2010 until his deposition.

In his affidavit dated March 17, 2016, Capodeferro swears that the transcript of his audio-taped statement taken on November 18, 2015 is "true and accurate." He acknowledged that he is a resident of

North Carolina, and that he previously worked for Domain. In his statement, taken by counsel for Domain, Capodeferro states that the plaintiff only complained about the subject truck on March 18, 2010, that if a driver has a problem with a truck during the day they were supposed to stop at Penske on the way home, and that, when he was told on March 18, 2010 that the plaintiff had experienced problems the day before, he asked the plaintiff why he had not stopped at Penske that day. He indicated that the plaintiff told him that Penske had said that they did not have a replacement switch and that the plaintiff "wanted to get home." Capodeferro asserts that the plaintiff did not hand in his inspection reports on the days indicated, and only did so "a week or two weeks" after this incident.

In support of that branch of Penske's motion which seeks to dismiss the complaint, counsel for Penske contends that the plaintiff "cannot demonstrate the necessary element of proximate cause." In support of his argument, counsel cites to the plaintiff's testimony that he continued to make deliveries with the malfunctioning lift gate, and Capodeferro's statement, among others, that the plaintiff was "supposed to stop ... on [his] way home" at Penske if he had a problem with his truck. A defendant moving for summary judgment cannot satisfy its initial burden of establishing his or her entitlement thereto merely by pointing to gaps in the plaintiff's case (***Coastal Sheet Metal Corp. v Martin Assoc., Inc.***, 63 AD3d 617, 881 NYS2d 424 [1st Dept 2009]; *see also* ***Tsekhanovskaya v Starrett City, Inc.***, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]).

It is undisputed that Penske had the obligation to maintain and repair the truck used by the plaintiff herein. It is well settled that an entity owes a duty to use reasonable care in repairing and inspecting items for defects and repairing any defects so that the item will be reasonably safe for its intended or foreseeable uses, and to warn a user if the item remains dangerous (***Olchovy v L.M.V. Leasing***, 182 AD2d 745, 582 NYS2d 764 (2d Dept 1992]; *see also* ***Bah v Benton***, 92 AD3d 133, 936 NYS2d 181 [1st Dept 2012]; ***Simon v Nortrax N.E., LLC***, 94 AD3d 861, 941 NYS2d 706 [2d Dept 2012]). In addition, that duty may extend to parties not in privity with the repairer (***Olchovy v L.M.V. Leasing***, *supra*).

It has been held that, "[g]enerally, issues of proximate cause are for the fact finder to resolve" (***Gray v Amerada Hess Corp.***, 48 AD3d 747, 748, 853 N.Y.S.2d 157 [2d Dept 2008], quoting ***Adams v Lemberg Enters., Inc.***, 44 AD3d 694, 695, 843 N.Y.S.2d 432 [2d Dept 2007]; *see also* ***Derdiarian v Felix Contractor Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]). In addition, it is well settled that a court's responsibility in considering a motion for summary judgment is issue finding, not issue determination (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, *supra*). Here, there are issues of fact including, but not limited to, whether Penske met its obligations under the Lease, whether its mechanic properly inspected the allegedly malfunctioning lift gate, and whether Penske took adequate measures to deal with the allegedly unsafe condition of the lift gate.

In addition, New York has adopted a "pure" comparative negligence approach in personal injury actions which allows a plaintiff whose contributory negligence is not the sole proximate cause of the plaintiff's injury to recover but reduces damages in proportion to the plaintiff's percentage of fault (CPLR 1411, 1412, 1413). Here, Penske has failed to establish that the plaintiff was the sole proximate cause of his injuries. The issue of comparative negligence is generally one for the jury to decide (***Bullock v Calabretta***, 119 AD3d 884, 989 NYS2d 862 [2d Dept 2014]; ***Todd v Godek***, 71 AD3d 872,

895 NYS2d 861 [2d Dept 2010]). Thus, Penske has failed to establish its prima facie entitlement to summary judgment dismissing the complaint.

The Court now turns to that branch of Penske's motion which seeks summary judgment on its fourth cause of action against Domain for contractual indemnification, and its fifth cause of action for failure to procure insurance. The right to contractual indemnification depends upon the specific language of the contract between the parties (*see* ***Kielty v AJS Constr. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81 [2d Dept 2009]). Thus, "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (***LaRosa v Internap Network Servs. Corp.***, 83 AD3d 905, 921 NYS2d 294 [2d Dept 2011] quoting ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]; ***Torres v LPE Land Development. & Constr. Inc.***, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]).

In this case, paragraph 10 of the Lease requires Domain to indemnify and hold Penske harmless under the following language:

> CUSTOMER shall protect, defend, indemnify and hold harmless PENSKE TRUCK LEASING and its partners and its agents, servants and employees from any and all claims, suits, costs, losses, damages, expenses, and liabilities arising from: (a) CUSTOMER's failure to comply with its obligations to governmental bodies having jurisdiction over CUSTOMER and the Vehicles or its failure to comply with the terms of the [the Lease], or the ownership, use, selection, possession, maintenance and/or operation of the Vehicle; (b) any liability imposed upon or assumed by CUSTOMER under any Worker's Compensation Act, plan or contract and any and all injuries (including death) or property damage sustained by CUSTOMER or any driver, agent, servant or employee of CUSTOMER ...

The Lease provides in its first paragraph that Penske will repair, maintain and provide replacement parts for all leased vehicles at its own cost and expense. Under the surrounding circumstances, it cannot be clearly implied that Domain agreed to indemnify Penske for its alleged negligence in inspecting and/or repairing the subject vehicle. "[I]n the absence of a legal duty to indemnify, a contract for indemnification should be strictly construed to avoid imputing any duties which the parties did not intend to assume" (***2632 Realty Dev. Corp. v 299 Main St., LLC***, 94 AD3d 743, 745-746, 941 NYS2d 252 [2d Dept 2012]; *see* ***Roldan v New York Univ.***, 81 AD3d 625, 628, 916 NYS2d 162 [2d Dept 2011]). "Generally, contracts will not be construed to indemnify a party against its own negligence unless such intention is expressed in unequivocal terms" (***Cortes v Town of Brookhaven***, 78 AD3d 642, 644, 910 NYS2d 171 [2d Dept 2010], quoting ***Kurek v Port Chester Hous. Auth.***, 18 NY2d 450, 456, 276 NYS2d 612 [1966] [internal quotation marks omitted]; ***Sovereign Bank v Biagioni***, 115 AD3d 847, 982 NYS2d 322 [2d Dept 2014]). That is, courts are inclined to deny an indemnitee protection against its own negligence where the contractual language could be construed to mean that the indemnitor was assuming responsibility for its own negligence or defective performance under the contract (***Walters v Rao Elec. Equip. Co.***, 289 NY 57, 43 NE2d 810 [1942]; ***Szalkowski v Asbestospray Corp.***, 259 AD2d 867, 686 NYS2d 243 [3d Dept 1999]; ***Lewis v McCrory Corp.***, 49

AD2d 734, 372 NYS2d 683 [1st Dept 1975]). Here, Penske has failed to establish its prima facie entitlement to summary judgment regarding its cause of action for contractual indemnification.

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (***Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership***, 304 AD2d 738, 739, 759 NYS2d 107 [2d Dept 2003]; *see* ***DiBuono v Abbey, LLC***, 83 AD3d 650, 652, 922 NYS2d 101 [2d Dept 2011]). The Lease at Paragraph 9, entitled "Liability Coverage," states in pertinent part:

> CUSTOMER, shall at its sole cost provide liability coverage for CUSTOMER and PENSKE TRUCK LEASING and it partners and their respective agents, servants and employees, in accordance with the standard provisions of a basic automobile liability insurance policy as required in the jurisdiction in which the Vehicle is operated, against liability for bodily injury, including death and property damage arising out of the ownership, maintenance, use and operation of the Vehicle(s) with limits of at least a combined single limit of One Million Dollars($1,000,000.00) per occurrence. Such Coverage shall be primary and not excess or contributory and shall be in conformity with the motor vehicle minimum financial responsibility laws as respects "Uninsured Motorists", "No-Fault", or other optional coverage. Any liability insurance obtained by PENSKE TRUCK LEASING shall be excess insurance over all insurance obtained by TRUCK LEASING as an additional insured and shall be in a form acceptable to PENSKE TRUCK LEASING.

In support of this branch of its motion, Penske submits, among other things, the affirmation of its attorney, and a copy of correspondence from Domain's automobile liability insurance carrier, Liberty Mutual Insurance (Liberty), dated April 26, 2013. In said correspondence, Liberty essentially acknowledges that Domain is its insured, and that Penske is an additional insured, and offers to provide a defense in this action "subject to a reservation of rights to deny coverage if it is determined that no coverage is owed under the policy." The correspondence also confirms that the policy limit of the subject insurance policy is $1,000,000. Penske does not submit a copy of Domain's automobile liability insurance policy. Here, there is an issue of fact whether Domain obtained the insurance coverage required pursuant to its contract with Penske. The Court can not determine the coverage afforded to Penske under the subject policy where the relevant policy is not submitted in support of this motion for summary judgment (*see e.g.* ***Tower Ins. Co. of N.Y. v T & G Contr. Inc.***, 44 AD3d 933, 845 NYS2d 356 [2d Dept 2007]).

Nonetheless, counsel for Penske contends that, because said correspondence indicates that Liberty takes the position that a condition in the policy will likely result in a denial of insurance coverage to Domain and Penske in this action, Domain has failed to perform under the Lease. The correspondence, however, does not demonstrate that Domain failed to procure insurance naming Penske as an additional insured and, hence, does not establish Penske's prima facie entitlement to judgment as a

matter of law. Here, Penske has failed to establish its prima facie entitlement to summary judgment regarding its cause of action for failure to procure insurance.

The failure to make a prima facie showing of entitlement to summary judgment dismissing the complaint, and on its causes of action for contractual indemnification and failure to procure insurance, requires a denial of said branches of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hospital***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). Accordingly, Penske's motion for summary judgment is denied in its entirety.

The plaintiff now cross-moves for an order pursuant to CPLR 3126 sanctioning Penske, in any manner the Court deems appropriate, for allegedly failing to preserve the subject truck and lift gate, and the records of the drivers' inspection reports for the truck. It has been held that a motion pursuant to CPLR 3126 seeking to impose a sanction for spoliation is untimely when made after a note of issue has been filed which does not reserve the party's rights to seek such relief or protecting its objections regarding disclosure (***Rivera-Irby v City of New York***, 71 AD3d 482, 896 NYS2d 337 [1st Dept 2010]; *see also* ***K-F/X Rentals & Equip., LLC v FC Yonkers Assoc., LLC***, 131 AD3d 945, 15 NYS3d 891 [2d Dept 2015]; *cf.* ***Horizon Inc. v Wolkowicki***, 55 AD3d 337, 865 NYS2d 195 [1st Dept 2008]). The computerized records maintained by the Court indicates that the plaintiff filed a note of issue and statement of readiness on November 23, 2015. The instant cross motion was made on June 3, 2016, the date that it was served (CPLR 2211). Accordingly, the plaintiff's cross motion is deemed untimely.

Nonetheless, a ruling as to the admissibility of evidence offered, and the wisdom of sanctioning Penske for any alleged spoliation, or delivering an adverse inference charge to the jury at trial, should be made at the time of trial, when a determination as to the relevance of such evidence and such charge may be made in context (*see* ***Grant v Richard***, 222 AD2d 1014, 636 NYS2d 676 [4th Dept 1995]; ***Speed v Avis Rent-A-Car***, 172 AD2d 267, 568 NYS2d 90 [1st Dept 1991]). Accordingly, the cross motion is denied, without prejudice to renewal at the time of trial.

Dated: Apl 4th, 2017

A.J.S.C.

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