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SHORT FORM ORDER

INDEX No. 11-11842

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 4-2-15 (004)
MOTION DATE 5-5-15 (005)
MOTION DATE 9-23-15 (006)
ADJ. DATE 8-9-16
Mot. Seq. #004- MG
#005- MG
#006- MD

MAXIM K. KARAFIAN and SUE KARAFIAN,

Plaintiffs,

- against -

MULTI-FLOW INDUSTRIES, LP, RIST TRANSPORT, LTD., d/b/a HOWARD'S EXPRESS, ROCKWELL FREIGHT FORWARDING, LLC, and PRESTIGE TRANSPORTATION & LOGISTICS, LLC,

Defendants.

PRESTIGE TRANSPORTATION & LOGISTICS, LLC,

Third-Party Plaintiff,

- against -

LONG ISLAND BEVERAGE SYSTEMS, INC.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 64 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; 20 - 31; 32 - 38 ; Answering Affidavits and supporting papers 39 - 56; 57 - 58; 59 - 60 ; Replying Affidavits and supporting papers 61 - 62; 63 - 64 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Multi-Flow Industries, LP for summary judgment dismissing plaintiffs' complaint against it is granted; and it is further

ORDERED that the motion by defendant RIST Transport, Ltd., d/b/a Howard's Express, Rockwell Freight Forwarding, LLC for summary judgment dismissing plaintiffs' complaint against it is granted; and it is further

ORDERED that the motion by third-party defendant Long Island Beverage Systems, Inc. for an order dismissing as abandoned the complaint by third-party plaintiff Prestige Transportation & Logistics, LLC is denied.

This action arises out of a complaint filed by plaintiff Maxim K. Karafian (Karafian) to recover damages for injuries he allegedly sustained on June 25, 2010 while working at the premises rented by Long Island Beverage Systems, Inc. and located at 921 Conklin Street, Suite F, Farmingdale, New York. Karafian's wife, plaintiff Sue Karafian, brings a derivative claim for loss of services.

Karafian is a general manager and half-owner of Long Island Beverage Systems, Inc. (LIBS). It is undisputed that at approximately 4:00 p.m. on the date in question, Karafian was alone in LIBS's warehouse, used a forklift to lift a pallet containing 45 three-gallon boxed bags of concentrated energy-drink syrup approximately eight feet into the air, climbed the forklift, stood on a raised shelf adjacent to the forklift, then began moving the boxes from the pallet to the shelf. At the point Karafian had cleared a sufficient number of boxes from the pallet to the shelf such that the edge of the pallet was exposed, he decided to stand on that edge of the pallet and continue transferring the boxes from there. After moving approximately 12 boxes from the pallet to the shelf, the portion of the pallet on which he was standing broke off, causing Karafian to fall to the floor.

Defendant Multi-Flow Industries, LP (Multi-Flow) manufactures the boxed energy-drink syrup that was present on the pallet in question. Defendants RIST Transport, Ltd. d/b/a Howard's Express, Rockwell Freight Forwarding, LLC (collectively, RIST), and Prestige Transportation & Logistics, LLC (Prestige) are all alleged by plaintiffs to have participated in the shipping of Multi-Flow's product from its location in Pennsylvania to LIBS. Multi-Flow and RIST assert cross claims against each other for indemnification, and Prestige asserts a third-party claim against LIBS for indemnification.

Multi-Flow and RIST now move for summary judgment. Multi-Flow argues that it did not supply the pallet in question and that it did not owe plaintiffs a duty of care. In support of its motion, Multi-Flow submits an affidavit of Richard Gonnella, a copy of a packing slip, a copy of a signed delivery reciept,

multiple photographs, copies of the pleadings, and deposition testimony of Karafian and Mr. Richard Gonnella. RIST moves for summary judgment against plaintiffs on the grounds that there is no evidence its actions damaged the pallet in question, that it had no notice of any dangerous condition, that Karafian accepted delivery of the product and found it satisfactory, and that the pallet performed its intended function until Karafian stood on it. In support of its motion, RIST submits a copy of the contract governing shipping and the deposition testimony of Mr. Stephen Wadhams. Further, LIBS moves at this time for dismissal of Prestige's third-party action against it for indemnification on the ground that Prestige failed to move to enter judgment within one year of LIBS's default in that action.

At his deposition, Karafian testified that he was the one who signed for the delivery from Multi-Flow when it arrived, and that he confirmed the correct number of boxes were present, but he did not inspect the pallet that they were resting upon. Karafian stated that he had 22 years of experience operating forklifts, but no formal training. He indicated that the pallet filled with Multi-Flow's product was lifted by his forklift for approximately ten minutes before he began transferring the boxes on it to his shelf. He testified that he was standing on the edge of the pallet for approximately ten minutes before he fell. He further testified that within a week after his accident, he inspected the subject pallet and noted that at the point at which the pallet broke, each of the three main supporting pieces of wood had been cut by a saw, making them particularly weak and susceptible to breaking. He also stated that he did not know who may have cut those pieces of the pallet.

