To commence the statutory period for appeals as of right under CPLR § 5513(a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
ROCKLAND COUNTY

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THEODORE OCHS,

Plaintiff,

-against-

ASCAPE LANDSCAPING & CONSTRUCTION CORP.,

Defendant.

----------X

ASCAPE LANDSCAPING & CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

SUPERIOR WASTE AND CARTING, INC.,

Third-Party Defendant.

----------X

33085

Index No. [redacted]/2016

DECISION AND ORDER

Zugibe, J.

Upon considering the papers filed in this case (Motion Sequence 002, Documents 44-87), the Court denies defendant/third-party plaintiff Ascape's motion for summary judgment dismissing this personal injury action against it.

Very briefly, plaintiff worked for third-party defendant Superior. His duties included driving and otherwise operating a garbage truck. On the date of the accident, plaintiff noticed

the brakes were not working as they were supposed to but continued to drive the truck while notifying his employer. Ultimately, the brakes failed on the truck and it crashed, resulting in severe personal injuries to plaintiff. This suit followed.

The heart of this case concerns defendant/third-party plaintiff Ascape's actions and inaction relating to servicing the truck. Ascape, a separate entity, admittedly did some general maintenance to the vehicle in question. There is sharply divergent evidence in the record whether Ascape was made aware of the problem with the brakes, as well as expert testimony regarding the brakes' condition as of the accident. This includes two affidavits from an Ascape employee at the time, Selvin Martinez. The first, that plaintiff proffered, states that this employee was aware of the issues with the brakes and made his superiors aware of the issue, all the way up to the named "boss of Ascape." The second, that Ascape offers in reply, claims that he was pressured to sign the first affidavit but, in truth, had never observed the issue with the brakes. The Court notes the completely different signatures on the two documents.

The Court rejects Ascape's attempt to shield itself from liability based upon the third-party relationship with plaintiff. This Court finds that a case plaintiff cites is dispositive here. In Vargas v Crown Container Co., Inc., 155 A.D.3d 989, 993 (2d Dep't 2017), the Second Department confronted a personal injury claim very similar to this case. There, the decedent was a "helper" on a garbage truck. He dies after the truck he was assigned to "lurched back," pinning him between it and a dumpster. He sued *inter alia*, the maintenance company, Advanced, that had serviced the transmission six months prior to the accident. The maintenance company allowed the garbage truck to enter back into service "without a required functioning neutral interlock system."

The Second Department rejected the maintenance company's attempt to avoid liability upon the jury verdict against it, apportioning 49.5% fault to it. Advanced argued exactly what Ascape argues here – that it owed no direct duty to the decedent. The appellate division found that Advanced owed a duty to the decedent. It opined that the maintenance contract, even though an oral contract, "intended to confer a direct benefit on the decedent, [and therefore] a duty is owed to the decedent." *Id.* at 992. The court found that the safety device was an important safety device primarily designed to keep workers safe. Thus, the contract for maintenance contemplated the decedent's safety. As a result, Advanced owed a duty to the decedent.

Here, the equipment that has been shown (as a matter of fact on summary judgment) to be inadequately serviced are the garbage trucks brakes. While this may be, a closer question than a system such as the one in *Vargas*, the Court cannot grant summary judgment on this issue to defendant Ascape. At bottom, brakes are meant to protect everyone involved in travel upon the nation's highways. This includes operators and passengers in a subject vehicle, other operators and passengers, and pedestrians. Nevertheless, given that many accidents are so-called "single vehicle accidents," and brakes are designed to prevent these as well, the Court cannot say that summary judgment is appropriate here. Schaeffer v. Caldwell, 273 A.D. 263, 271 (4th Dep't 1948) ("The law requires that such a vehicle be equipped with brakes adequate to its quick stopping when necessary for the safety of its occupants or of others…"). Thus, Ascape owed a duty to plaintiff here.

With the legal issue resolved in plaintiff's favor, the remaining arguments may be quickly disposed of. Given the two diametrically opposing affidavits from an Ascape employee at the time and the expert opinions in this case, a question of fact obviously exists whether Ascape knew or should have known about the brakes' condition. Further, given the circumstances,

including plaintiff's own decision to drive a truck he was aware had an issue with its brakes, a jury, and not the Court, should initially be tasked with apportioning liability in this case, subject of course to this Court's and the appellate court's review. The Court is not prepared to say that Ascape has no liability here. The Court therefore denies summary judgment to Ascape.

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The foregoing constitutes the Decision and Order of the Court.

Dated: December 6, 2019
New City, New York

ENTER

THOMAS P. ZUGIBE
J.S.C.

To: George A. Kohl, Esq.
Attorney for Plaintiff
Via EFILE

Christopher Coleman, Esq.
Attorney for Defendant
Via EFILE