

**Isselbacher v Larry Lopez Truck Equip., MFG Co.**

2008 NY Slip Op 30297(U)

January 30, 2008

Supreme Court, Suffolk County

Docket Number: 0022242/2002

Judge: Robert W. Doyle

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

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 9-28-07 (007)  
9-20-07 (008)  
ADJ. DATE 11-8-07  
Mot. Seq. # 007 - MG  
008 - MG; CASEDISP

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MURRAY ISSELBACHER and	:	MORTON POVMAN, P.C.
LINDA ISSELBACHER	:	Attorneys for Plaintiffs
	:	108-18 Queens Boulevard
Plaintiffs,	:	Forest Hills, New York 11375
- against -	:	
	:	
LARRY LOPEZ TRUCK EQUIPMENT, MFG	:	O'CONNOR, O'CONNOR, HINTZ, et al.
CO., CASSEL TRUCK SALES CORP., VENCO	:	Attys for Defendant Cassel GMC Truck Sales Corp.
MANUFACTURING, INC., and DANA	:	One Huntington Quadrangle
CORPORATION, d/b/a CHELSEA, WILLIAMS	:	Melville, New York 11747
MACHINE & TOOL CO., FLORIG EQUIPMENT	:	
COMPANY, INC., FLORIG EQUIPMENT OF	:	HAMMILL, O'BRIEN, CROUTIER, et al.
BUFFALO, INC.,	:	Attys for Defendant Larry Lopez Truck Equipment
Defendants.	:	6851 Jericho Turnpike, P.O. Box 1306
-----X		Syosset, New York 11791

Upon the following papers numbered 1 to 10 read on this motion and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4 - 6; Answering Affidavits and supporting papers 7 - 8; Replying Affidavits and supporting papers 9 - 10; Other   ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (#007) by defendant, Cassel Truck Sales, Corp., for summary judgment dismissing all claims interposed in this action against it and the cross-motion (#008) by defendant, Larry Lopez Truck Equipment MFG, Co., for the same relief in its favor, are considered under CPLR 3212 and are granted.

Plaintiffs commenced this action to recover damages, both and derivative, for the personal injuries sustained by plaintiff, Murray Isselbacher, on March 21, 2002, while manually attempting to engage a lever to permit a dump truck to dump its load. The truck was owned by the plaintiffs' company, Eagle Concrete, for whom, the injured plaintiff and the plaintiffs' son, Christopher, worked at the time of the accident. The subject truck, a 1998 GMC flatbed, was purchased by Eagle Concrete on in December of 1999 from defendant, Cassel Truck Sales, Corp. (hereinafter Cassel). After the truck's purchase but prior to its delivery

to Eagle Concrete, defendant Cassel sent the truck to defendant, Larry Lopez Truck Equipment MFG, Co. (hereinafter Lopez) for installation of the custom items Eagle Concrete had ordered at the time of purchase, namely, installation of 16' x 18' platform body with a Venco VC620 underbody hoist and a PTO (power take-off mechanism). Upon completion of this work, Lopez returned the truck to Cassel. On December 21, 1999, one or more principals of Eagle Concrete picked up the truck from Cassel GMC.

In or about March of 2001, the injured plaintiff first experienced problems with the truck's inability to dump its load. To alleviate the problem, the injured plaintiff reached underneath the bed of the truck in the hydraulic area above the rear tires of the passenger side and manually manipulated a lever attached to a cable thereby enabling the truck to dump its load. For this fix to be effective, the truck's engine had to be running and all pull levers situated on the inside of the cab used to employ the dump mechanism had to be fully engaged.

In or about July of 2001, the injured plaintiff began to experience transmission problems which caused the truck to be removed from service. The injured plaintiff took the truck to defendant Cassel for repair of this problem and others. After six days, the truck was picked up by the plaintiffs' son, Christopher, who reported that the transmission problem was resolved. However, approximately two months later, when the injured plaintiff next attempted to use the dump mechanism, the defect with dumping mechanism remained the same as it was prior to the transmission and other repairs made by Cassel in July of 2001.

