

**Palumbo v New Penn Motor Express, Inc.**

2007 NY Slip Op 32989(U)

September 4, 2007

Supreme Court, Suffolk County

Docket Number: 0013882/2003

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 5-30-07 (004)  
6-27-07 (005, 006)  
ADJ. DATE 8-6-07  
Mot. Seq. #004 - MD  
005 - MD  
006 - XMD

-----X  
NICHOLAS PALUMBO, :  
 :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 NEW PENN MOTOR EXPRESS, INC. and :  
 COSTCO WHOLESALE CORPORATION, :  
 :  
 :  
 Defendants. :  
-----X

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Upon the following papers numbered 1 to 50 read on this motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-22; Notice of Cross Motion and supporting papers 23-27; 28-33; Answering Affidavits and supporting papers 34-44; Replying Affidavits and supporting papers 45-47; 48-50 Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (004) by defendant New Penn Motor Express, Inc. pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied; and it is further

**ORDERED** that this motion (005) by defendant Costco Wholesale Corporation pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied; and it is further

**ORDERED** that this motion (006) by defendant New Penn Motor Express, Inc. submitted in opposition to motion (005) seeking denial of defendant Costco Wholesale Corporation's motion, has been rendered academic by denial of motion (005) and is denied as moot.

The complaint of this action sounding in negligence sets forth that on August 15, 2002, while

plaintiff was in front of his residence, he was caused to sustain injury during the delivery of a Sentry Safe by defendant New Penn Motor Express, Inc. (hereinafter New Penn), due to a defective tailgate on the delivery truck requiring assistance from plaintiff to unload the safe from the delivery vehicle. The safe had been purchased from defendant Costco Wholesale Corporation (hereinafter Costco) who in turn, ordered the safe from Sentry Safe to be delivered to plaintiff. Plaintiff alleges in his bill of particulars that as a result of defendants' negligence, he was caused to sustain a disc herniation at L5-S1 compressing the left S1 nerve root and touching the ventral aspect of the thecal sac; disc bulges at L3-4, L4-5 and L5-S1 impinging upon the thecal sac; and aggravation and/or exacerbation of degenerative disc disease of the lumbar spine and disc bulge at L5-S1.

Defendants seek summary judgment on the issue of liability and dismissal of the complaint, asserting they did not deliver the safe to plaintiff on August 15, 2002.

The 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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In motion (004) defendant New Penn seeks summary judgment asserting plaintiff has failed to provide any evidence that they made a delivery to him on August 15, 2002; that defendant did not owe a duty of care to plaintiff on the date of loss as no delivery was made on that date; and that neither New Penn, On Time Trucking, nor co-defendant Costco has any record of a delivery to plaintiff on August 15, 2002. In support of this application, New Penn has submitted, inter alia, copies of the summons and complaint and its answer; a copy of the bill of particulars; copies of the transcripts of the examinations before trial of Nicholas Palumbo and Andrew Kerlik, and non-party witnesses John McLaughlin and David B. Bernardino; affirmation of Andrew Kerlik; a delivery receipt dated August 1, with "New Penn Trucking August 15, 2002" written on the top; and a delivery receipt dated August 1, with "On Time Trucking August 1, 2002" written on the top.

In motion (005) defendant Costco seeks summary judgment adopting and incorporating in their

entirety the arguments set forth in New Penn's motion for summary judgment, their affirmation in support of the motion and the memorandum of law, and seeks dismissal of the complaint on those arguments and principals of law. While CPLR 3212(b) does not provide for a party to adopt and incorporate another party's arguments and submissions, this court will search the record accordingly. Costco additionally asserts it cannot be liable for the negligence of an independent contractor whom Costco did not hire and that Costco had no control over the delivery of the safe to plaintiff. In support of this application, Costco has submitted an attorney's affirmation, a copy the summons and complaint, its answer and various discovery demands.

Counsel for Costco argues that New Penn was an independent contractor hired by non-party Sentry Group to deliver a safe to plaintiff on August 1, 2002. New Penn then hired another non-party, On Time Trucking, to actually deliver the safe to plaintiff. Costco asserts the Sentry Group was an independent contractor hired by Costco to arrange for the delivery of the Sentry Safe. Plaintiff had ordered the Sentry Safe over Costco's internet website. Neither Sentry Group nor On Time Trucking have been named in this action.

Based upon review of the evidence, affidavits and transcripts of the examinations before trial, it is determined that it is undisputed that a Sentry safe was delivered to plaintiff on August 1, 2002, and that a second safe was delivered to plaintiff on August 15, 2002. However, neither New Penn nor Costco have demonstrated prima facie entitlement to summary judgment on the issue that they did not deliver, or cause to be delivered, the second safe to plaintiff on August 15, 2002, on which date plaintiff claims to have sustained personal injury, thus precluding summary judgment to the moving defendants

Plaintiff Nicholas Palumbo testified at his examination before trial that he retired from New York City Sanitation in 1987 on an emotional disability. He worked for them as a loader/driver for fifteen years and then was on disability for five years from 1982 to 1987. He testified that on August 15, 2002, he sustained an injury to his back, witnessed by his daughter Nicola Palumbo. The incident occurred in front of his house when a safe was being delivered. He purchased the Sentry safe on the internet from Costco. It was delivered in a box by New Penn. He stated he received that information from Sentry. He stated the safe was delivered as a replacement safe for a defective safe delivered on August 1, 2002 by On Time Trucking. Mr. Palumbo testified that when he discovered the first safe was damaged, he called Sentry on the delivery date and left a message on their recording machine, but never received a call back from them. He did not call Costco. He testified, "One day, a truck just showed up and unloaded it and there it was."

Mr. Palumbo produced a delivery receipt which he states is for the second delivery on August 15, 2002, and which receipt he signed on that date. He stated the second safe was delivered by On Time Trucking as they had called him and told him they were responsible for the incident. He had an original receipt for the delivery of the safe on August 1, 2002, but testified it was given to him for the August 15, 2002 delivery. He still has both safes as Sentry has not come to pick up the scratched and damaged safe delivered on August 1, 2002.

Mr. Palumbo was unsure if it was the same truck which delivered the safes on August 1, 2002 and August 15, 2002. He did not recall color or markings of either truck but described the truck in the

August 15, 2002 delivery as extremely large, maybe fifteen or twenty feet, eight or ten wheels, but no separate cab. It had a tailgate, the driver did not have a helper, and the truck stayed out on the street. He stated the driver got into the van, went to the back, pulled or pushed the box forward to the edge of the truck and then asked him to help take the safe off the truck. The lift gate was not being used as the driver informed him the tailgate was defective, that he couldn't bring it down because if he did, he couldn't bring it back up. He said he told the driver the safe was heavy, but the driver said they could take it down a step about two feet, but the driver didn't stop there and kept pulling the safe to the ground. It was then put on a hand truck or dolly, and placed in the door of the house in a room just off the garage. The driver left. The safe was then moved to the living room by his son. Mr. Palumbo testified he didn't open the box for the second safe for about a week or ten days because he was hurt. He felt the pain when he went to go on the computer. He first sought medical treatment for his back about two weeks after the incident.

He believed he notified Costco around August 19, 2002 that he had been injured, then called Sentry. He said Costco said it was not their responsibility, that he should take it up with Sentry Safe. Costco advised him the safe was delivered by New Penn and they would be the ones to contact with regard to the injury. He called New Penn, spoke to someone who said he'd get back to him, but did not

