SHORT FORM ORDER

INDEX No. 05-19000
CAL. No. 07-00924-OT

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 7/10/07
ADJ. DATE 8/28/07
Mot. Seq. # 003 - MD

WALTER GONZALEZ,	:	MEYER, SUOZZI, ENGLISH & KLEIN
	:	Attorneys for Plaintiff
Plaintiff,	:	990 Stewart Avenue, P.O. Box 9194
	:	Garden City, New York 11530-9194
- against -	:	
	:	McGINITY & McGINITY, P.C.
AMERICAN STEEL PROCESSING CO.,	:	Attorneys for Defendant
	:	100 Quentin Roosevelt Blvd.
Defendant.	:	Garden City, New York 11530

Upon the following papers numbered 1 to 13 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 10 - 11; Replying Affidavits and supporting papers 12 - 13; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant, American Steel Processing Co., for summary judgment dismissing plaintiff's complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff, Walter Gonzalez, on February 26, 2004, when the landing gear crank affixed to a trailer owned by defendant, American Steel Processing Co., struck him in the eye. Plaintiff, a tractor trailer operator employed by Brook Trailer Services, Inc. ("Brook Trailer"), was operating the trailer's landing gear at American Ref-Fuel facility in Westbury, New York, when the handle of the crank apparatus, which was attached to the trailer's landing equipment, recoiled and struck him in the eye. Plaintiff's complaint alleges causes of actions sounding in negligence, breach of warranty, and strict products liability.

Defendant now moves for summary judgment on the basis that plaintiff cannot prove that the trailer's landing gear crank was defective or that its conduct was culpable in any respect. Defendant also asserts that plaintiff caused his own injury by overextending the landing gear crank. Defendant, in support of the motion, submits the pleadings, an affidavit by Thomas J. Fanell, and copies of the parties' deposition transcripts.

In opposition, plaintiff contends that defendant's motion for summary judgment is premature, because all discovery has not been completed. More specifically, plaintiff alleges that he was not afforded an opportunity, until recently, to inspect the subject trailer's landing gear crank. Plaintiff further asserts that the motion should be denied on the ground that defendant failed to address plaintiff's claim that it was negligent in failing to warn of the possible danger associated with the use or misuse of the landing gear crank.

In his affidavit, Thomas J. Fanell, chief executive officer of American Steel, averred that the subject trailer was owned by American Steel but operated by Brook Trailer at the time of plaintiff's accident. Fanell stated that Brook Trailer was allowed to use the subject trailer as well as other American Steel trailers pursuant to an agreement and its course of dealing with Brook Trailer. Fanell explained that according to the agreement, Brook Trailer was responsible for maintaining the trailers it used. He explained that the landing gear and crank on the trailer at issue were not designed, installed or manufactured by American Steel. He also stated that the landing gear and crank on the subject trailer were the typical and customary type generally affixed to a trailer like the one in question. Fanell further stated that the subject trailer was sold to Whitfield Recycling in Florida prior to the commencement of the instant lawsuit.

Richard Kingry, the general manager of defendant's Hicksville facility, testified at a deposition that American Steel owned approximately two to three trailers, including the subject trailer, located at the Hicksville facility. Kingry testified that Brook Trailer was hired to do the trucking for defendant and, pursuant to a one-year contract, Brook Trailer was to load and haul ferrous from American Ref-Fuel's Westbury facility to defendant's Hicksville facility on a per ton basis. Kingry testified that while he never saw the written contract, it was his understanding that Brook Trailer was required to maintain the trailers it used. Kingry testified that all of the trailers, including the subject trailer, had landing gear cranks, which allowed the operator to disconnect the tractor from the trailer. He explained that the landing gear held the trailer in place once it was disconnected from the tractor. He further explained that the landing gear crank was manually operated and it stopped wherever the operator stopped it. Kingry stated that the plaintiff was employed with Brook Trailer as a driver and that plaintiff hauled ferrous from American Ref-Fuel's facility to defendant's facility. He testified that he was not present at the American Ref-Fuel's Westbury facility when the plaintiff was injured but later was informed of the accident. Kingry testified that he was told that plaintiff's injury occurred while plaintiff was disconnecting a trailer, when his hand slipped off the crank and the crank "came back on him." He testified that he was informed by the owner of Brook Trailer that Gonzalez was operating an American Steel trailer when he was injured. He testified that the owner of Brook Trailer stated that he believed that plaintiff's injury happened because plaintiff had overextended the crank, causing it to slip out of his hand and "pop" him in the eye. Kingry further testified that the subject trailer was sold to Whitfield Recycling and still is in use today.