Richard Gonnella, Multi-Flow's Director of Manufacturing and Warehousing, testified that Multi-Flow manufactures sodas and juices, which are packed as bags of syrup in individual cardboard boxes, stacked on pallets, and then shrink-wrapped together. He testified that on June 24, 2015, LIBS ordered 45 boxes of "Re-Fuel," an energy drink, from Multi-Flow. This product, he stated, was stacked evenly on a pallet, then shipped to LIBS the next day by RIST. Mr. Gonnella testified that Multi-Flow obtains its pallets from a nonparty company known as Wesley's Pallets, that those pallets do not have anything printed on them, and that the pallets never are reused or recovered from the clients to whom they are shipped. In addition, Mr. Gonnella testified that the pallets Multi-Flow purchases from Wesley's are inspected for cracks when they arrive and any defective pallets are returned to Wesley's.

Stephen Wadhams, deposed on behalf of RIST, testified that it was notified of Multi-Flow's desire to procure shipment of its product to LIBS by Rockwell Freight Forwarding. He testified RIST arranged pick-up of that product and then transferred it to a truck operated by Prestige, which completed the delivery to LIBS. He further testified that if a transport driver saw any dangerous condition with regard to the shipped items they would be expected to note that condition on a strip manifest. He stated he was unaware of any such notations in relation to the shipment in question.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to

raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by defendant to plaintiff, a breach of that duty, and resulting injury which was proximately caused by the breach (*see* ***Solomon v City of New York***, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; ***Conneally v Diocese of Rockville Ctr.***, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]). "[A] duty of reasonable care owed by a tortfeasor to an injured party is elemental to any recovery in negligence" (***Palka v Servicemaster Management Servs. Corp.***, 83 NY2d 579, 584, 611 NYS2d 817 [1994]). "[T]he definition of the existence and scope of an alleged tortfeasor's duty is usually a legal, policy-laden declaration reserved for [j]udges to make" (*id.*). As the circumstances of this case are somewhat unique, the Court is forced to utilize a hybrid analysis to determine the burden owed by defendants herein.

A defendant's duty of care, when transferred property is the subject of a negligence action, is dependent upon whether said transfer was a sale, a gratuitous bailment, or bailment for the mutual benefit of the parties. A party owes a duty of care where it loans property to another, and the conduct necessary to satisfy such duty depends on facts and circumstances, including the type and the purpose of the bailment (***Dufur v Lavin***, 101 AD2d 319, 476 NYS2d 389 [3d Dept 1984]; *see also* ***Fili v Matson Motors, Inc.***, 183 AD2d 324, 590 NYS2d 961 [4th Dept 1992]). "A bailment, made without compensation and without any benefit to the bailee, is a gratuitous bailment" (***Massimo v Martucci Dev. Corp.***, 1 Misc 3d 130[A], 781 NYS2d 625 [App Term, 2d Dept 2003]). Generally, a gratuitous bailor is under a duty to warn of a defect or hazard of which it has actual knowledge, and to warn the bailee of defects that were not readily discernible (***Pineda v North E. Sec. Dev. Corp.***, 271 AD2d 591, 707 NYS2d 846 [2d Dept 2000]; ***Acampora v Acampora***, 194 AD2d 757, 599 NYS2d 614 [2d Dept 1993]; ***Sofia v Carlucci***, 122 AD2d 263, 505 NYS2d 178 [2d Dept 1986]; ***Daoust v Palmenteri***, 109 AD2d 774, 486 NYS2d 288 [2d Dept 1985]). In the case of a mutual bailment, where a bailment benefits both parties, the bailor must warn the bailee of any known defects, and it impliedly represents that the chattel is reasonably fit for its intended purpose (***Santiago v United Cerebral Palsy of Ulster County, Inc.***, 77 AD3d 1270, 910 NYS2d 220 [3d Dept 2010]; ***Fili v Matson Motors, Inc.***, *supra*).

Here, none of the named defendants is alleged to be the manufacturer of the subject pallet, or that the pallet was defectively designed or defectively manufactured. Rather, the evidence indicates that LIBS entered into an agreement with Multi-Flow to purchase boxes of beverage syrup. Those boxes of syrup were delivered to LIBS atop a pallet. There is no evidence that LIBS was purchasing said pallet (*see* ***Crist v K-Mart Corp.***, 653 NE2d 140 [Ind Ct App 1995]). In fact, Multi-Flow's witness testified that the company had no expectation that the pallets it used to ship its products would be returned by its clients; any pallet was provided to the client at no cost. Thus, defendants' primary duty was to deliver Multi-Flow's product to LIBS intact, which is proven by Karafian's signature upon RIST's "Delivery Receipt," as well as his deposition testimony.

The arrangement between Multi-Flow and LIBS (and, concomitantly, RIST and Prestige), with regard to the subject pallet, was most akin to a gratuitous bailment. Accordingly, defendants owed a duty to Karafian to warn him of any defect or hazard of which they had "actual knowledge" or was not "readily discernable" (*see* ***Pineda v North E. Sec. Dev. Corp.***, *supra*). As defendants testified to having no knowledge of any defect in the pallet in question, Multi-Flow and RIST established their prima facie entitlement to summary judgment.

The burden then shifted to plaintiffs to establish a triable issue of material fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). To that end, plaintiffs submit, in addition to those materials already submitted by the movants, affidavits of Karafian, Mr. Joseph R. Franco and Mr. Joseph Schmitt, and various photographs.

Mr. Schmitt, a professional engineer testifying on behalf of plaintiffs, swears in an affidavit that the pallet in question, as loaded by defendants, was not, in his professional opinion, overstressed at the time of Karafian's accident. He avers that "cracks" were present in the wooden ribs located "well away" from the section of the pallet that failed, and that the general appearance of the pallet was "that of considerable past use." He concludes that "the pallet was in a damaged and weakened condition prior to the failure incident" and that such condition was the cause of its failure.

Plaintiffs mistakenly contend that defendants had a duty to inspect the pallet in question and ensure that no defects were present, citing ***McGough v Cryan, Inc.***, 111 AD3d 900, 976 NYS2d 135 (2d Dept 2013). In that case, sounding in premises liability, a bar owner was denied summary judgment when it did not establish, prima facie, that it maintained its premises in a reasonably safe condition. The instant case cannot be based upon the tenets of premises liability due to the accident occurring at a premises partially owned by Karafian.

Plaintiffs also allege that defendants breached their implied warranty of fitness of the subject pallet for a particular purpose, citing ***Winckel v Atlantic Rentals & Sales***, 159 AD2d 124, 557 NYS2d 951 (2d Dept 1990). In ***Winckel***, the court held that "a lessor of a chattel will be held to have made an implied warranty that the chattel in question is fit to be used as intended" (*id.* at 127). Here, none of the defendants were "lessors" of the pallet and, even if the Court were to assume them to be, the pallet in question fully performed its intended function by providing a stable base for Multi-Flow's product throughout the entire shipping process, including when lifted by a forklift. In ***Winckel***, by contrast, defendant was in the business of renting equipment and leased plaintiff an allegedly defective chair. The "strict liability on manufacturers and sellers in the normal course of business . . . lack[s] applicability in the case of a party who is not engaged in the sale of the product in issue as a regular part of its business (***Sukljian v Charles Ross & Son Co.***, 69 NY2d 89, 95, 511 NYS2d 821 [1986]; *see* ***Gebo v Black Clawson Co.***, 92 NY2d 387, 681 NYS2d 221 [1998]; *see also* ***Gobhai v KLM Royal Dutch Airlines***, 85 AD2d 566, 445 NYS2d 445 [1st Dept 1981], *affd* 57 NY2d 839, 455 NYS2d 764 [1982] [airline not strictly liable when traveler fell while using airline's complementary slippers at home, because airline was not in the regular business of manufacturing slippers]).

After the beverage syrup was delivered by defendants, it was Karafian's choice how to store that product and how to dispose of the packaging materials, which included the pallet. Karafian, in choosing

to re-purpose that pallet as an elevated platform, was himself responsible for ensuring its structural soundness and safety to stand upon. It has been held that the duty to warn of a product's danger does not arise when the injured party is already aware of the specific hazard (***Mangano v United Finishing Serv., Corp.***, 261 AD2d 589, 590 [2d Dept 1999]). Karafian possessed 22 years of experience operating forklifts. Parenthetically, the Court notes that Exhibit I of plaintiff's opposition is a photograph of the forklift in question on which there is affixed a sticker clearly warning against a user's standing upon the forks of that forklift. Therefore, plaintiffs have failed to raise a triable issue of material fact. Accordingly, the motions for summary judgment dismissing the complaints and cross claims as against Multi-Flow and RIST are granted.

The Court now turns to LIBS's motion for dismissal of the third-party claim by Prestige against it. Prestige commenced a third-party claim against LIBS on June 20, 2014 for indemnification. The summons and third-party complaint were served upon LIBS by service upon the Secretary of State on July 22, 2014. LIBS admits it failed to answer the third-party complaint within the statutory time. LIBS now moves to dismiss Prestige's third-party claim on the ground Prestige has not moved for a default judgment against it within one year. CPLR 3215 (c) provides, in relevant part, "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . on motion, unless sufficient cause is shown why the complaint should not be dismissed." However, "in third-party actions, CPLR 3215 (c)'s mandate that an action is deemed abandoned unless 'proceedings' towards a default are taken within one-year of the default, does not apply to indemnification claims until liability is established in the main action" (***IMP Plumbing & Heating Corp. v 317 E. 34th St., LLC.***, 89 AD3d 593, 594, 933 NYS2d 252 [1st Dept 2011]; *see* ***Multari v Glalin Arms Corp.***, 28 AD2d 122, 282 NYS2d 782 [2d Dept 1967]). As Prestige's complaint seeks indemnification from LIBS in the event that Prestige is found liable for Karafian's accident, LIBS's motion to dismiss Prestige's third-party complaint is denied.

This matter will be set down for further proceedings with regard to the sole remaining defendant/third-party plaintiff, nonmovant Prestige, and third-party defendant LIBS.

Dated: July 7, 2016

W. Gerard Asher
J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**