Rather than return the truck to defendant Cassel, the injured plaintiff chose to continue using the truck and its dump mechanism by resorting to the manual fix he employed prior July of 2001. The injured plaintiff successfully negotiated this fix on at least six occasions prior to his March 21, 2002 accident. On that date, plaintiffs' son, Christopher, was operating the truck and attempted to dump a load of yard debris. When he couldn't get the truck to dump, he called out to his father. Christopher remained in the cab of the truck with both the black and red pull levers fully engaged and the truck's engine running while the injured plaintiff sat on the ground next to the rear, passenger side of the vehicle where the hydraulics were located. While sitting on the ground, the plaintiff reached up underneath the truck bed in attempt to move to a forward position the flat metal lever attached to the cable which would enable the dump mechanism. While feeling for this lever, the injured plaintiff's hand came in contact with a spinning shaft on the PTO (power take-off mechanism) which mangled the injured plaintiff's hand.

Five days after the plaintiff's accident, an employee of Eagle Concrete delivered the truck to defendant Lopez whose employees conducted a thorough inspection of the 16' x 18' platform body, the Venco VC620 underbody hoist and the PTO (power take-off mechanism), all of which, defendant Lopez had installed in 1999. As a result of said inspection, Lopez advised plaintiff, Linda Isselbacher, that the truck needed major repairs, including replacement of the PTO cable. Linda Isselbacher authorized Lopez to repair only the PTO cable and asked that the reason for such repair be put in writing. Lopez obliged by letter dated April 11, 2002, advising as follows: "The old PTO cable in question was too tight to operate due to either lack of use or lack of lubrication. The cable itself became damaged and in our opinion had to be replaced".

In August of 2002, the plaintiffs commenced this action seeking recovery of damages from all defendants named in the caption. All of the plaintiffs' claims were subsequently withdrawn and/or discontinued by written stipulations except the plaintiff's common law negligence claims against the moving

defendants. By the instant motion and cross-motion, said defendants demand an award of summary judgment dismissing the plaintiff's remaining claims and all cross-claims. The motion and cross-motion are principally predicated upon the defendants' claims that they breached no duty owing to the plaintiffs and/or that any such breach is not actionable for want of proximate cause. In support of their applications, the moving defendants rely the deposition testimony of the injured plaintiff and his son Christopher and the deposition testimony of the each of the moving defendants' principals.

The plaintiffs oppose the motion on the grounds, *inter alia*, that material questions of fact exist regarding liability on the part of each of the moving defendants for the occurrence of the accident, including those of credibility, and upon one or more of the defendants' failure to produce for deposition witnesses with material knowledge of facts concerning the conduct of the defendants' employees who interfaced with the truck, the plaintiffs or other employees of Eagle Concrete prior to the plaintiff's accident. To establish these claims, the plaintiffs rely on the deposition testimony of the plaintiff, his son and of various defendants. The plaintiffs also rely upon the affidavit of an automotive expert, whose retention was disclosed by the plaintiffs' service of a CPLR3101(d) notice on the date defendant Cassel's motion was served. This expert performed an inspection of the vehicle, the date of which is not disclosed. Plaintiffs assert that these submissions establish that the Venco hoist and Williams pump installed by Lopez prior to delivery of the truck to Eagle Concrete in 1999 had no cover guard over the lever the plaintiff was attempting to manipulate at the time of his accident. Plaintiffs argue that defendant Lopez was negligent during the course of its 1999 installation of Venco hoist and attendant apparatus and that defendant Cassel was negligent in failing to discover this defect or in failing to report and/or repair same when it serviced the truck in July of 2001.

To be actionable in tort under theories of common law negligence, the conduct of a defendant about which a plaintiff complains must be shown to be unreasonable under the circumstances and a breach of a duty owing to such plaintiff which proximately caused the plaintiff's accident and resulting injuries (*see, Dabnis v West Islip Public Library*, 45 AD3d 802, 846 NYS2d 331 [2007] and the cases cited therein). The determination of the existence and scope of a duty may involve, not only considerations of the wrongfulness of a defendant's conduct, but also an examination of a plaintiff's own informed estimate of the possible risks, viewed in light of what people may reasonably expect of one another (*Vetrone v Ha Di Corp.*, 22 AD3d 835, 803 NYS2d 156 [2005]; *see also Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347, 728 NYS2d 731 [2001]; *Turcotte v Fell*, 68 NY2d 432, 437, 510 NYS2d 49 [1986]).

Here, moving and cross-moving papers established, *prima facie*, that neither of the moving defendants engaged in any unreasonable conduct in either their 1999 installation of the truck's customized equipment or in repairing the truck's transmission in July of 2001. The moving and cross-moving papers further established, *prima facie* that said defendants had no contact with the truck after July of 2001. There being no evidence that the defendants created an unreasonable risk of harm that was a proximate cause of the plaintiff's accident or that the defendants had a duty owing to the injured plaintiff which they breached, it cannot be said that the defendants engaged in conduct that is actionable under common law theories of negligence (*Alvino v Lin*, 300 AD2d 421, 751 NYS2d 585 [2002]; *see also, Ragone v Springs Scaffolding, Inc.*, \_\_\_ AD3d \_\_\_, 848 NYS2d 230 [2007]). The record adduced on the instant applications, did however, demonstrate that the injured plaintiff's conduct in reaching under the truck bed in an attempt to reach a lever

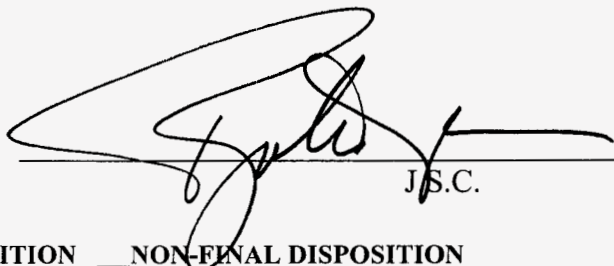
Isselbacher v Lopez  
 Index No. 02-22242  
 Page No. 4

attached to a cable while the truck's engine was running and with full knowledge that the shaft of the PTO mechanism was turning was the sole proximate cause of his accident (*see, Alvino v Lin, supra*).

The plaintiffs opposing papers failed to rebut the defendants' *prima facie* showing of their respective entitlement to the summary judgment demanded by them. The affidavit of the plaintiffs' expert was conclusory as it failed to disclose the of his inspection of the subject truck. The court is thus without a sufficient evidentiary predicate to conclude, as did the plaintiffs' expert, that the truck was in the same condition on the date of his inspection as it was on March 21, 2002, the date of the accident (*see, Oboler v City of New York*, 31 AD3d 308, 819 NYS2d 34 [2006]; *Papazian v New York City Transit Authority*, 293 AD2d 658, 740 NYS2d 450 [2002]). In addition, the expert's assertions were speculative with respect to any failure to install the safety lever guard in 1999 when the other customized equipment was installed (*see, Tantuccio v Marina Holding Corp.*, 20 AD3d 472, 799 NYS2d 234 [2005]; *Masterson v City of New York*, 272 AD2d 591, 709 NYS2d 831 [2000]). The record is thus devoid of any competent proof that truck was without the lever guard safety cover when it was originally delivered to Eagle Concrete in 1999 and was without said lever guard when the truck was serviced by defendant Cassel in July of 2001. Accordingly, no genuine questions of fact on the issue of the defendants liability to the plaintiffs were raised by the plaintiffs' opposing papers. The plaintiffs' claim that summary judgment must be denied due one or more of the defendants' failures to properly disclosure evidence is rejected as unmeritorius (CPLR 3212 (f)). Where, as here, the plaintiff certifies an action as trial ready and notices it for trial by the filing of a note of issue and certificate of readiness, a claim of incomplete discovery will not defeat a *prima facie* showing of entitlement to summary judgment (*Matuszak v B.R.K. Brands, Inc.*, 23 AD2d 628, 804 NYS2d 814 [2005]). The court has considered the other contentions of the plaintiffs and finds them to be without merit.

In view of the foregoing, the instant motion and cross-motion by the defendants for summary judgment dismissing the plaintiffs' complaint and all cross- claims asserted against said moving defendants are granted. The within action shall be marked disposed upon the Calendar Clerk's receipt of this order as there are no claims that remain unresolved.

Dated:     JAN 30 2008    

  
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 J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION