6.28.10

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

PRESENT: BARBARA JAFFE J.S.C. PART 5
Justice

ANDERSON

- v -

CITY

INDEX NO. 105600/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO. 4

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 6-24-10
JUN 24 2010

BARBARA JAFFE J.S.C.
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 5

----------x

ANDREW ANDERSON and SANDRA JO ANDERSON,

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant.

----------x

Index No. 105600/08
Motion Date: 04/27/10
Motion Seq. No.: 001
Calendar No.: 4

DECISION & ORDER

BARBARA JAFFE, JSC:

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By notice of motion dated January 25, 2010, plaintiffs move pursuant to CPLR 3212 for an order granting them summary judgment on the issue of liability, and directing an immediate trial on damages. Defendant opposes.

I. UNDISPUTED FACTUAL BACKGROUND

Plaintiff Andrew Anderson (plaintiff) was a sanitation worker employed by the New York City Department of Sanitation (DOS). He alleges that on January 12, 2008, he became permanently disabled when a rear wheel of a forklift operated by a DOS employee ran over his ankle. (Affirmation of Joshua D. Kelner, Esq., dated Jan. 25, 2010 [Kelner Aff.]).

On the day of his accident, plaintiff was one of several sanitation workers assigned to install snow plows onto sanitation trucks. (Kelner Aff., Exh. E ¶¶ 3, 4). As a plow weighs more than 1,000 pounds, a forklift is used to deliver it to the front of a truck. (Kelner Aff., Exh G at

31). Several workers then use heavy metal pins to secure the plows to the trucks. (Kelner Aff., Exh. D at 26-27). Thomas Stavola operated the forklift; Joe Kelly and Robert Stucky installed the plows with plaintiff. (*Id.*). Another worker, Russell Hansen, sat inside the trucks while plaintiff and the others affixed and secured the plows to the trucks. (Kelner Aff., Exhs. B at 65-66, G).

A forklift is steered by its rear wheels. (Kelner Aff., Exh. J). When the steering wheel is turned in one direction, the rear wheels swing out in the opposite direction, known as a "tail swing." (*Id.*). The training of forklift operators like Stavola includes information about the tail swing, and Stavola acknowledged his understanding of the tail swing and his responsibility to ensure that no one would be nearby when he turned. (*Id*,, Exh. B at 16-17). Stavola's forklift was equipped with a horn, as are all forklifts (*id.*, Exh. J at 11, 13), although Stavola was unaware of it (*id.*, Exh. B at 28).

That day, plaintiff and his co-workers were at 2 Bloomfield Street by the West Side Highway in Manhattan. (*Id.*, Exhs. D at 14-15, 23, I, K). The plows were on the west side of the work area, and the pins were stored next to a mechanics bay where vehicles are repaired. (*Id.*, Exh B at 16-18). The sanitation trucks, 20 feet apart from one another, stood between the plows and the mechanics bay, each facing the mechanics bay. (*Id.*, at 18, 41, Exh. E ¶ 4).

After plaintiff and the others had installed two plows, Stavola drove the forklift to the next plow, backing up until the forklift was flush with the trucks. (*Id.*, Exh. B at 56). He then loaded the plow onto the forklift. (*Id.*). Pursuant to the usual procedure, plaintiff and the others stood by the truck and inserted the pins. (*Id.* at 56-57). Stavola waited as they did so, keeping the plow and forklift properly lined up. (Kelner Aff., Exhs. B at 56-57, D at 24-25).

Believing that the men had inserted the wrong pin, Stavola backed up the forklift to retrieve another pin. (*Id.*, Exh. B at 57-58). As plaintiff and the others waited by the truck, Stavola parked the forklift, loaded the pins onto the pallet of the forklift, and drove back to the truck. (*Id.* at 58). Plaintiff, on the right, driver's, side of the truck, attempted to insert a pin, taking care to avoid injury. (*Id.*, Exh. H at 43, 46, Exh D at 46). Stavola saw plaintiff in his peripheral vision (*id.*, Exh B at 65) and sought to retrieve another plow while plaintiff was installing the pin (*id.*, Exh. D at 46). Plaintiff struggled with the pin for two to three minutes before the accident (*id.*, Exh D at 46-47), and saw the forklift between 45 seconds and a minute before it struck him (*id.*, Exh. E ¶ 5).

Although Stavola announced that he was going to retrieve another plow, neither plaintiff nor Hansen heard him and could not have heard him over the loud noise in the work area. (*Id.*, Exhs. E ¶ 3; G at 22, H at 42). Kelly heard someone say "go get another plow." (*Id.*, Exh. H at 41-42). Hansen, who was facing Stavola from his vantage in the truck, saw Stavola gesturing towards the plows. (*Id.*, Exh. G at 37). Stavola did not honk his horn. (*Id.*, Exh. H at 42).

Stavola then drove past the truck; plaintiff was on his left. (*Id.*, Exh. B at 61). He turned the wheel of the forklift to the right and the left rear tire rolled to the left, over plaintiff's ankle. (*Id.*, Exh. D at 48). As the others helped plaintiff, Hansen heard Stavola say, "I passed him. I thought I was clear." (*Id.*, Exh. H at 41).

II. PERTINENT PROCEDURAL BACKGROUND

On April 21, 2008, plaintiff served defendant with his summons and complaint, alleging common law negligence and unspecified violations of the Labor Law, and a loss of consortium claim on behalf of his wife. (Kelner Aff., Exh. A).

III. CONTENTIONS

Plaintiff argues that he is entitled to summary judgment given the evidence that Stavola failed to act with reasonable care, that his negligence was the proximate cause of his injuries, and that there is no evidence that he, plaintiff, was negligent. (Kelner Aff.). In addition to his own testimony, plaintiff relies on the undisputed testimony of Stavola, Hansen, and Kelly, along with his own affidavit and an expert's affidavit. (*Id.*, Exhs. B, D, E, G, H).

In opposition, defendant denies that plaintiff has established liability as a matter of law, and maintains that affidavits by plaintiff and plaintiff's expert should be not considered, and that in any event, plaintiff is not entitled to summary judgment given the triable issues of fact as to his own culpable conduct by moving towards the forklift or remaining in close proximity to it and by neglecting to follow protocol. (Affirmation of Peter C. Lucas, ACC, dated March 29, 2010 [Lucas Aff.]). Defendant also relies on the testimony of the witnesses and objects to plaintiff's expert's affidavit. (*Id.*, Exhs. C, D).

IV. ANALYSIS

"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." (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs, Inc.*, 46 NY2d 1065, 1067 [1979]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853).

When the moving party has demonstrated entitlement to summary judgment, the burden

of proof shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562). The opposing party must "lay bare" its evidence (*Silbertstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1st Dept 2003]); "unsubstantiated allegations and assertions are insufficient" (*Zuckerman*, 49 NY2d 557, 562).

The material facts are not in dispute (Kelner Aff., ¶ 16; Lucas Aff. ¶ 3), except to the extent that City alleges that plaintiff's co-workers heard Stavola announce that he was going to get another plow (Lucas Aff., ¶ 20), a contention unsupported by the evidence (Kelner Aff., Exhs. H at 41-42, G at 22, 37, E ¶ 3).

The undisputed facts establish that Stavola drove the forklift's rear left wheel over plaintiff's ankle notwithstanding his awareness that plaintiff was nearby and in the process of inserting a pin. In *Lopez v WS Distribution, Inc.*, 34 AD3d 759 (2d Dept 2006), the court upheld the motion court's award of summary judgment to the plaintiff who established that he had been struck by a forklift driven in reverse by the defendant's employee. The facts here are essentially the same. Having turned the forklift's steering wheel to the right while in close proximity to plaintiff on his left, and notwithstanding the space between the trucks and his knowledge of the tail swing, Stavola thereby created a danger like that created when one backs up a vehicle without looking behind. Stavola also had reason to know, having assisted in installing two plows that day, that plaintiff was focused on installing a pin into the plow.

Lopez is also instructive because there, based on the failure of the forklift driver to say where he was looking before striking the plaintiff or whether he saw the plaintiff and, if so, why he could not avoid striking him, the court would not consider his testimony that the plaintiff had

walked behind the forklift, thereby causing the accident. (34 AD3d at 760). Here too, Stavola admitted that he did not look before turning. Consequently, there is no evidentiary basis for his assertion that plaintiff caused the accident by standing too close to the forklift. Rather, Stavola was negligent even if he had looked because he would have seen plaintiff in close proximity to his left rear wheel, which would have alerted him to the danger. That he had no reason to know or presume that plaintiff would position himself near the forklift while he was in the process of pulling away from the truck does not relieve him of liability, in view of his knowledge of the positions of plaintiff and the others relative to the forklift. Likewise, absent any evidence that plaintiff was able to hear anything over the din at the site, Stavola's announcement that he was getting another plow did not serve as a warning sufficient to relieve defendant of liability. Rather, sounding the horn would have been more effective. (*Cf Anderson v Future Fastfreight, Inc.*, 11 AD3d 925, 926 [denying plaintiff summary judgment where tractor driver honked horn]).

Any inconsistencies between plaintiff's affidavit and his prior testimony provide an insufficient basis for discrediting either. (*Compare Lupinsky v Windham Const. Corp.*, 293 AD2d 317, 318 [1st Dept 2002] [self-serving affidavit of counsel is insufficient, contradicted by evidence], *with Rodriguez v Forest City Jay Street Assocs.*, 234 AD2d 68, 69 [1st Dept 1996] [no issue of credibility where plaintiff's testimony does not contradict testimony]; *Perez v Chase Manhattan Bank, N.A.*, 262 AD2d 160, 161 [1st Dept 1999] [same]).

Accordingly, plaintiff has established, *prima facie*, that Stavola's negligence was a substantial cause of the events which produced the injury (*see Lopez*, 34 AD3d 759 [plaintiff entitled to summary judgment where defendant struck plaintiff with forklift]; *Hernandez v New*

York Post Co., 205 AD2d 447 [1st Dept 1994] [driver of forklift hit plaintiff while in reverse, without looking at his surroundings]), and the burden shifts to defendant to establish a triable issue of fact.

Defendant alleges that having moved in the direction of the forklift and remained in close proximity to it, plaintiff was contributorily negligent, which precludes judgment for plaintiff as a matter of law. (Lucas Aff.).

Absent any evidence that plaintiff moved in the direction of the forklift, defendant's allegation is without factual basis. (*See Lopez*, 34 AD3d at 760; *Beadleston v American Tissue Corp.*, 41 AD3d 1074, 1076 [3d Dept 2007] [no evidence that plaintiff walked into dangerous area).

"A plaintiff is only expected to exercise ordinary care for his own safety, particularly when he has no reason to believe he is in any danger." (*Rountree v Manhattan and Bronx Surface Trans. Op. Auth.*, 261 AD2d 324, 328 [1st Dept 1999], *lv denied*, 94 NY2d 754 [1999]). Although plaintiff knew that he was near the forklift, he had no reason to believe that Stavola would turn the wheel in such a manner that the rear wheel would crush his foot. City's assertion that plaintiff may have not been following "requisite protocol for truck plowing" is speculative, and neither enlightens nor informs as to the protocol. (*See Lopez*, 34 AD3d at 760 ["mere hope or speculation" insufficient]). Rather, plaintiff was where he was supposed to be and Stavola knew that he was there, securing the plow. (*See Hotaling v CSX Transp.*, 5 AD3d 964, 968 [3d Dept 2004] [plaintiff worker not contributorily negligent where "he was exactly where he was required to be"]). And, given the weight of the pin plaintiff was securing at the time, and the even greater weight of the plow he was maneuvering, it is unreasonable to even suggest that he should have

been elsewhere. (*Id.* [to establish that plaintiff should have selected a safer alternative, defendant must show that plaintiff's actions were unreasonable]). At most then, plaintiff's presence merely provided the occasion for the accident (*Beadleston*, 41 AD3d at 1076), and does not constitute negligence. In view of the foregoing, I need not address the sufficiency of plaintiff's expert report.

V. CONCLUSION

As the undisputed facts demonstrate that Stavola was negligent in causing plaintiff's injuries by running over his ankle with the rear wheels of the forklift, despite the ability to make the turn without risking an accident, and given defendant's failure to offer any evidence that plaintiff was comparatively negligent (*see Tsebelius v Ryder Truck Rental, Inc.*, 72 AD3D 198 [1st Dept 2010]), it is hereby

ORDERED, that the motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendant as follows:

Defendant is found liable to plaintiff on the first and third causes of action and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED, that the action shall continue as to the second cause of action.

This constitutes the decision and order of the court.

Barbara Jaffe, JSC

DATED: June 23, 2010
New York, New York