Erickson v Cross Ready Mix, Inc.
2008 NY Slip Op 32658(U)
September 22, 2008
Supreme Court, Nassau County
Docket Number: 011947/05
Judge: Daniel Martin
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

Richard J. Erickson.

Plaintiff.

- against -

Cross Ready Mix, Inc., and "JOHN DOE", an agent, servant and/or employee of Cross Ready Mix, Inc., Turner Construction Company, Elite Ready Mix Corporation and "JOHN DOE", an agent, servant and/or employee of Elite Ready Mix Corporation.

Defendants.

Sequence No.: 006, 007, 008 & 009
Index No.: 011947/05

Turner Construction Company.

Third-Party Plaintiffs.

- against -

Commodore Construction Corp.

Third-Party Defendant.

The following named papers have been read on this motion:	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motions and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Defendant, Cross Ready Mix, Inc. moves pursuant to CPLR 3212, for an Order granting summary judgment dismissing the complaint of the plaintiff, Richard J. Erickson, and dismissing any and all cross claims asserted against it.

Third-party defendant, Commodore Construction Corp. moves pursuant to CPLR 3212, for an Order granting summary judgment dismissing the complaint of the defendant/third party plaintiff, Turner Construction Corp., and dismissing any and all cross claims asserted against it.

Defendant, Elite Ready Mix Construction, moves pursuant to CPLR 3212, for an Order granting summary judgment and dismissing the complaint of the plaintiff, Erickson, in its entirety, and all cross claims asserted against it.

Defendant/third party plaintiff, Turner Construction Company, cross-moves pursuant to CPLR 3212, for an Order granting summary judgment dismissing plaintiff, Erickson's complaint; and for an Order, pursuant to CPLR 3212, granting summary judgment in its favor for contractual indemnification against the third party defendant, Commodore Construction Corp.

The motions are determined as set forth below.

This personal injury action arises out of an accident which occurred on November 4, 2003, at a construction site located at 177 Cantiague Rock Road, Hicksville, New York (the "job site"). On July 28, 2003, defendant/third party plaintiff, Turner Construction Company ("Turner"), entered into a contract with third party defendant, Commodore Construction Corp. ("Commodore") to perform concrete and masonry work for and at the Endo Pharmaceutical 177 R&D Building located at the job site (*Turner Cross Motion*, Ex. K) . The construction job included renovation of an existing building and construction of a new one along with roads, parking lots and walking areas around the buildings. Turner, as the general contractor for this project, retained Commodore, as a concrete subcontractor (*O'Connor Tr*., p. 13). Commodore's laborer foreman, James O'Connor, testified at deposition that in order to perform its work, Commodore entered into a verbal agreement with defendant, Cross Ready Mix, Inc. ("Cross") to deliver the concrete to the job site (*Id*., p. 13).

Cross's dispatcher, Patrick Deacitis explained at deposition that Cross too, on occasion, hired trucks from other concrete companies to make deliveries for it and on those occasions, the truck hire was done by phone call without a written contract or other documentation (*Deacitis Tr*., p. 7). Deacitis explained that when Cross hired trucks from other concrete companies, the drivers from those other companies reported to Cross' facility, filled up their truck's water tank and then went to Cross's "dispatch room" to get a delivery ticket showing them where they were to make the concrete delivery (*Id*., p. 8). After learning where the delivery was to be made, those drivers then had their truck loaded with concrete and left to make the delivery (*Id*).

Deacitis testified that he was working as Cross's dispatcher on November 4, 2003 and that he specifically recalled dispatching trucks from other companies that day and more particularly, dispatching two trucks hired from Elite Ready Mix, one of which was sent to the subject work site. He testified that he personally wrote in the name "Elite" on the particular delivery ticket at the time the delivery ticket was given to the Elite driver (*Id*., p. 16). Deacitis testified that, other than giving the Elite driver directions as to where the delivery of concrete was to be made, the Elite driver was given no other instructions (*Id*., p. 22). Deacitis testified that Cross did not pay the Elite driver directly for his work that day; instead, Elite sent Cross a bill for the truck hire for the day (*Id*., pp. 24, 28). At the end of the day, the Elite truck and driver did not return to the Cross facility.