Andrew Kerlick testified he has been employed as vice president of risk by New Penn Motor Express since 1991 and has worked for the company for thirty two years. He stated New Penn is a common carrier of general freight pursuant to the Interstate Commerce Act under the Federal Highway Administration. He knew of no agreement in August 2002 between New Penn and Costco. He did know of one delivery of equipment to Mr. Palumbo in August 2002. He testified that On Time Trucking delivers some freight for New Penn in the eastern Long Island area, per written agreement, and that they are a separate company located in Bay Shore or Farmingville. New Penn gives them a percentage of the revenues per an arrangement. He was aware of a delivery of a Sentry safe by On Time Trucking to Mr. Palumbo on August 1, 2002 and stated New Penn's Maspeth terminal would have brought the freight to On Time to Bay Shore or Farmingdale as a matter of course. The safe would have come from Rochester, New York and New Penn would have picked it up July 26, 2002 at New Penn's Rochester terminal. On Time then delivers from the New Penn freight bills as they use the New Penn documents to document the delivery. The yellow copy goes to the consignee and the white copy comes back to New Penn. He was not sure if New Penn had that document. He did not know of a delivery to Mr. Palumbo on August 15, 2002, and stated a new receipt would have been generated if there was a second delivery. He knew of no incident report by Mr. Palumbo to New Penn. He knew of no complaint by Mr. Palumbo of delivery of a damaged safe.

John McLaughlin, a nonparty witness, testified at his examination before trial that he was a driver employed by On Time Trucking and made a delivery of a safe to Nicholas Palumbo on August 1, 2002 on behalf of On Time Trucking, and did not make another delivery to him on the 15<sup>th</sup> of August. He stated On Time Trucking makes deliveries and pickups for New Penn, Bullet Freight Systems, Roadrunner Freight, Fed Ex Freight and other carriers. The bill of lading states the name of the company he is making a delivery for. His receipt indicated that for the August 1, 2002 delivery to Mr. Palumbo, he was driving truck number 10, a box truck, which he had been driving for about four years. He used the lift gate to lower the safe down from the truck because he noticed the age of Mr.

Palumbo and didn't want him to lift it off the back of the truck. He stated that sometimes customers will help lift the delivery, but Mr. Palumbo did not lift and did not sustain any injury. The delivery was not indicated to be an inside delivery so he left the safe at the top of Mr. Palumbo's driveway in front of the garage, wheeling the safe up the driveway with a hand truck. He did not know what kind of safe it was or how big, but testified that according to the freight bill, it was 206 pounds. He did not remove it from the box it was delivered in before leaving the premises. When he looked at exhibit A-1 with the writing "On Time Trucking, August 1, 2002-No injury" he stated he never saw it before. When shown Exhibit A with the writing "New Penn Trucking, August 15, 2002-Injury" he stated he never saw it before. He testified that Exhibits A, A-1 and A-2 are all for the same document because they have the same freight bill number "19358872." He stated that when the delivery is made, the driver keeps the white copy and the yellow copy or consignee memo, is given to the consignee. He described Exhibit E as a New Penn delivery receipt for which the customer gets the carbonized copy called consignee memo. He testified that if New Penn or On Time Trucking had to deliver a new safe or replace the existing safe, Mr. Palumbo would be given a new consignee memo with a different freight bill number.

Daniel Leitgeb, the president of On Time Trucking, testified at his examination before trial that he has been with the company for twenty two years. He and his wife, Patricia, keep the records, including records of deliveries. He did a search for deliveries to Mr. Palumbo after receiving a phone call from New Penn for proof of a delivery. There was no record of a delivery to Mr. Palumbo for August 15, 2002. The procedure for generating a document for delivery is that a carrier will drop a loaded tractor trailer with multiple deliveries on the trailer, at which time the trailer driver gives On Time a stack of delivery receipts. The receipts are then dated and processed by pro number into On Time's computer. They do not deliver on any other bills other than the carrier's bills. There are no other bills of lading other than the original bill of lading that the "driver that represents New Penn hands us." He had a manifest which shows all the deliveries for August 1, 2002, but none for August 15, 2002. He didn't know if he had a manifest for Jack 10 for August 15, 2002. In August, 2002, On Time Trucking employed about twenty drivers. His search included deliveries that any other driver made as well. He testified he is in possession of the original delivery receipt. If there was a subsequent delivery, there would be a new freight bill generated. The delivery of August 1, 2002 came in on a New Penn trailer. Mr. Leitgeb testified he had a conversation with Mr. Palumbo who told him he had a delivery of a safe on August 1, 2002 and that everything was fine. He then had a delivery on August 15, 2002 and injured his back because the lift gate was not working on the truck, that it broke at the last delivery. He stated Mr. Palumbo told him the driver told him if he wanted the safe, he could help lift it off the back of the truck. He also told him that it wasn't Jack, that it was a Spanish driver, and that everything was fine with that first delivery. Mr. Palumbo faxed over two documents which Mr. Leitgeb did not save, but he thought they were both the same. He said Mr. Palumbo did not state which company made the second delivery and did not feel it was the same truck. Mr. Leitgeb testified he has a relationship with New Penn that consists of them giving him overflow, so he can go to Holbrook today for New Penn and tomorrow New Penn will go to Holbrook.

Mr. Bernardino testified on behalf of the Sentry Group, Rochester, New York and stated he was employed by them on August 15, 2002. Sentry is in the business of manufacturing fireproof and security safes. He reviewed letters, invoices, bill of lading and various correspondence for his testimony. Costco had contacted Sentry via letter regarding the purchase and sale of a safe to Mr.

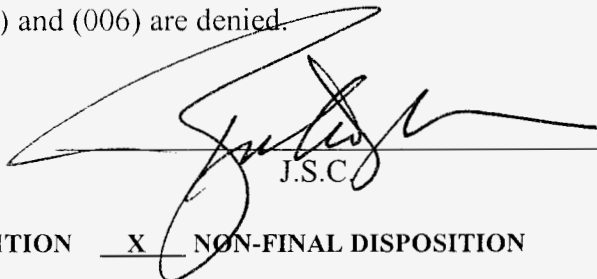
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Palumbo. An initial purchase order from Costco.com to Sentry was received directing them to ship a safe to Mr. Palumbo. Sentry has a contractual agreement with Costco. The order was completed via shipping the safe to Mr. Palumbo through New Penn pursuant to a contractual agreement between Sentry and New Penn. Sentry had trucks to facilitate moving the safe to the New Penn location, but he did not know if it was a pick up or delivery. He was not aware of any transaction between New Penn and On Time Trucking. He was unsure of any method Sentry would have had to track the shipping or if they relied on New Penn. Sentry would have inspected the safe prior to its delivery and would have packed it also. He testified that Mr. Palumbo never contacted Sentry regarding the shipping of the safe. Concerning a packing list for the safe, he was not sure if it was prepared by Sentry. A packing list is usually attached to the box being shipped with an additional form of labeling or sticker. Mr. Bernadino stated that the only communication about the shipping of the safe was from Costco in July, 2003, concerning a complaint from Mr. Palumbo of a dispute over a damaged safe. They had no record of any shipment to Mr. Palumbo for August 15, 2002 or any date other than August 1, 2002. Sentry would have prepared an invoice for payment directly to Costco. Then a bill of lading and a packaging list would have been prepared for shipping, and possibly a label.

Based upon the foregoing, it is determined that Mr. Palumbo has two safes sitting in his living room and no one can explain how the second safe got there. Neither New Penn nor Costco have produced a manifest to show the deliveries for August 1, 2002 or August 15, 2002. Neither New Penn or Costco produced a manifest from Sentry or On Time, or from anyone else, to demonstrate whether or not Sentry or On Time, or another entity, delivered the safe on August 15, 2002. At this juncture, it has not been demonstrated by the moving defendants that they did not deliver the safe, or cause the safe to be delivered to Mr. Palumbo on August 15, 2002. This factual issue of who delivered the second safe remains unresolved. Therefore, neither New Penn nor Costco have demonstrated by admissible evidence that they are entitled to summary judgment in this matter. Additionally, Costco has not produced a copy of any agreement it has with Sentry, or any other entity, concerning the terms and conditions for delivering a safe from Sentry when it is ordered through Costco. New Penn has not produced a copy of the agreement it has with Sentry concerning the deliveries made for Sentry or a copy of the agreement New Penn has with On Time. Most importantly, no manifests for August 15, 2002 have been produced. Therefore, these factual issues preclude summary judgment.

Accordingly, motions (004), (005) and (006) are denied.

Dated: SEP 04 2007

  
 J.S.C.

FINAL DISPOSITION  NON-FINAL DISPOSITION