Supreme Court of the State of New York
County of Kings

Index Number 519508/2017
Seq. 004

Part 91

DECISION/ORDER

EDWIN MARRERO AND EVARESTA MARRERO,

Plaintiff,

against

NIKCO HVAC CORP., MOCA ASIAN BISTRO, KANG YUE USA CORPORATION, 107–18 REALTY, L.L.C., CRESCENT PROPERTIES INC., AND KLC CONSTRUCTION LLC,

Defendants.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2–3
Replying Affidavits	4
Exhibits	Var.
Other	

Upon the foregoing papers, plaintiff's motion on summary judgment on liability against defendant NIKCO HVAC Corp. (Seq. 004) is decided as follows:

Factual Background

This action arises out of a jobsite accident that occurred on May 15, 2017. Plaintiff Edwin Marrero was employed as a parking garage manager at 107–36 Queens Blvd., Forest Hills, NY (Marrero EBT at 12). Mr. Marrero worked in an office that was located near the entrance to a parking garage. The office was at the bottom of a downward sloping ramp that was approximately 100 feet long (*id.* at 22–23). On the date of the accident, the plaintiff testified that a boxed air-conditioning unit weighing approximately 150 pounds was mounted on a dolly by NICKO employees (*id.* at 33–35). That dolly then rolled down the ramp causing a commotion. Mr. Marrero was struck by the runaway dolly when he emerged from his office at the bottom of the ramp in response to the commotion (*id.* at 33–35).

Heng Cui, a NIKCO employee who was part of the team tasked with installing the air-conditioning unit, confirmed that it was NIKCO's van, air-conditioning unit, and dolly that were involved in the accident. (Mr. Cui EBT at 21, 26). Mr. Cui further acknowledged that the box was not secured before it started to roll down the ramp, and that the box should not have been on the dolly at the point when it did roll down the ramp (*id.* at 31–33). In response, the defendants rely heavily on the testimony of Weifeng Shi, the owner of defendant NICKO, to establish a question of fact as to whether the dolly was secured with tools or some other mechanism. However, Mr. Shi testified that he was not present at the site of the accident (Mr. Shi EBT at 19). Accordingly, Mr. Shi's testimony is inadmissible hearsay (*see Deresky v Scully*, 156 AD2d 362, 363 [2d Dept 1982]).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The Court of Appeals has identified three situations wherein the party who enters into a contract to render services may be held liable in tort to a third party, including the situation "where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm" (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 140 [2002] [a "defendant who undertakes to render a service and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury").

Here, the plaintiff contends that NIKCO created a dangerous condition by negligently bracing the cart onto which its employees loaded the air conditioner, and that plaintiff was subsequently injured due to that dangerous condition. Plaintiff's allegations make out a prima facie case that NIKCO violated its duty of care by launching an instrument of harm (an air-conditioner on a dolly), and that Mr. Marrero (a third-party) was injured due to that negligence.

In its effort to resist plaintiff's motion, defendant NIKCO argues that the workers for NICKO acted reasonably by attempting to block the dolly with tools, and that it was an unfortunate wind that resulted in the dolly rolling down the ramp. Additionally, the defendant argues that Mr. Marrero put himself intentionally in the way of harm by stepping out of his office into the path of the air conditioner and is therefore comparatively negligent for the injuries that he sustained.

Each of the defendant's arguments are unpersuasive. As an initial matter, the defendant's arguments are largely predicated on the inadmissible hearsay testimony of Mr. Shi. Moreover, it is clear that the defendant's employees by their own admission "[launched] . . . an instrument of harm" due to their negligent handling of the air-conditioning unit and dolly. This act constitutes the basis for its liability pursuant to *Espinal*. There is no evidence that the plaintiff contributed to the launching of the instrument. The defendant's theory that the plaintiff intentionally placed himself in harm's way is unfounded—as the manager of the garage, Mr. Marrero could be reasonably expected to both leave his office to check on the commotion and to shut the door of his office after leaving it. Neither of these actions constitute negligence that contributed to the plaintiff's injury.

Finally, NICKO contends that the plaintiff's moving papers are deficient, as the plaintiff did not file a statement of facts pursuant to 22 NYCRR 202.8-g. However, it is within the

discretion of the court to determine the appropriate remedy for a failure to comply with this rule (22 NYCRR 202.8-g [e]). The sustained historical practice of this jurisdiction is to place a high premium on determining motions on their merits (*see e.g. Matter of Goldstein v. NYS Urban Dev. Corp.*, 13 NY3d 511, 521 [2009]). Accordingly, as the plaintiff attaches a copy of his EBT with a notarized acknowledgment of the truth of the statements therein to his moving papers, the defect is deemed harmless (Marrero EBT at 236). The plaintiff's motion is therefore granted; this action shall proceed to trial on damages.

This constitutes the decision and order of the court.

August 29, 2022
DATE

DEVIN P. COHEN
Justice of the Supreme Court