Elite's owner and operating manager, Anthony Grecco, also testified that on November 4, 2003, he hired out two Elite trucks with drivers named "Alex" and "Joe" to Cross but that neither "Alex" nor "Joe" was involved in an accident on November 4, 2003 (*Grecco Tr.*, pp. 18-23, 33).

At his deposition, plaintiff, Richard J. Erickson ("Erickson") testified that at the time of the incident he was employed by Commodore as a concrete laborer. His job duties for the project included shoveling dirt, building forms for the pouring of concrete, hammering, nailing, bending rebar, grading dirt and excavating pipes with shovels and by hand (*Erickson Tr.*, pp. 9-12). Plaintiff stated that he had worked at the job site for approximately one and one-half months before the incident occurred (*Id.*, p. 16) and during that time, he received all of his work assignments, instructions and directions of where to perform his work from his foreman and his "shop steward" both of whom were employed by Commodore (*Id.*, pp. 22-23).

On November 4, 2003, plaintiff arrived at the jobsite at approximately 7:00 am and was assigned by Commodore's carpenter foreman, James O'Connor, to pour sidewalk curbs and light pole bases in the subject parking lot (*Id*, pp. 24-27; *O'Connor Tr.*, pp. 21-22). Plaintiff was responsible for shoveling and leveling the concrete as it was poured from a concrete truck (*Id.*, pp. 27-28). In order to pour the concrete for the base of a light pole, the concrete truck would back up to the excavated hole, the chute would be extended into the hole and then the concrete would be poured from the truck (*Id.*, p. 28). When the encased form in the hole filled up, the workers would tell the driver of the concrete truck to stop the pouring (*Id.*, pp. 28-29).

Plaintiff was working with another Commodore employee named Michael Schutt when the incident occurred (*Id.*, pp. 31-32). At that time, plaintiff was in the process of checking and preparing a wooden form for a light pole base. The form had been set in a hole that was four feet wide and five feet deep (*Id.*, p. 35). When Erickson was preparing the form, he noted that there was a concrete truck in the vicinity (*Id.*, p. 40). The truck was stopped about twenty feet away from the hole where plaintiff and Schutt were working and the rear of the truck was closest to them (*Id.*, pp. 41-42). Plaintiff was unable to recall the color of the truck or the cab (*Id.*, pp. 38, 42).

Plaintiff's co-worker, Michael Schutt testified that there was only one concrete truck on site on the date of plaintiff's accident (*Schutt Tr.*, p. 20). Specifically, Shutt testified, in pertinent part, as follows:

> Q: Was there one concrete truck involved in the curb pours or more than one?
> A: I think one.
>
> ***
>
> Q: Could you describe the truck that was involved in the pour of the curbs that day?
> A: Well, there was – it was a regular concrete truck. They got the big barrel on them. It said Elite and Cross Concrete on it. It had Elite. It had, like, Elite Concrete and

[* 4]

Cross Concrete, the sign on the truck.

Q: So it's your recollection that it said both Elite Concrete and Cross on this truck?

A: Yeah, I wrote them both down, so – whether they had them both, and one works for the other in, like, I'm not totally positive, but that's how I have it written down here.

Q: Other than what you have written down, do you have any recollection, independent of what you have written, as to what it said on the truck that day?

A: No. I just wrote down what I wrote down that day.

Q: Do you have any independent recollection of what color the truck was that was involved –

A: Green and gray.

Q: – that did the pouring that day?

A: I'd say, green and gray.

Q: Do you recall any writing at all on the truck?

A: To my best recollection, if you want to pin me down, I would say, Cross.

Q: What are you basing that on? Is that based on what you wrote down?

A: I got written down Cross. I'm trying to – it's three years ago. I'm trying to definitely remember the name on the thing, but I'm almost positive it would be Cross, if you want to do it like that.

Q: You, also, mentioned Elite. Do you know where you got that name from?

A: Well, after this happened, I'm trying to figure out who's responsible, 'cause supposedly that's part of my job. So, I guess, I might have even got that from the GC Turner, maybe, because when I went in to fill out the accident report, I had to find out all this stuff, so I could know what the heck was going on.

(*Schutt Tr.*, pp. 20-22)

Schutt also testified that it is the responsibility of the cement truck operator to secure the cement chute on the truck (*Id.*, p. 79).

Plaintiff testified that he was standing and bending over the hole with his back to the concrete truck just before the incident occurred (*Erickson Tr.*, pp. 50-51). He was struck from behind by "something" that made contact with the upper part of his back and knocked him off balance (*Id.*, pp. 53-55). Plaintiff fell into the hole (*Id.*, p. 55). Plaintiff did not know what struck him, but was later told by his co-worker, Michael Schutt, that he had been struck by the chute from the cement truck (*Id.*, p. 53). Plaintiff testified that no warning sound was made by the truck as it backed up (*Erickson Tr.*, p. 191).

In bringing this action against defendants, Cross, Elite and Turner, plaintiff alleges negligence and violations of Labor Law §§ 200, 240(1) and 241(6). Specifically, plaintiff alleges that he was injured as a result of being struck in the back by the "chute" of a concrete delivery truck which allegedly swung into him when one of the rear wheels of the cement truck went up onto a pile of debris.

It is noted at the outset that plaintiff's claims that defendants, Cross, Turner and Elite, are all liable under Labor Law § 240(1) are entirely meritless and are therefore dismissed.

Plaintiff's injuries are also not compensable under Labor Law §240(1) since the accident is not attributable to the kind of extraordinary height related risk contemplated by the statute. Labor Law §240(1) was enacted "[i]n recognition of the exceptionally dangerous conditions posed by elevation differentials at work sites ... for workers laboring under unique gravity-related hazards [citation omitted]" (Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 491 [1995], *rearg. denied* 87 N.Y.2d 969 [1996]).The Court of Appeals has made it clear that "[t]he extraordinary protections of Labor Law §240(1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" (Nieves v. Five Boro A.C. & Refrig. Corp., 93 N.Y.2d 914, 915-916 [1999], Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501 [1993]).

In this case, plaintiff was working on ground level when he was struck by the chute extending from the rear of a cement truck, which knocked him into a hole that approximately four feet wide and five feet deep. It is clear that the chute from the cement truck that struck the plaintiff was nothing more than a general hazard of the workplace and not the special type of risk that would trigger Labor Law §240(1) (Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509 [1991]; Meslin v. The New York Post, 30 A.D.3d 309 [2nd Dept. 2006]). Accordingly, plaintiff's Labor Law §240(1) claims are dismissed.

It is well settled that as a predicate to sustaining a Labor Law §241(6) claim, a plaintiff must identify a specific and applicable Industrial Code provision that mandates compliance with "concrete specifications" (Ross v. Curtis-Palmer Hydro Elec. Co., 81 N.Y.2d 494, 505 [1993]; Biszick v. Ninnie Constr. Corp., 209 A.D.2d 661 [2nd Dept. 1994]). By order dated September 22, 2008 this court granted plaintiff's motion to compel defendants herein to accept plaintiff's proffered supplemental bill of particulars in which plaintiff sets forth various alleged violations of, *inter alia*, the Industrial Code. Thus, the court denies these branches of the motions.

In contrast to Labor Law §§240 and 241(6), Labor Law §200 has been deemed a codification of the common law duty of an owner or employer to provide employees with a safe place to work (Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877 [1993]). As such, liability can be imposed under Labor Law §200 only if the party charged with violating it was negligent. This requirement generally means that the defendant cannot be held liable unless it knew or should have known of the condition or the work practice in issue and had the ability/authority to correct it (DeBlase v. Herbert Construction Company, Inc., 5 A.D.3d 624 [2nd Dept. 2004]; Miller v. Shah, 3 A.D.3d 521 [2nd Dept. 2004]; Begor v. Mid-Hudson Hardwoods, Inc., 301 A.D.2d 550 [2nd Dept. 2003]). Thus, to establish liability for common-law negligence or violation of Labor Law §200, plaintiff must establish that the defendant in issue had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v. Picciano & Son, 54 N.Y.2d 311, 317 [1981]; Rizzuto v. Wenger Contr. Co., 91 N.Y.2d 343, 352 [1998]; Singleton v. Citnalta Constr. Corp., 291 A.D.2d 393, 394 [2nd

Dept. 2002]). "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200" (Dos Santos v. STV Engrs., Inc., 8 A.D.3d 223, 224 [2nd Dept. 2004], *lv denied*, 4 N.Y.3d 702 [2004]). Further, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed (Loiacono v. Lehrer McGovern Bovis, 270 A.D.2d 464, 465 [2nd Dept. 2000]).

