

McFarlane v Airis Holdings, LLC

2007 NY Slip Op 31901(U)

June 25, 2007

Supreme Court, Queens County

Docket Number: 0008799/2005

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

<p style="text-align: right;">x</p> <p>NOEL MCFARLANE,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>AIRIS HOLDINGS, LLC, et al.,</p> <p style="text-align: center;">Defendants.</p> <p style="text-align: right;">x</p>	<p>Index Number <u>8799</u> 2005</p> <p>Motion Date <u>April 25,</u> 2007</p> <p>Motion Number <u>30</u></p> <p>Motion Seq. No. <u>4</u></p>
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AIRIS HOLDINGS, LLC, et al.,

Third-Party Plaintiffs,

-against-

PROFESSIONAL AVIATION MANAGEMENT,
INC.,

Third-Party Defendant.

x

The following papers numbered 1 to 17 read on this motion by Airis Holdings, LLC (Airis) and Alliance Airlines, s/h/a Alliance Air, collectively referred to herein as the Alliance defendants, for summary judgment in their favor, and cross motion by Lan Chile Airlines, Ltd. (Lan), for summary judgment in its favor pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits-Exhibits	5-8
Answering Affidavits - Exhibits	9-11
Reply Affidavits	12-17

Upon the foregoing papers it is ordered that the motion is granted and the cross motion is denied.

Plaintiff in this negligence action seeks damages for personal injuries sustained on April 22, 2004, when a forklift struck him outside building 23 at JFK International Airport. At the time of the subject accident, plaintiff was employed by Evergreen Aviation as a ramp supervisor who supervised the loading and unloading of aircrafts. The ramp area where plaintiff worked was used by Alliance but owned by Port Authority. Building 12 was built by Airis who held the ground lease for the parcel of land known as Tract 9. The forklift was operated by Pericles Perdomo, an employee of Professional Aviation Management, Inc. (PAM), a handling company that supplied employees to oversee the movement of cargo for Lan Chile aircraft. Perdomo was responsible for overseeing the loading and unloading of cargo from Lan.

Motion

The Alliance defendants move for summary judgment in their favor on the ground that they did not exercise supervision and/or control over the activity which produced plaintiff's injury. They made a prima facie showing of entitlement to summary judgment in their favor with the collective (uncontroverted) testimony of Nathan West, the comptroller/treasurer of Airis at the time of the subject accident, and the testimony of plaintiff and Perdomo. West testified as follows: His duties were to oversee the accounting and finances of the operating entities that Airis had at that time. Airis constructed building 23 and leased portions of it to Alliance Airlines and Lufthansa Airlines to perform cargo-related business. Airis was not involved, in any way, with the cargo operations of the subtenants at building 23; Airis had no involvement or responsibility with respect to how the subtenants performed their operations; Airis had no contracts for cargo-related operations at building 23; and had no control over any cargo handling companies hired by its subtenants. Finally, West testified that Airis did not inspect the work performed by its subtenants.

Perdomo testified, in short, that he was employed by PA to oversee ground handling for Lan, specifically the movement of cargo; that he worked under a supervisor named Rolando Burgos, who was the cargo service manager and a direct employee of Lan; that he also worked with another Lan employee by the name of Alvero Sande, a station manager. Perdomo testified that on the day in question he was operating a large forklift which was equipped with two headlights which had to be activated. The cargo that had to be moved was located on the ramp outside building 23, about 50 feet from the building; when he started

driving the forklift it was already dark but that half of the ramp area was illuminated by lights, that the accident occurred after he finished moving the cargo; he became aware of the accident immediately after he turned off the forklift (which also turned off the headlights), when he noticed plaintiff by the right of the fork on the ground.

Plaintiff testified, briefly, that the accident occurred on April 22, 2004, at approximately 8:00 P.M., on the ramp adjacent to building 23; at the time of the accident, plaintiff was standing on the ramp in front of an aircraft, about 30-40 yards from the building. Plaintiff further stated that he was struck in the legs by a forklift, and that when the accident occurred, he was standing still beneath the nose of an aircraft, marshaling the air start of the aircraft. Plaintiff testified that at the time he was struck, the forklift did not have its lights on. Collectively, the evidence establishes, prima facie, that the Alliance defendants had no control over the subject forklift which caused plaintiff's injuries (see Hellyer v Law Capitol, Inc., 124 AD2d 782 [1986]).

In opposition, plaintiff failed to raise a triable issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). In his bill of particulars, plaintiff asserts multiple theories of liability on the part of the Alliance defendants, including that these defendants were negligent in the ownership, operation, management, supervision, repair and control of the subject forklift; that the forklift was defective in that it had insufficient brakes and tires, and that defendants violated numerous sections of the New York State Vehicle and Traffic Law. The other theories of liability relate specifically to the operation of the forklift by Perdomo, and are not applicable to the Alliance defendants. Plaintiff attempts to assert, in opposition, that the accident resulted (at least in part) from inadequate lighting of the premises. Plaintiff did not raise this theory in the complaint or bill of particulars, and thus may not assert that theory in an attempt to defeat defendants' motion for summary judgment (see Yaeger v UCC Constructors, Inc., 281 AD2d 990 [2001]). “[A] new theory, presented for the first time in opposition to a motion for summary judgment, cannot bar relief which is otherwise appropriate” (Forester v Golub Corp., 267 AD2d 526, 527 [1999], quoting Scanlon v Stuyvesant Plaza, 195 AD2d 854, 855 [1993]; see Otonoga v City of New York, 234 AD2d 592, 593 [1996]).

In any event, that theory lacks merit. The evidence indicates that the plaintiff was struck by the forklift operated solely by Perdomo. There was no proof that inadequate lighting contributed to the happening of the accident. Raised for the first time in opposition to the motion for summary judgment, this

theory cannot be considered as a basis for defeating summary judgment (see Pinn v Baker's Variety, 32 AD3d 463 [2006]; Yaeger v UCC Constructors, *supra*; Otonoga v City of New York, *supra*; *cf.* Rosse-Glickman v Beth Israel Med. Ctr.--Kings Highway Div., 309 AD2d 846 [2003]; Orros v Yick Ming Yip Realty, 258 AD2d 387, 388 [1999]). Consequently, the motion for summary judgment in favor of the Alliance defendants is granted.

Cross Motion

In moving for summary judgment in its favor, Lan argues that PAM (Perdomo's employer), was an independent contractor and that Lan is not liable for the negligent acts of PAM's employees. The general rule is that an employer has no liability for the negligent acts of its independent contractor (see Campos v Brooklyn Union Gas Co., Inc., 17 AD3d 500 [2005]). The question of whether Perdomo was an employee or an independent contractor is determined by the extent of control Lan exercised over the work performed by PAM employees (see Willis v City of New York, 266 AD2d 208 [1999]; Berger v Dykstra, 203 AD2d 754 [1994]). In support of the motion, Lan relied upon the deposition testimony of Perdomo wherein he testified that he was employed by PAM. Lan argues that since Perdomo was employed by PAM, and Lan did not operate the forklift or instruct Perdomo to operate the forklift, there is no evidence to establish that Lan's negligence was the cause of the accident. Perdomo's testimony, however, standing alone, does not establish, *prima facie*, Lan's entitlement to summary judgment in its favor. Perdomo also testified (without contradiction) that, although he was employed by PAM, he was under the daily supervision and control of Rolando Burgos, a supervisor of Lan who worked at building 23. Perdomo further stated that he worked under the daily supervision of Burgos and was told what to do every day by Burgos. Evidence that a Lan employee was involved in the work of PAM (its independent contractor), raises a jury question as to the amount and nature of Lan's involvement in order to determine whether the instant circumstances present an exception to the general rule that an employer has no liability for the negligent acts of its independent contractor (see Wright v Esplanade Gardens, 150 AD2d 197 [1989]). Thus, the cross motion for summary judgment in its favor is denied.

Accordingly, the motion by defendants Airis Holdings, LLC and Alliance Air, for summary judgment in their favor is granted, and the action is dismissed as to those defendants. The cross motion by Lan Chile Airlines, Ltd., for summary judgment in its favor, is denied upon the ground that there are triable issues of fact.

Dated: June 25, 2007

J.S.C.