

**Wilson v Structure Tone, Inc.**

2005 NY Slip Op 30392(U)

April 15, 2005

Supreme Court, New York County

Docket Number: 103814/03

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. CAROL EDMÉAD** Justice

PART 35

0103814/2003

WILSON, TIMOTHY  
vs  
STRUCTURE TONE INC.

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

SEQ 5

SUMMARY JUDGMENT

The following papers, numbered \_\_\_\_\_ is motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...  
Answering Affidavits -- Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the accompanying memorandum decision. It is hereby

ORDERED that the motion of defendant Structure Tone, Inc. for an order granting summary judgment, dismissing the complaint of plaintiff Timothy Wilson, is denied. It is further

ORDERED that counsel for defendant Structure Tone, Inc. shall serve a copy of the decision and decision with notice of entry within twenty days of entry.

**FILED**  
APR 21 2005  
COUNTY CLERK  
NEW YORK

Dated: 4/15/05

**HON. CAROL EDMÉAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 35

\_\_\_\_\_  
 TIMOTHY WILSON, x

Plaintiff,

Index No. 103814/03

-against-

DECISION/ORDER

STRUCTURE TONE, INC.,

Defendant.

\_\_\_\_\_  
 EDMEAD, J.S.C. x

MEMORANDUM DECISION

Defendant Structure Tone, Inc. (“defendant”), moves pursuant to CPLR 3211 and 3212 for an order granting summary judgment, dismissing the complaint of plaintiff Timothy Wilson (“plaintiff”).

Plaintiff’s complaint and verified bill of particulars allege that on or prior to January 31, 2002, defendant entered into an agreement with TrezecHahn for the performance of certain work, labor and services (the “agreement”) at One New York Plaza, New York, New York (the “subject premises”). The subject premises were in a state of construction, alteration, renovation and/or repair. On January 31, 2002, at approximately 1:30 p.m. plaintiff was lawfully and properly on the subject premises when he was seriously injured due to a defective, hazardous and trap-like condition on the subject premises. The accident occurred at the loading dock area of the subject premises.

Plaintiff claims that defendant received actual notice in that the defendant actually placed the beams of steel on the floor of the loading dock, was actually on the premises on a daily basis and was aware of the conditions of the flooring, actually provided the entranceway for the

plaintiff to use, actually invited the plaintiff onto the premises, actually directed the plaintiff to use the entranceway onto the jobsite and was actually aware of the conditions existing at the time and place of the occurrence.

Plaintiff claims that defendant received constructive notice in that the conditions existed for a sufficient period of time prior to the accident that the defendant, in the exercise of reasonable care, could and should have known of the conditions and taken steps to correct them. The conditions were actually created by the defendant and existed for days prior to the occurrence.

Defendant argues that documentary evidence establishes that defendant did not own, possess, control maintain and/or manage the subject premises. Defendant was never involved in construction work using steel beams at the time of the incident. Therefore, defendant never owed a duty to plaintiff with respect to the steel beams located on the loading dock. Further, no triable issue of fact exists as to defendant, and, therefore, summary judgment is warranted.

In opposition, plaintiff argues that defendant has failed to carry out its affirmative burden of demonstrating as a matter of law that it was not involved in construction work using steel beams on the loading dock on the date and time of the plaintiff's accident. Further, defendant has failed to establish that it did not owe a duty to plaintiff. Finally, questions of fact exist as to the liability and responsibility of defendant for plaintiff's accident.

According to plaintiff's deposition, in January, 2002 plaintiff was employed by Trizek Kahn, as an operating engineer, member of Local 94, working at the subject premises. (Dep. at p. 7) Plaintiff ran and operated high pressure steam refrigeration equipment, steam turbine. He monitored all of the HVAC equipment. (Dep. at p. 12) His duties were confined to the subject

premises. (Dep. at p. 13) In 2001, as a result of a fire, contractors and vendors were hired to do certain repair work. There were electrical and demolition contractors, welders and ironworkers. However, plaintiff does not know who the contractors were. (Dep. at pp. 51-53) Timbil Refrigeration was on the job prior to January 31, 2002 to perform air conditioning work. (Dep. at p. 53) Defendant subcontracted to Eagle Demolition, and Eagle Demolition was responsible for removal of the old turbine. The work of Eagle Demolition, physically removing the old steam turbine, was ongoing at the time of plaintiff's accident. (Dep. at p. 55) Defendant and Timbil were responsible for the temporary refrigeration units that were stored on Broad Street at the subject location. These units were running. (Dep. at p. 57)

When plaintiff first got to the loading dock, which is indoors, prior to his accident, he saw a security guard there in the booth. He was walking west, southwest, on the south side of the building. He was on his way to the basin, which is on the loading dock. He does not recall seeing any material stored on the loading dock when he went down to the basin. He was there about 20 minutes. He was intending to go to the engine room when he left the basin to finish filing his reports. Before the accident, he did not notice any materials stored on the loading dock. On the day of the accident, he does not recall seeing any debris, construction material placed onto the cement flooring of the loading dock. (Dep. at pp. 80-90) He was walking on the loading dock, he tripped and realized he tripped into something; he hit an immovable object. He hit it with both feet. (Dep. at pp. 90-91) He saw that he had tripped over a steel beam, laying on the floor, about ten feet long, about six inches wide, about twelve by six, six inches high beam. (Dep. at pp. 92-93) He does not recall seeing any individual contractor placing or removing materials on the loading dock. (Dep. at p. 95) Other than the beam that he observed on the floor

of the platform, there were other beams stacked right next to them or behind them. (Dep. at pp. 119-120)

According to the deposition testimony of Derek McGovern, account executive for defendant, he has worked for defendant for eight years, and he goes to the sites where defendant is undergoing its general contracting. (Dep. at pp. 5-6) Defendant was not involved in any work at the loading dock in January 2002. Four of defendant's subcontractors were involved in work at the specific location in January 2002. (Dep. at p. 8) However, none of those subcontractors did any work with steel beams. (Dep. at p. 9) The general contractor in the building at this time was Lehrer Construction. (Dep. at p. 12) Defendant's subcontractors were having materials brought in via the hole, the sidewalk opening, they created. These items were brought in for the construction work. Nothing was being brought in through the loading dock. (Dep. at pp. 20-21) Some of the debris from the work being done by defendant's subcontractors was moved through mini containers through the freight elevator to the loading dock. (Dep. at p. 27) None of that debris included metal, other than wires. (Dep. at p. 28) There was a search conducted by defendant to ascertain whether or not any of its subcontractors or laborers were involved in the removal or involved in working with or involved in using any steel for any reason at our about the time of plaintiff's accident. The result was that no one used steel for any reason. (Dep. at p. 38)

According to the deposition transcript of Joseph Syslo, property manager for Trizec Properties, Inc. ("Trizec"), he has worked for them for three years. (Dep. at p. 5) Trizec owns the subject premises, and owned and managed the subject premises at the time of plaintiff's accident. In January, 2002, there was ongoing construction at the subject premises. (Dep. at p. 6) He is not

aware of any construction going on at the subject premises in January, 2002, but there was routine maintenance of the chiller plant. (Dep. at pp. 7-8) If construction work were going on at the subject premises, the loading dock would be the place where the materials would come in and out and the place where materials would be staged. (Dep. at p. 11) He does not believe defendant was doing work for Trizec in the subject premises in 2002. (Dep. at p. 12) Defendant's work would include removal of metal beams, not steel beams. (Dep. at p.12) Also, defendant's work did not involve the removal of beams. (Dep. at pp. 12-13) Timbil would have been at the subject premises in January 2002, doing maintenance work on the chiller plant, and Timbil's work could include the removal of steel beams and piping, but he does not believe that it did. (Dep. at pp. 20-21)

Defendant was doing work on the construction on the cooling towers at the subject premises in 2002. (Dep. at p. 28) Defendant employed subcontractors at the subject premises at that time to aid in the performance of the work. (Dep. at p. 29) Defendant was the project manager. (Dep. at p. 31) The building of the cooling towers involved the use of steel piping or steel beams. (Dep. at p. 29) The loading dock was not used to stage any of the construction materials in use or being used to construct the cooling towers. (Dep. at p. 30)

According to the deposition testimony of Peter Fiore, he was assistant chief with Trizec in 2002. (Dep. at p. 11) Plaintiff reported to him. (Dep. at p. 13) In January 2002, construction and repair work was underway at the subject premises. (Dep. at p. 14) There had been a chiller plant blowup so the demolition was about finished. He is not sure if construction of the new plant was underway. (Dep. at p. 14) Defendant and Eagle Demolition were doing the demolition work. (Dep. at p. 15) The demolition included "chopping up" and removing the turbine, which had steel

or metal beams, that were 10 feet, 20 feet long (Dep. at p. 17) The bigger pieces were hoisted out, but the other pieces were wheeled out in carts to the freight car, to the loading dock. (Dep. at p. 18) He never saw materials being wheeled out from the engine room up to the loading dock. (Dep. at p. 21)

### Analysis

#### CPLR 3211 [a] [1]: Defense is founded upon documentary evidence

Pursuant to CPLR 3211 [a] [1], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Thus, where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]). The test on a CPLR 3211 [a] [1] motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1<sup>st</sup> Dept 2001] citing *Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1<sup>st</sup> Dept 1999]).

Where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211[a][1] (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1<sup>st</sup> Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1<sup>st</sup> Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1<sup>st</sup> Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1<sup>st</sup> Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d

Affidavits and deposition transcripts do not qualify as “documentary evidence” for purposes of this rule (*see Realty Investors v Bhaidaswala*, 254 AD2d 603, 679 NYS2d 179 [3d Dept 1988]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court Bronx County 2004]).

CPLR 3212: Summary Judgment

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212 [b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perl binder*, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1<sup>st</sup> Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings

and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra; Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1<sup>st</sup> Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad*

*Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973];  
*Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1<sup>st</sup> Dept 1998]).

Defendant failed to attach the documentary evidence establishing that it did not own, possess, control maintain and/or manage the subject premises. However, that issue appears to be uncontested. And, if such agreement were attached, it would still not result in dismissal of the complaint.

Based on all of the deposition testimony, it cannot be said, as a matter of law that defendant was never involved in construction work using steel beams at the time of the incident. Nor can it be said, as a matter of law, that a subcontractor working at the behest of defendant was never involved in construction work using steel beams at the time of the incident. The deposition testimony of all of the witnesses and of the plaintiff does not foreclose the possibility of defendant's liability.

#### Conclusion

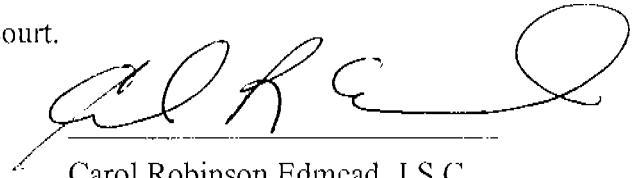
Thus, it cannot be said that defendant never owed a duty to plaintiff with respect to the steel beams located on the loading dock. Nor can it be said that no triable issue of fact exists as to defendant. Therefore, it is hereby

ORDERED that the motion of defendant Structure Tone, Inc. for an order granting summary judgment, dismissing the complaint of plaintiff Timothy Wilson, is denied. It is further

ORDERED that counsel for defendant Structure Tone, Inc. shall serve a copy of the decision and decision with notice of entry within twenty days of entry.

This constitutes the decision and order of this court.

Dated: April 15, 2005



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**  
APR 21 2005  
COUNTY CLERK  
NEW YORK