Plaintiff testified at his deposition that he was employed by Brook Trailer as a driver, picking up and delivering trailers, from 2002 until his accident. He testified that he is an experienced tractor trailer driver, having obtained his New York State commercial driver's license approximately ten years ago. Gonzalez testified that the subject crank is not permanently affixed to the landing gear and rests on a hook on the side of the trailer when it is not in use. He explained that the crank is manually operated in

a counterclockwise motion to lower the trailer's landing gear. He testified there is no device on the landing gear crank that prevents an operator from cranking it too far down. Rather, the operator "feels" the pressure of the trailer and pavement, which signals the operator to stop cranking. Plaintiff testified that although he performed a pre-trip inspection of the subject trailer, he did not inspect the landing gear crank. He stated that he was injured while in the process of lowering the subject trailer's landing gear at American Ref-Fuel's facility, when the crank slipped out of his hand, recoiled, and struck him in his face. He testified that he did not feel any resistance prior to the crank recoiling, nor did he hear any air on the suspension to inform him that he should stop turning the crank. Plaintiff further testified that he did not overextend the crank because there was approximately two to three inches of space between the landing gear and the pavement.

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 demonstrate the absence of any material issues of fact (*see,* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing party's moving papers (*see,* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Once the showing has been made, the burden will then shift to the opposing party to raise an issue of fact by producing evidentiary proof in admissible form sufficient enough to require a trial on the merits (*see,* ***Zuckerman v City of New York***, *supra*). A party will not sustain its burden by simply pointing to gaps in its opponent's proof but must affirmatively demonstrate the merits of its claim or defense (*see,* ***Mennerich v Esposito***, 4 AD3d 399, 772 NYS2d 91 [2004]; ***George Larking Trucking Co. v Lisbon Tire Mart, Inc.***, 185 AD2d 614, 585 NYS2d 894 [1992]).

Based upon the foregoing, defendant has failed to make a prima facie showing of its entitlement to judgment as a matter of law (*see,* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). "Under general tort rules, a person may be negligent because he or she fails to warn another of known dangers or, in some cases of those dangers which he or she had reason to know" (***Schumacher v Richards Shear Co.***, 59 NY2d 239, 246, 464 NYS2d 437 [1983]; *see,* ***Heller v Encore of Hicksville***, 53 NY2d 716, 493 NYS2d 332 [1981]; *see also,* Restatement [Second] of Torts § 391-392]).

Here, defendant contends that Brook Trailer was responsible for maintaining the subject trailer pursuant to an agreement with defendant. However, defendant failed to submit a copy of its contract with Brook Trailer, and there is no evidence showing that it did not know, and did not have any reason to know, that the crank was potentially dangerous to individuals operating the trailer's landing gear equipment (*see,* ***Synder v Kramer***, 94 AD2d 860, 463 NYS2d 591 [1983], *affd* 61 NY2d 961, 475 NYS2d 279 [1984]). Rather, the evidence in the record regarding the nature of the business relationship between defendant and Brooks Trailer raises an issue as to whether defendant owed plaintiff a duty to ensure that the landing gear equipment on the subject trailer was safe for its intended purpose (*see,* ***Synder Kramer***, *supra*).

Furthermore, the only evidence submitted by defendant regarding the condition of the subject trailer was the deposition testimony of Kingry. When specifically asked whether there were any

problems or complaints regarding the landing gear crank on the subject trailer before the plaintiff's accident, Kingry testified that he could not remember. Under these circumstances, defendant has failed to demonstrate that it lacked notice or knowledge of any defective condition prior to the incident (*see,* ***Sulinski v Ardco, Inc.***, 298 AD2d 992, 747 NYS2d 674 [2002]; ***Gallagher v TDS Telecom***, 294 AD2d 860,741 NYS2d 630 [2002]).

Having determined that defendant failed to meet its burden of proof, the Court need not consider the sufficiency of plaintiff's papers in opposition to the motion (***Frank v Price Chopper Operating Co.***, 275 AD2d 940, 941, 713 NYS2d 614 [2002]; ***Joyce v Buffalo Waterfront Rest. Corp.***, 262 AD2d 1019, 1019-20, 681 NYS2d 835 [1999]). Accordingly, defendant's motion for summary judgment is denied.

Dated: JAN 28 2008

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**