To commence the statutory time period for appeals as of right (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
COUNTY OF WESTCHESTER

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OSCAR AGUSTIN-ALONZO,

Plaintiff,

-against-

O & G INDUSTRIES, INC.,

Defendant.

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DECISION & ORDER
Index No. 51136/2019
Sequence No. 1

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 16-36 were read in connection with defendant's summary judgment motion to dismiss the complaint.

The accident happened on Old Post Road at its intersection with Guard Hill Road in Bedford, wherein plaintiff, a laborer, was a passenger in a dump truck owned by his employer, Mark Mariani Inc., and driven by Luis Cardenas, when it flipped over while traveling around a curve. The dump truck contained pallets of stone that was loaded and purchased from O&G.

Based upon the foregoing, the motion is decided as follows:

It is well settled that "a 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]).

A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (68 NY2d 320,324). CPLR 3212(b) specifically provides that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact".

The elements of common law negligence are: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury" (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]). A threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (Darby v Compagnie Natl. Air France, 96 NY2d 343 [2001]). The existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 138 [2002]).

Regarding the liability of third party persons, a party who enters into a contract to render services may have assumed a duty of care and thus be potentially liable in tort to third persons in the following circumstances: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (Espinal v Melville Snow Contractors, Inc., 98 N.Y.2d 136, 142 [2002]) (collectively, "the Espinal Exceptions"). Thus, a limited contractual undertaking to provide services does not make the contractor liable in tort for personal injuries of third parties (Lubell v Stonegate at Ardsley Home Owners Ass'n, Inc., 79 AD3d 1102, 1103 [2d Dept 2010]). A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (Romano v Village of Mamaroneck, 100 AD3d 854 [2d Dept 2012]). Before an injured party may recover as a third-party beneficiary for failure to perform a duty imposed by contract, it must clearly appear from the provisions of the contract that the parties thereto intended to confer a direct benefit on the alleged third-party beneficiary to protect him or her from physical injury (Ramirez v Genovese, 117 AD3d 930, 931 [2d Dept 2014])

Plaintiff contends that the subject accident was caused by a shifting of cargo that was improperly loaded and secured by O&G, and that O&G should have strapped the load to the truck and that such strapping would have prevented the accident. In divergence, O&G argues that there is a lack of duty running from it to plaintiff; O&G does not own or was operating the vehicle at the time of the accident; had no duty to maintain the dump truck; and there is no evidence that Defendant O&G negligently loaded the pallets on the dump truck.

O&G's expert witness, William J. Meyer, P.E., a licensed Professional Engineer in New York State opines that:

"based on the laws of physics and experience in these matters, that travel speed on a roadway is the primary factor for vehicles tipping or overturning. A vehicle traveling at an excessive speed for a given roadway curve will result in tipping or overturning of the vehicle regardless of how the cargo was loaded, distributed and secured on the vehicle. It is the writer's concluding opinion with a reasonable degree of engineering certainty that the subject 1/15/18 motor vehicle accident did not resolve from any improper action or inaction on the part of O&G Industries. Under an assumption that the load on the incident truck shifted and caused it to tip, said condition was solely the result of Mr. Cardenas' failure to properly load and secure the cargo. Had Mr. Cardenas exercised reasonable care, commensurate with his employment as a commercial vehicle operator, and adjusted his travel" (NYSCEF#27).

O&G witnesses Robert Rizzo and James Gallagher testified O&G was instructed by customers where to place materials into their trucks. Rizzo, who is the assistant vice president of O&G manage the day-to-day operations of all the mason 19 yards, testified that the loading of materials onto a customer's truck would be at the instruction and discretion of the customer and how they wanted the truck loaded . Rizzo testified that the driver is responsible for the load and to secure the load. The customer is entirely responsible and has the discretion for how and the way the truck is loaded. Gallagher the facility manager, does not know, and there are no records to show, who actually loaded the subject truck on the accident date (NYSCEF#24 pgs. 24-25).

Based upon the evidence presented, including the deposition transcripts, the engineer's report, O&G failed to demonstrate its entitlement to judgment as a matter of law by establishing that their employees did not load the truck and did not create an unreasonable risk of harm that was a proximate cause of the plaintiff's injuries. A genuine issue of material fact precluded summary judgment as to whether O&G launched any force or instrument of harm. (Lopez v New York Life Ins. Co., 90 AD3d 446, [2d Dept 2011]). Thus, the court need not consider plaintiff's opposition (Farrington v Bovis Lend Lease LMB, Inc., 51 AD3d 624, 626 [2d Dept 2008]).

All matters not specifically addressed are herewith denied.

This constitutes the decision and order of the court.

Accordingly, It is hereby:

ORDERED, that O&G's motion for summary judgment is denied; and it is further

ORDERED, that the parties are directed to appear at the Compliance Conference Part at a date, time, place and method as designated by that Part.

Dated: January 4, 2021
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF