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

PRESENT: HON. SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 101862/2004

MELENDEZ-NATAL, REINALDO

VS.

MAREN ENGINEERING CORP.

SEQUENCE NUMBER : # 011

SUMMARY JUDGMENT

INDEX NO. 101862-04

MOTION DATE

MOTION SEQ. NO. #011

MOTION CAL. NO.

› read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 31 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 10/18/07

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
----------X

REINALDO MELENDEZ-NATAL,
Plaintiff,

-against-

RED APPLE GROUP, INC., NAMDOR INC., GRISTEDE'S FOOD NY, INC., GRISTEDE'S NY, LLC, NEW ENGLAND HYDRAULIC, INC., and LNS NEW LIGHT SERVICE, INC.,

Defendants.
----------X

Index No.:101862/2004

DECISION and ORDER

Action #1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
----------X

REINALDO MELENDEZ-NATAL,
Plaintiff,

-against-

JACK SQUICCIARINI, UNITED REFINING COMPANY, RED APPLE COMPANY, RED APPLE INC., GRISTEDE'S OPERATING CORP., NAMDOR AS THE SUCCESSOR IN INTEREST OF GRISTEDE'S OPERATING CORP., GRISTEDE'S BROS., INC., SLOAN'S SUPERMARKET, INC., STEVEN MOSKOWITZ, and JOHN GILDEA,

Defendants.
----------X

Index No.:102190/2006

Action #2

KORNREICH, SHIRLEY WERNER, J.:

In this personal injury action against multiple parties, plaintiff Reinaldo Melendez-Natal ("plaintiff") seeks to recover damages for serious injuries he sustained in February, 2003 when his arm was crushed in a compacting machine known as a "baler." At the time of the incident plaintiff was working at Gristede's Store No. 98 in Manhattan, New York. United Refining

Company ("URC") moves for summary judgment as to plaintiff's claims. CPLR § 3212(b). In support of its motion, URC submits an affirmation of counsel, the affidavit of Defendant John Catsimatidis (its Chairman and Chief Executive Officer), and copies of the following documents: the verified complaint; URC's verified answer; plaintiff's Bill of Particulars in response to URC's demand; transcripts of the examinations before trial ("EBTs") of plaintiff, and of defendant Jack Squicciarini (for himself and for defendant Red Apple Group, Inc.); and various exhibits.

Plaintiff opposes the motion and in support, he submits an affirmation of counsel and the following documents: plaintiff's affidavit; plaintiff's opposition to order to show cause; transcripts of the examinations before trial ("EBT") of defendants John Gildea and Jack Squicciarini; an affidavit of Lawrence A. Loughlin, Vice President of Human Resources for URC, and various exhibits.

I. *Procedural History*

Plaintiff initially brought suit, under Index No. 101862/2004 , against Maren, the manufacturer of the baler; Red Apple Group, Inc. ("Red Apple"), Namdor, Inc. ("Namdor"), Gristedes Food NY, Inc. ("Gristedes Food"), and Gristede's NY, LLC ("Gristedes LLC"), as owners of the Gristedes store and the Maren baler and as entities responsible for the inspection, maintenance and servicing of the baler; along with New England Hydraulic, Inc. ("New England") and LNS New Light Service, Inc. ("LNS"). Namdor, by Order to Show Cause, sought to dismiss plaintiff's action on the ground that it was plaintiff's employer and therefore Worker's Compensation Insurance was available. By stipulation of the parties, So Ordered by this court

and dated May 5, 2005, the action against Namdor was dismissed and it then became a third-party defendant based on the then-existing cross-claims.

Plaintiff then filed a second and separate action under Index No. 102190 in 2006 against putative employees of Namdor, Steven Moskowitz ("Moskowitz") and John Gildea ("Gildea"); as well as several entities involved in the administration of certain supermarket locations: Red Apple Company; Red Apple, Inc.; Gristede's Operating Corp.; Gristede's Bros., Inc.; Sloan's Supermarket, Inc.; and Jack Squicciarini ("Squicciarini"), as an employee of Red Apple Company in charge of "security" at certain supermarket locations. Plaintiff also named Namdor "as the successor in interest of Gristede's Operating Corp." By Order dated January 29, 2007, this court (on agreement of the parties) consolidated the two separate actions brought by plaintiff, and granted the defendants' motion for summary judgment in part insofar as it sought to dismiss the complaint against defendant Gristede's Operating Corp. This court also granted, in part, plaintiff's motion for reargument of a prior motion to dismiss the complaint, and modified its Order dated October 31, 2006, thereby allowing plaintiff's claims against defendants Moskowitz and Gildea to continue, because there was evidence in the record from which a jury could conclude that they were employed by the moving defendants.