The owner and general contractor cannot be held vicariously liable, either at common law or under Labor Law §200, for a subcontractor's failure to follow safe procedures (Palmer v. Center for Nursing and Rehabilitation, 18 A.D.3d 364 [2nd Dept. 2005]; Davis v. Manitou Construction Company, 299 A.D.2d 927, 928 [4th Dept. 2002]). Also, such defendants cannot be held responsible for a contractor's unsafe work practices if the defendant did not actually supervise or control the contractor's work (Perri v. Gilbert Johnson Enterprises, Ltd., 14 A.D.3d 681 [2nd Dept. 2005]; O'Brien v. Triborough Bridge and Tunnel Authority, 17 A.D.3d 105 [1st Dept. 2005]). On the other hand, such a defendant can be deemed at fault if the defendant knew or should have known of the unsafe work practice and it had "supervisory control" over the activity (Galassa v. Lizda Realty, Ltd., 18 A.D.3d 809 [2nd Dept. 2005]). However, general control over the project as a whole does not constitute the kind of close supervision that will render such a defendant responsible for the contractor's work methods (Dos Santos v. STV Engineers, Inc., supra; Parisi v. Loewen Development of Wappinger Falls, L.P., 5 A.D.3d 648 [2nd Dept. 2004]).

Turner's Cross-Motion/Commodore's Motion

In cross moving for summary judgment dismissal of plaintiff's Labor Law §200 and common law negligence claims and dismissal of co-defendant, Cross and Elite's cross claims for common law indemnity/contribution, Turner submits ample evidence to establish that it did not direct, supervise or control the plaintiff's work, the work area where the accident occurred, or direct the concrete truck that was making a delivery of concrete at the time of the incident. In addition, Turner maintains that it did not provide plaintiff with his tools, materials and equipment nor did it determine the means, methods and/or procedures used by plaintiff to perform his job. Based upon the evidence submitted by Turner in support of its cross motion, this Court finds that Turner has also demonstrated that it was not given any prior notice by Commodore, its subcontractor, of any problems concerning deliveries of concrete made to the job site or problems during the pouring of concrete that allegedly caused the subject incident such that it cannot be held liable on plaintiff's common law negligence and Labor Law §200 claims.

Thus, in light of Turner's showing of entitlement to judgment as a matter of law , the burden shifts to the parties opposing Turner's motion to come forward with proof in evidentiary form establishing the existence of triable issues of fact, or demonstrate an acceptable excuse for its failure to do so (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]).

[* 7]

In opposition, defendants, Cross and Elite both argue that in an action where a plaintiff's injury is alleged to be at least partially attributable to a defect upon the property of a work site, Turner may be held liable under Labor Law 200 and upon common law negligence due to its actual or constructive notice of the alleged dangerous condition regardless of whether they supervised plaintiff's work (Abayev v. Jaypson, 2 A.D.3d 548 [2nd Dept. 2003]; Blanco v. Olivieri, 304 A.D.2d 599 [2nd Dept. 2003]). Cross and Elite maintain that Erickson was injured as a result of being struck in the back by the chute of a concrete truck which allegedly swung into him when one of the rear wheels of a cement truck went up onto a pile of debris. Cross and Elite submit that it is apparent that plaintiff's injury may have arisen not only out of the "means and methods" utilized by the plaintiff, his employer and the cement delivery company, but also, at least in part, as a result of an inherently "dangerous condition," i.e., a large pile of debris, existing upon the site and more particularly in the specific area where plaintiff was performing work. Cross and Elite submit that there remain questions of fact with respect to Turner's potential active negligence in permitting the subject debris pile to exist in an area where active work was taking place and construction vehicles were operating in close proximity to workers, as well as whether Turner had active and/or constructive notice of that condition.

It is well settled that the burden on parties opposing the motion is to submit evidentiary proof in *admissible* form that is sufficient to ultimately create material issues of fact (Ayotte v. Gervasio, 81 N.Y.2d 1062 [1993]). Mere conclusions and unsubstantiated allegations and assertions, as those presented by defendants, Cross and Elite, herein, are clearly insufficient (Zuckerman v. City of New York, supra at 562).

It is true that where the accident is caused by a premises defect, as opposed to a contractor's unsafe work practice, and as opposed to a defect in the contractor's tools, liability can be imposed on the general contractor or owner under Labor Law §200 or under general common law negligence principles (Kerins v. Vassar College, 15 A.D.3d 623 [2nd Dept. 2005]). However, because liability is necessarily premised on negligence, it is essential that either there be proof of actual or constructive notice (Bennett v. Fairchild Republic Charter, Inc., 298 A.D.2d 418, 418-419 [2nd Dept. 2002]; Lara v. Saint John's University, 289 A.D.2d 457 [2nd Dept. 2001]) or, there be proof that the defendant affirmatively caused the dangerous condition (*see, e.g.,* Fernez v. Kellogg, 2 A.D.3d 397 [2nd Dept. 2003]).

The record here is clear that Turner did not direct, supervise or control the plaintiff's work, the work area where the accident occurred, or the concrete truck that was making a delivery. Nor did Elite or Cross submit any evidence that any complaints were made to Turner or that Turner had any notice, actual or constructive, of the pile of dirt and/or debris that the cement truck purportedly drove over as it negligently operated in reverse towards where the plaintiff was working at the job site.

It is undisputed that there was ongoing construction and excavation work in the area where the incident occurred and no testimony was elicited or documentary evidence submitted that Turner had been present in the location where the incident occurred on the day of, or in close

proximity to the date of, the incident, or that Turner had actual notice of the alleged pile of debris. There is also no testimonial or documentary evidence concerning the length of time that the pile of debris existed prior to the accident.

Moreover, there is absolutely no support based on the facts here for a claim that a pile of debris was an inherently dangerous condition (*see,* Curatas v. Tomis Kourkoumelis, 265 A.D.2d 293 [2nd Dept. 1999]). There is no evidence that a pile of debris was a dangerous or defective condition as it existed on the day of the accident. There is no showing that there were any complaints or that there were any job site rules or procedures violated (Lombardi v. Stout, 80 N.Y.2d 290 [1992]). Rather, the evidence shows that the plaintiff's injury was caused by the manner in which the chute was secured (or failed to be secured) to the truck. The unsafe condition in this case is the swinging cement chute. In the absence of any evidence that Turner created or had notice of a problem with the concrete chute - the actual and proximate cause of the plaintiff's injury - the Labor Law § 200 and common law negligence claims are herewith dismissed.

In initially opposing Turner's cross motion, plaintiff, Erickson, submits that the outstanding deposition testimony of Elite's truck driver - "Joe" a/k/a "Jose Morico" - also precludes an award of summary judgment because "the witness could implicate Turner or state that he took directions from or was supervised by parties at Turner" (*Plaintiff's Aff in Opp.*, ¶11). Plaintiff claims that the matter is not ripe for a summary judgment motion.

It should be further noted that the deposition of said non-party witness was held on September 7, 2007 and the court permitted the parties herein to submit sur-reply papers relative thereto. Nowhere does plaintiff assert that Mr. Morico testified at his deposition that defendant Turner controlled his work.

In light of plaintiff's lack of evidence that Jose Morico's testimony implicates Turner (Baron v. Incorporated Village of Freeport, 143 A.D.2d 792 [2nd Dept. 1988]), Turner's cross-motion for summary judgment is granted.

Plaintiff also conclusively, and without any evidentiary support, asserts that ultimately, the general contractor, Turner, had control over both parties, had the final word on work and had control over the work site and who entered onto and exited from said work site. Again, inasmuch as plaintiff is required to submit evidence in admissible form when opposing a motion for summary judgment, his failure to do so herein precludes a denial of Turner's motion dismissing plaintiff's Labor Law §200 and common law negligence claims. Plaintiff has not proven that Turner, as the general contractor, exercised direct supervisory control over the manner in which the activity alleged to have caused the injury was performed (Rizzuto v. L.A. Wenger Construction Co., 91 N.Y.2d 343, 352 [1998]).

Accordingly, Turner's cross motion for summary judgment dismissal of plaintiff, Erickson's complaint is herewith granted and the complaint is dismissed.

[* 9]

Under these circumstances, Turner's cross-motion for an order granting it summary judgment on its contractual indemnification claims against the third party defendant, Commodore Construction Corp., is denied as moot.

Likewise, third party defendant, Commodore's motion, granting it summary judgment dismissal of Turner's third party complaint, on the grounds that plaintiff, Erickson, cannot make a prima facie case against Turner for negligence under the common law or under Labor Law §§ 240(1), 241(6), or 200 is granted.

Cross's Motion/Elite's motion

Defendants, Cross Ready Mix, Inc. and Elite Ready Mix, Inc., move, separately, for an order granting them summary judgment dismissal of plaintiff, Richard Erickson's complaint. The underlying basis for both defendants' separate motions is that the truck which struck the plaintiff was simply not their truck.

Specifically, in support of its motion, Cross maintains that the evidence establishes that Cross, was not negligent in any manner nor can it be held vicariously liable for any alleged negligence of Elite's driver. Cross maintains that plaintiff's Labor Law allegations are inapplicable to it because it had no authority or control over the plaintiff or the work he was performing. Cross maintains that plaintiff's Labor Law §200 cause of action is without merit as it is patently clear that it neither directed nor controlled the plaintiff or the work he was performing at the job site.

Similarly, Elite argues that based on the evidence submitted, Elite cannot be held liable for any damages to the plaintiff. Elite submits its delivery tickets which purport to show that on the date of plaintiff's accident, Alex and Joe were hired by Cross as "truck hires". Elite submits that the testimony of Alex Salcedo and the affidavit of Jose Morico clearly establish that neither of these two drivers were at the construction site on the date of plaintiff's accident. Since neither driver was sent by Cross to the site, Elite argues they could not have caused plaintiff's accident.

In a sur-reply submission authorized by the court plaintiff asserts that plaintiff has, in fact, identified non-party Jose Morico as the driver of an Elite truck on the date of the accident. At his deposition which was held on September 7, 2007, Mr. Morico testified that:

1) he was employed by Elite on the date of the accident; and
2) he was the only driver employed by Elite who drove truck number 14 in November, 2003.

Non-party witness Mike Schutt testified at his deposition that the driver of the truck whose chute struck plaintiff was Hispanic. Plaintiff testified at his deposition which had been held previously that said driver appeared to be Arab or Indian.

Most importantly, plaintiff avers in the sur-reply papers that at said September 7, 2007 deposition of Mr. Morico he came face to face with the witness and identified him as the driver of the cement truck at the jobsite on the date of accident and that he was the "medium to tanned skinned Hispanic person that I observed operating the cement truck on the day that it hit me."

In reply to this Elite first asserts the court should disregard the affidavit from plaintiff due to inconsistencies in 1) the ethnicity of the driver; 2) the description of the occurrence of the accident; and 3) plaintiffs testimony with the testimony from Mr. Morico as to whether he was at the job site.

More compelling than plaintiff's ability to correctly identify another man's ethnicity is the fact that upon seeing Mr. Morico at the deposition he identified him as the driver of the vehicle. Also unavailing is Elite's position that Mr. Erickson had inconsistently described how the accident occurred and that his affidavit is inconsistent with Mr. Morico's testimony. The court's role in deciding summary judgment motions is to determine whether issues of fact exist and the determination of credibility thereon is improper. See, Castronovo v. Doe, 274 A.D.2d 442 (2000).

Thus, defendant Elite's motion for summary judgment dismissing plaintiff's Labor Law §200 claim and common law negligence claim is denied.

With regard to defendant Cross the court reaches a different conclusion. Generally, a party who hires an independent contractor as opposed to an employee or servant is not liable for the negligence of the independent contractor. See, Rosenberg v. Equitable Life Assurance Society, 79 N.Y.2d 663 (1992); Gravello v. Norman, 75 N.Y.2d 779 (1989). The exceptions to this rule are where the hiring defendant negligently hired the independent contractor, employed the contractor to perform an inherently dangerous task and where the hiring defendant is under a specific statutory non-delegable duty. See, Kleeman v. Rheingold, 81 N.Y.2d 270 (1993).

In opposition to defendant Cross' motion plaintiff offers no evidence that defendant Cross was anything other than an independent contractor or that any of the above referenced exceptions apply to this matter such that liability can be imposed on Cross for Elite's negligence.

Accordingly, Cross' motion for summary judgment is granted and the complaint and all cross-claims asserted against this defendant are dismissed.

So Ordered.

A.J.S.C.

Dated: September 22, 2008

ENTERED
SEP 30 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE