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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 100165/10
Motion No.: 009 & 010

VINCENT CACCESE,

Action No. 1

Plaintiff

against

DECISION & ORDER

LIEHBERR CONTAINER CRANES, LTD., LIEHBERR CRANES INC.

HON. JOSEPH J. MALTESE

Defendants

LIEHBERR CONTAINER CRANES, LTD.

Index No. A100165/10

Third-Party Plaintiff,

Action No. 2

against

CARGOTEC SOLUTIONS, LLC,

Third-Party Defendant.

The following items were considered in the review of these motions to dismiss

	Numbered
Motion No. 9	
Defendant Liehberr's Motion for Summary Judgment, to include Affirmation in Support dated October 2, 2013	1
Memorandum of Law in Support of Motion dated October 2, 2013	2
Affirmation in Opposition with Exhibits	3
Reply Affirmation in Support of Liehberr's Motion for Summary Judgment with Exhibits	4
Motion No. 10	
Third-Party Defendant Cargotec Solutions, LLC Motion for Summary Judgment including the Affirmation of Glen F. Fuerth, Esq. in Support of the Motion dated October 4, 2013, with Exhibits	1
Memorandum of Law dated October 4, 2013	2
Affirmation in Opposition to Summary Judgment by John Dugan, Esq., Counsel for Defendant/Third-Party Plaintiff dated December 2, 2013	3

Memorandum of Law of Liehberr In Opposition to the Motion for Summary Judgment dated December 21, 2013	**4**
Reply Affirmation of Glen J. Fuerth, Esq. in Further Support of Defendant Cargotec's Motion with Exhibits Dated December 16, 2013	**5**
Affirmation in Further Opposition by John M. Dugan, Esq. Dated December 17, 2013	**6**

These matters having come on for hearing on December 20, 2013 and this court having read the foregoing papers listed above, this court denies the motion of the defendants, Liehberr Container Cranes, Ltd. and Liehberr Cranes, Ltd. to dismiss the plaintiff's causes of action from Action No. 1 (Motion 009) and further denies the motion of Cargotec Solutions, LLC, the third-party defendant to dismiss Liehberr Container Cranes, Ltd. causes of action from Action No. 2 (Motion 10).

The plaintiff, Vincent Caccese, claims that on August 9, 2007, while working at the Howland Hook Marine Terminal (now known as and hereinafter referred to as the New York Container Terminal ("NYCT")) as a hustler driver, he was injured. The claimed cause of his injury was the malfunction of a container crane; manufactured by PACECO, and refurbished earlier in 2007 by the defendant, Liehberr. The plaintiff claims that a container which was being lowered by the operator of the subject container crane, Louis Spitalieri . . . "suddenly and without warning dropped with excessive force and speed . . ." and struck the trailer attached to his hustler, thereby causing his hustler to shake and in turn causing him to be thrown about the interior of the cab of the hustler. A hustler is a simplified truck tractor used to pull trailers and chassis. (See Dep. Exs. 3, 5 and 14.) The trailers used (sometimes called bomb carts or red birds) are also modified with slanted sides so as to assist the crane operator in landing a container onto the trailer. A truck chassis was not involved in this case. When a container is lowered by the container crane operator, the front of the container (end without an opening) is closest to the front of the trailer (end of trailer closest to the hustler) and the back of the container (end with the doors of the container) is closest to the rear of the trailer.

Mr. Caccese never saw the container that he alleges struck his trailer with excessive force. (Caccese Dep. p. 80, l. 16-18; p. 83, l. 24 to p. 85, l. 6.) The operator of the crane, Louis Spitalieri, has no knowledge of the events of August 9, 2007. (Spitalieri Dep. p. 91 l. 11-16; p. 103, l. 20-23; p. 148, l. 5-17.) A co-worker, Cynthia Brooks, who was also a hustler driver was a witness to the event complained of by Mr. Caccese.

Ms. Brooks was located in her hustler with a trailer attached, two hustlers behind the hustler operated by Mr. Caccese. Her perspective was such that the trailer's/container's right side was to her right and the trailer's/container's left side was to her left.

Mr. Brooks, now deceased, appeared for her deposition on February 6, 2012. During her deposition, Ms. Brooks testified that at the time of the plaintiff's alleged injury, she observed a container being lowered by the crane operator toward the trailer attached to the plaintiff's hustler at a rate that was faster than usual. That the subject container was twisted (skewed) to the right (right-front of the container was positioned to the right of the right side of the trailer and the left-rear of the trailer was positioned to the left of the left side of the trailer). That the front of the container was tilted (trimmed) so that the front of the container was lower than the rear of the container. That the container was listing to the right (right side of the container was lower than the left side of the container). Because of the position of the container, as it was being lowered, it first made contact with the right front corner of the trailer before making contact with any other portion of the trailer, and the trailer tilted right when the container first made contact. When the container was first put down on the plaintiff's trailer, it was not straight and the operator had to lift the container and put it back down again. Ms. Brooks did not observe anything that caused her to know why the container was lowered in the manner she described, a manner she also stated was unusual. (Brooks Dep. p. 26, l. 7-17; p. 27, l. 11 to p. 28, l. 10; p. 30, l. 23 to p. 31, l. 10; p. 33, l. 24 to p. 34, l. 6; p. 35, l. 8 to p. 37, l.2; p. 55, l. 16-19.)

Mr. Spitalieri, the operator of the crane never stopped working and there was no shutdown of the work after Ms. Brooks observed the container placed onto the plaintiff's red bird. (Brooks Dep. p. 23, l. 25 to p. 24, l. 14.)

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".[1] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[2] As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.[3] On a motion for summary judgment, the function of the court is issue finding, and not issue determination.[4] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.[5]

Motion No. 9

After reading the papers and exhibits submitted and the arguments of counsel for each of the parties, it appears to this court that there are issues of fact as to the method of operation of the crane's spreader bar as it descended with the loaded container towards the red bird vehicle. The defendant, Liebherr argues that this accident occurred due to a human error by crane operator, Louis

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[1] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

[2] *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

[3] *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

[4] *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

[5] *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

Spitalieri, who failed to further slow down the dissent of the container before attempting to place it on the red bird operated by the plaintiff.

The plaintiff has argued that this type of accident is foreseeable. Plaintiff's experts testified that the slow down mechanism on the container crane requires a back up or redundancy system to prevent the type of accident that occurred in this case. The defendant, through its expert, argues that the slow down system is designed perfectly and is adjusted by the owner, New York Container Terminal, as to the speed and distance by which the container is slowed down sufficiently to safely place it upon the red bird. It is the contention of the defendant Liebherr, who refurbished the crane in 2007, that the design was proper and that it was not defective because it lacked a backup or redundant slow down system, which the plaintiff's experts claim was in use by most of the other container terminals in the United States.

To prevail on a claim for design defect under theories of strict tort liability and negligence, a plaintiff must demonstrate that (1) the product as designed was "not reasonably safe," (2) there was a safer, feasible alternative design at the time of manufacture; and (3) the defective design was a substantial factor in causing the plaintiff's injuries.[6]

There appears to be a vast difference of opinion between the presented plaintiff's and defendant's expert opinions. The plaintiff has demonstrated that the subject slow down mechanism may not have been reasonably safe and there were safer, feasible alternative designs at the time of the crane refurbishing by the defendant that were in use in other container terminals and that the lack of the redundant slow down system, which only left foreseeable operator error in allowing a loaded container to descend onto the plaintiff's red bird at an excessive speed and force which was a substantial factor in causing plaintiff's injury.

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[6] *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 107 (1983); *Gonzalez v. Delta Intl. Mach. Corp.*, 307 A.D.2d 1020, 1021, (2 Dept. 2003).

The Appellate Division, Second Department in *Gleeson-Casey v. Otis Elevator Co.*,[7] held that "the weight to be afforded the conflicting testimony of experts is a matter particularly within the province of the jury."[8] In 2013 the Appellate Division, Second Department held that where there are conflicting expert opinions with regard to the reasonable safety of a machine, the denial of summary judgment is appropriate.[9] This is exactly what is presented by the opinions of plaintiff's expert Matt Hartzell and defendant's in-house expert Jerry Clifford. Consequently, the defendant, Liehberr is not entitled to summary judgment dismissing the plaintiff's causes of action against it.

Motion No. 10

The cross-claims against Cargotec Services USA by Liehberr were voluntarily abandoned by Liehberr as to the quality of the work performed by Cargotec Services USA are accordingly dismissed.

As to the claims by Liehberr against Cargotec Solutions, LLC, those claims are not dismissed as there still remains conflicting positions of whether Cargotec or its predecessor company, Kalmar, provided hustler vehicles with seatbelts, which the drivers, like the plaintiff, Vincent Caccese, could have used. Moreover, counsel for Cargotec admitted in court that Cargotec did not post any warnings to the drivers to wear seatbelts. While the plaintiff could not confirm if there was a seatbelt in the hustler he was driving on the date of the accident, he claimed in a Notice to Admit that had he been warned to wear a seatbelt, he would have worn it if it was available.

Whether Caccese's wearing of a seatbelt would have prevented or minimized his injuries is another issue of fact for a jury or a judge to determine. Consequently, Cargotec is not entitled to summary judgment on those issues in the cross-claims by Liehberr.

Accordingly, it is hereby:

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[7] 268 A.D.2d 406, (2d Dept. 2000).

[8] *Id.*

[9] *Melendez v. Abel Womack, Inc.*, 103 A.D.3d 609 (2d Dept. 2013).

ORDERED, that the motion (Number 9) of defendant, Liebherr Container Cranes, Ltd., is denied in all respects; and it is further

ORDERED, that the motion (Number 10) of the third-party defendant, Cargotec Solutions, LLC, is granted in part to dismiss the third-party plaintiff, Liebherr Container Cranes, Ltd. cross-claim as to the quality of the work performed by Cargotec Services USA, a/k/a Cargotec Solutions, Ltd.; and it is further

ORDERED, that all other cross-claims of Liebherr against Cargotec Solutions, LLC are not dismissed; and it is further

ORDERED, that Cargotec Services USA is hereby dismissed from Action No. 1; and it is further

ORDERED, that the case shall proceed to trial on the remaining issues.

This case is transferred for trail to Justice Judith N. McMahon, the Assignment Judge, to schedule a date for this non-jury trial.

ENTER,

DATED: January 16, 2014

Joseph J. Maltese
Justice of the Supreme Court