Defendant Maren Engineering Corporation ("Maren") then filed a motion for summary judgment seeking to dismiss all of plaintiff's claims against it. By Order dated September 24, 2007, this Court granted the motion and dismissed plaintiff's claims against Maren and the latter's cross-claim against Namdor.

I. *Statement of Facts*

The court assumes familiarity with the Court's prior decisions. URC now argues that no vicarious liability lies against it because there is no evidence that URC had any connection either to the Gristedes store where plaintiff was working, to the baler (cardboard box compacting machine) in which plaintiff injured his arm, or to any of the individuals who serviced, maintained or repaired the baler, except for Jack Squicciarini. Squicciarini was on URC's payroll and received benefits from URC.

The employment status of several defendants, as well as what is owned by the several corporate defendants, remains highly disputed in this action. This court discussed the various defendants and their interests in and connection to both the Gristedes Store where the accident occurred and the baler, in its January 29, 2007 Order dismissing Namdor as a defendant and reinstating the claims against defendants Moskowitz and Gildea. The parties are referred to the prior Order and findings. The court also refers the parties to its September 25, 2007 Order granting Maren's motion for summary judgment, and the findings made therein.

The evidence URC has presented in support of its motion is either redundant to the evidence previously submitted in regard to prior motions or, to the extent that it constitutes new evidence, it serves only to further complicate the many factual issues that remain disputed in this case. URC relies on an additional deposition it noticed of Squicciarini, but that deposition is directly at odds with his prior deposition as to key facts. For example, as plaintiff points out in his opposition to the motion, Squicciarini stated in his first deposition that his paycheck came from URC, that he had been to URC's Pennsylvania facility many times, that he reported only to Catsimitidis (URC's Chairman and CEO), and that his job entailed security for URC and its gas

stations and trucks. In his subsequent deposition, noticed by URC after it became a named party, Squicciarini answered "no" or "I don't know" to virtually identical questions, denying any connection with URC. URC further relies on an undated and unverified organizational chart of the entity for the year 2003 and an affidavit from URC's 2007 Vice President of Human Resources. The chart was produced by URC in response to plaintiff's demand and purports to represent the structure of the company in 2003. Neither Squicciarini, Moskowitz nor Gildea appear on it. The affidavit of Lawrence A. Loughlin, as URC's Vice President of Human Resources, does not address February 2003, the accident month, but rather attests to facts in existence as of the date of the affidavit, February 20, 2007.

II. Conclusions of Law

A. *Applicable Legal Standards*

To obtain summary judgment, 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, subd [b]); it must do so by tender of evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557, 562-563 (1980). Once movant has met the initial burden, the burden shifts to the party opposing the motion to show facts sufficient to require a trial of any issue of fact. CPLR 3212 (b); *id.* at 560. *See also GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case has no merit). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the

motion." *Lakeside Constr. v Depew & Schetter Agency*, 154 A.D.2d 513, 515-515 (2d Dept. 1989).

Plaintiff has alleged three cause of action against URC and multiple entities and individuals, whose relationships are in dispute: negligence; breach of express and implied warranties; and strict products liability. It is undisputed that Maren manufactured the baler in question. Plaintiff's apparent theory of liability against URC is premised on allegations of ownership and/or control of the store and the baler, and/or direction and control of individuals who serviced, maintained or controlled the baler. URC does not argue lack of merit to the causes of action themselves, only that URC had no connection to the store and the baler, that the Complaint fails to allege a vicarious liability claim against it and that the proof of any such liability is insufficient as a matter of law.

B. *Strict Products Liability & Breach of Warranty*

In count three of the complaint, plaintiff alleges that the "defendants were part of a chain of distribution of the ... baler ... and are liable to the plaintiff by virtue of strict products liability," and that defendants warranted the safety and merchantability of the baler. (Complaint ¶¶ 92,103, Exh. A to Motion.) URC has produced sufficient evidence to establish lack of merit to this theory of liability. While it is true that New York has extended the manufacturer's strict liability to "certain sellers, such as retailers and distributors of allegedly defective products" [*Sukljian v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 95 (1986)], the undisputed evidence shows that URC did not fall into any of these categories. Although the scope of URC's business operations remains unclear and unresolved, there is no allegation, or evidence, suggesting that URC was in the business of selling or distributing balers. Without that, strict liability does not apply and summary

judgment is appropriate as to this third cause of action. *See, e.g., Sukljian v. Charles Ross & Son Co.*, 69 N.Y.2d 89 (1986) (corporation that sold machine previously used in production as surplus property is not liable to remote purchasers in strict products liability for injuries allegedly resulting from defect in machine). Plaintiff also has apparently abandoned his claim for breach of warranty, count two of the complaint. Although he does not state so specifically in the papers supporting this motion, he does so state in the papers opposing the motion for summary judgment made by Maren, which the court has granted.

C. *Vicarious Liability for Negligence*

The elements necessary to a cause of action in negligence are: (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result of the breach. *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 333 (1981). An employer can be vicariously liable for an employee's torts to the extent that the underlying acts are within the scope of employment. *Adams v. New York City Transit Authority*, 88 N.Y.2d 116 (1996). The relevant cases stress control over means of work, rather than who pays the worker's wages, as the most important factor in determining the actual employer of a worker. *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553,558 (1991); *Cruz v. HSS Properties Corp.*, 309 A.D.2d 720 (1st Dept. 2003).

URC argues that summary judgment as to count one of the complaint alleging negligence is appropriate because the evidence shows it was not Squicciarini's employer. To the extent URC relies on Squicciarini's second deposition, it contradicts his first deposition in material respects, and thus should be disregarded. *See Kelly v. Berberich*, 36 A.D.3d 475, 477 (1st Dept. 2007) (witness' affidavit directly contradicting her prior deposition testimony should not be considered).

The record in this case suggests that either defendants Moskowitz or Gildea may have incurred liability while working for companies other than Namdor before or during 2003, since they were shared among a set of interrelated and overlapping entities, often performing work under the supervision of managers who were not Namdor employees. Such a state of affairs would potentially give rise to liability, because any negligence of Gildea and Moskowitz would not be insulated by the Workers' Compensation bar to the extent that they were not Namdor employees. A jury could infer that Gildea was employed by either of the Red Apple entities or URC. His supervisor, Squicciarini, testified that he is employed by the Red Apple Company, he was produced as a witness by the Red Apple Group, Inc., he carried a business card with the name Red Apple, I-N-C., and was paid by URC. All of the moving defendant entities have a common manager, Castimatidis, to whom Squicciarini reports. Moskowitz was hired by Castimatidis, and reported to someone in the Red Apple Companies or Red Apple Group office for seven years. The manager of Store #98 was an employee of Red Apple Group for 35 years. The OSHA fine was paid by Gristede's Foods, I-N-C.

URC's additional evidence is either inadmissible (the unverified organizational chart) or bolsters the conclusion that the facts necessary to decide the bulk of this case are disputed (Catsimatidis Affidavit). A jury should be given the opportunity to assess the credibility of plaintiff's and defendants' witnesses, and to decide whether URC is the employer of Squicciarini, Moskowitz and/or Gildea, individuals whose duties involved inspection of the Baler prior to the accident. Accordingly, it is

ORDERED that defendant United Refining Company's motion for summary judgment as to the First Cause of Action in Index No.102190-2006 is denied; and it is further

ORDERED that defendant United Refining Company's motion for summary judgment as to the Second and Third Causes of Action in Index No.102190-2006 is granted; and it is further

ORDERED that the Second and Third Causes of Action in Index No.102190-2006 shall continue against defendants Jack Squicciarini, Red Apple Company, Red Apple Inc., Gristede's Operating Corp., Namdor as the Successor in Interest of Gristede's Operating Corp., Gristede's Bros., Inc., Sloan's Supermarket, Inc., Steven Moskowitz, and John Gildea; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Date: October 5, 2007

J.S.C.