

All Craft Fabricators, Inc. v ATC Assoc. Inc.
2018 NY Slip Op 32131(U)
August 30, 2018
Supreme Court, New York County
Docket Number: 156897/2013
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

**ALL CRAFT FABRICATORS, INC. and
DONALDSON INTERIORS, INC.,**
Plaintiffs,

INDEX NO. 156897/2013

MOTION DATE 08/29/2018

MOTION SEQ. NO. 014

- against -

**ATC ASSOCIATES INC., CARDINO ATC,
SKANSKA USA BUILDING INC., CERTIFIED MOVING
AND STORAGE CO., LLC, HLW INTERNATIONAL LLP,
WING INC., SPECIALTY TRADES, TERRASAN
ENVIRONMENTAL SOLUTIONS, INC., PINNACLE
ENVIRONMENTAL CORP., THE MANHATTAN COMPANY
OF NEW YORK, LLC, INTERNATIONAL PAPER COMPANY
and OWENS-ILLINOIS, INC.,**

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 8 were read on this motion for summary judgment by Certified Moving and Storage Co., LLC:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	<u>7 - 8</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Certified Moving and Storage Co., LLC's ("Certified Moving") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against it is granted, Plaintiffs' Complaint and all cross-claims against Certified Moving is dismissed.

The United Nations ("UN") adopted a resolution to renovate its headquarters complex in New York on June 30, 2006 (Moving Papers Ex. G, known as the "Capital Master Plan"). The UN hired Defendant Skanska USA Building Inc. ("Skanska") as the construction manager for the Capital Master Plan (*Id* at Ex. H). The UN subsequently awarded Defendant Certified Moving a contract for moving services on August 16, 2009 (*Id* at Ex. K). The UN requested that Certified Moving pick up and transport 50 crates from the UN to Certified Moving's warehouse in October 2010 (June 1, 2018 Affidavit of Douglas Dayne).

In December 2011 a UN representative notified Certified Moving to deliver 27 of the 50 crates to Plaintiff All Craft Fabricators, Inc.'s ("All Craft") warehouse (Dayne Affidavit). Certified Moving delivered all 27 requested crates to All Craft's warehouse by February 21, 2012. All Craft's shipping receiving manager Joe Tyler accepted the crates for delivery (Moving Papers Ex. M). All Craft personnel removed the contents from the crates, evaluated which doors and panels to use for the Capital Master Plan, and then cut, edge, sand, finish and assemble those materials (*Id*). Plaintiffs allege that while cutting into the doors and wood panels, hazardous asbestos escaped and contaminated their warehouse (*Id* at Ex. A). Plaintiffs commenced this action on July 29, 2013 to recover for damages resulting from the Plaintiffs' warehouse being exposed to asbestos.

Certified Moving now moves for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against it. Certified Moving contends that smmary judgment must be granted because: (i) Plaintiffs'

FOR THE FOLLOWING REASON(S):
FULLY REFERRED TO JUSTICE

negligence claims fail because Certified Moving owed them no duty; (ii) Plaintiffs cannot establish trespass as a matter of law; and (iii) Plaintiffs cannot establish nuisance as a matter of law.

The Plaintiffs oppose the motion contending that summary judgment must be denied because: (i) Certified Moving failed to annex admissible evidence, which without it, cannot make a prima facie showing of entitlement to judgment as a matter of law; (ii) Certified Moving made this motion prematurely as depositions of other defendants remain outstanding; and (iii) contradictions in testimony demonstrates issues of fact requiring denial of this motion.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], *aff'd* 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

The Plaintiff must establish three elements in a claim for negligence: “(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. The question of whether a defendant owes a legally recognized duty of care to a plaintiff is the threshold question in any negligence action” (*On v BKO Express LLC*, 148 AD3d 50, 45 NYS3d 68 [1st Dept. 2017]). A transporter of goods has no duty to inspect the contents of the containers it is hauling (*Banner Mfg. Co. v Long Island R. Co.*, 277 AD 142, 97 NYS2d 730 [1st Dept. 1950] *citing* *Lewis v N.Y., O. & W. R. Co.*, 210 NY 429, 104 NE 944 [1914]).

Certified Moving had no duty to the Plaintiffs. Certified Moving executed a contract only with the UN to move furniture, files and other items for it in connection with the relocation of employees during construction. Certified Moving establishes that there is no evidence that it knew that the crates contained asbestos as the contract made no references to the transporting of hazardous materials, nor inserted any legal obligation to inspect the crates. Furthermore, *arguendo*, even if Certified Moving undertook a duty to inspect, the duty did not extend to the Plaintiffs as third-parties to Certified Moving’s contract (*Espinal v Melville Snow Contractors*, 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 [2002]). Certified Moving makes a prima facie showing that Plaintiffs’ negligence claim against it must be dismissed.

“Trespass is the invasion of a person’s right to exclusive possession of his land and includes the entry of a substance onto land” (*Berenger v 261 W. LLC*, 93 AD3d 175, 940 NYS2d 4 [1st Dept. 2012]). The defendant must “intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness” (*Phillips v Sun Oil Co.*, 307 NY 328, 121 NE2d 249 [1954]). A “plaintiff is unable to establish a claim for trespass under New York state law where he or she consents to the defendant’s presence on the property” (*Frederique v Cty. of Nassau*, 168 F. Supp. 3d 455 [EDNY 2016] *citing* *Hill v Raziano*, 63 AD3d 682, 880 NYS2d 173 [2nd Dept. 2009]).

Certified Moving makes a prima facie showing that Plaintiffs' claim based on trespass must be dismissed. Certified Moving established that it did not know the crates contained asbestos. Furthermore, Certified Moving establishes that All Craft consented to Certified Moving's delivery of the crates and willingly accepted the delivery (Opposition Papers Ex. U).

The Plaintiff must demonstrate five elements for a private nuisance claim: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (Copart Indus., Inc. v Consol. Edison Co., 41 NY2d 564, 394 NYS2d 169, 362 NE2d 968 [1977]).

Certified Moving makes a prima facie showing that Plaintiffs' claim based upon private nuisance must be dismissed. Certified Moving establishes that its actions were not "intentional in origin" or "unreasonable in character." Certified Moving was solely responsible for transporting crates from the UN to its facility, and then to Plaintiffs' warehouse. Certified Moving never intended to deliver asbestos to the Plaintiffs.

If an unsigned deposition transcript is certified by the court reporter, it may be annexed into evidence as support for a motion for summary judgment, as long as they are certified by the court reporter as accurate (White Knight Ltd. v Shea, 10 AD3d 567, 782 NYS2d 76 [1st Dept. 2004]). The lack of any dispute over the accuracy of deposition transcripts further supports admissibility (Luna v CEC Entm't, Inc., 159 AD3d 445, 71 NYS3d 80 [1st Dept. 2018]).

"Allegations of mere hope that [further] discovery will reveal something helpful...provides no basis for postponing the determination" of a summary judgment motion (Bryan v City of N.Y., 206 AD2d 448, 614 NYS2d 554 [2nd Dept. 1994]).

Plaintiffs fail to raise any triable issues of fact. Since the court reporter certified the deposition transcripts that Certified Moving relied upon, the transcripts are admissible (Reply Papers, Exs. U, V, W; see Rodriguez v Ryder Truck, Inc., 91 AD3d 935, 937 NYS2d 602 [2nd Dept. 2012] *party allowed to "submit the certification page of the deposition of defendant... on reply in response to the defendants' arguments in opposition"*). Plaintiffs have deposed Certified Moving and reviewed voluminous amounts of documents. Plaintiffs contention that depositions from other defendants may reveal that Certified Moving knew about the contents of the packages, amount to "mere hope," and is insufficient cause to deny Certified Moving's motion.

Finally, Certified Moving's affidavit and deposition testimony by Douglas Dayne, partner at Certified Moving in charge of the UN Project, is consistent with the affidavit from Richard L. Hoffman, of Richard L. Hoffman and Associates, Inc. (Plaintiffs allege that Mr. Hoffman's statement that he "did not supervise, direct, or instruct Certified Moving in reference to the delivery of any crates...to All Craft's facility," is inconsistent with Mr. Dayne's June 1, 2018 Affidavit stating that "the UN's own representative notified Certified Moving that it would be requesting that we deliver 27 of the 50 crates to the All Craft facility"). Plaintiffs fail to raise any triable issues of fact, requiring that this court grant Certified Moving's motion for summary judgment and dismiss Plaintiffs Complaint and all cross-claims against it.

Accordingly, it is ORDERED, that Defendant Certified Moving and Storage Co., LLC's motion for summary judgment pursuant to CPLR §3212 is granted, and it is further,

ORDERED, that the Complaint and all cross-claims against Defendant Certified Moving and Storage Co., LLC are dismissed, and it is further,

ORDERED, that the caption is amended to remove Defendant Certified Moving and Storage Co., LLC as a party Defendant, and it is further,

ORDERED, that the caption in this action is amended and shall read as follows:

**ALL CRAFT FABRICATORS, INC. and
DONALDSON INTERIORS, INC.,**

Plaintiffs,

-against-

**ATC ASSOCIATES INC., CARDINO ATC,
SKANSKA USA BUILDING INC., HLW INTERNATIONAL LLP,
WING INC., SPECIALTY TRADES, TERRASAN
ENVIRONMENTAL SOLUTIONS, INC., PINNACLE
ENVIRONMENTAL CORP., THE MANHATTAN COMPANY
OF NEW YORK, LLC, INTERNATIONAL PAPER COMPANY
and OWENS-ILLINOIS, INC.,**

Defendants.

and it is further,

ORDERED, that within twenty (20) days from the date of entry of this Order Defendant Certified Moving and Storage Co., LLC shall serve a copy of this Order with Notice of Entry on all parties appearing, the Trial Support Clerk located in the General Clerk's Office (Room 119) and upon the County Clerk (Room 141B) who are directed to amend the caption and the court's records accordingly, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

ENTER:

**MANUEL J. MENDEZ
J.S.C.**

Dated: August 30, 2018


**MANUEL J. MENDEZ
J.S.C.**

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE