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SHORT FORM ORDER

COPY

INDEX No. 05-20759
CAL. No. 10-01046-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 9-8-10 (#005)
MOTION DATE 10-8-10 (#006)
ADJ. DATE 10-15-10
Mot. Seq. # 005 - MD
006 - XMD

ROBERTO TEJADA and CANDIDA TEJADA, Plaintiffs, - against - HILO YALE INDUSTRIAL TRUCKS, HILO HOLDING LLC, and HILO MAINTENANCE SYSTEMS, INC., Defendants.	EDELMAN, KRASEIN & JAYE, ESQS. Attorney for Plaintiffs One Old Country Road, Suite 210 Carle Place, New York 11514 CALLAHAN & FUSCO, LLC Attorney for Defendants/Third-Party Plaintiffs 40 Exchange Place, 18th Floor New York, New York 10005
HILO YALE INDUSTRIAL TRUCKS, HILO HOLDING LLC, and HILO MAINTENANCE SYSTEMS, INC., Third-Party Plaintiff, - against - IWCO DIRECT NEW YORK, INC., and FALA DIRECT MARKETING, INC., Third-Party Defendants.	HAMMILL, O'BRIEN, CROUTIER, DEMPSEY, PENDER & KOEHLER, P.C. Attorney for Third-Party Defendants 6851 Jericho Turnpike, Suite 250 P.O. Box 1306 Syosset, New York 11791

Upon the following papers numbered 1 to 58 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers 20 - 37; Answering Affidavits and supporting papers 38 - 54; Replying Affidavits and supporting papers 55 - 56; 57 - 58; Other Hilo's memorandum of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Hilo Yale Industrial Trucks for summary judgment dismissing plaintiffs' complaint against it is denied; and it is further

RST

ORDERED that the cross motion by third-party defendants Fala Direct Marketing, Inc. and IWCO Direct New York, Inc. for summary judgment dismissing the third-party complaint against them is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Roberto Tejada on May 4, 2005 when he injured himself while operating a forklift leased to his employer by defendant Hilo Yale Industrial Trucks ("Hilo"). The accident allegedly occurred when the forklift plaintiff was operating malfunctioned and crushed his left leg against a wall. By his bill of particulars, plaintiff asserts that Hilo caused the accident by failing to properly maintain and repair the tires and controls on the forklift, and by negligently permitting the forklift to remain in a defective, unsafe and dangerous condition. After Hilo joined issue on October 31, 2005, it commenced a third-party action against plaintiff's employer, FALA Direct Marketing, Inc. ("FALA"), for indemnification based upon a "hold harmless" provision contained in the parties' forklift lease agreement. The third-party complaint also named as a defendant to the third-party action IWCO Direct New York, Inc. ("IWCO"), which purchased FALA in July 2005. By order dated July 15, 2008, this court (Baisley, J.) vacated the initial note of issue filed by the parties on October 22, 2007 and denied, with leave to resubmit, a motion by Hilo seeking summary judgment dismissing plaintiff's complaint.

Hilo now moves for summary judgment dismissing plaintiff's complaint, or alternately, for judgment in its favor on its third-party complaint seeking common law or contractual indemnification against FALA. Hilo argues it never breached any duty owed to plaintiff, as it was never notified of any alleged problems with the subject forklift, and it was not obligated to control the conduct of plaintiff's employer who failed to provide it with such notice. Hilo also asserts it is entitled to a conditional grant of judgment in its favor on its third-party claims for common law and contractual indemnity against FALA as it was FALA's inaction that caused the accident, and FALA is contractually obligated to indemnify it for any injuries sustained by use of the forklift. Third-party defendants IWCO and FALA cross-move for summary judgment in their favor dismissing Hilo's third-party complaint. They argue that Hilo's third-party complaint against them seeking indemnification is barred by Section 11 of the Workers' Compensation Law because plaintiff did not sustain a grave injury as defined by the statute. IWCO also asserts that under the terms of its agreement to purchase FALA's assets, it is exempt from any liability based upon the indemnity provision contained in FALA's previous lease agreement with Hilo. Plaintiffs opposes both motions on the that grounds triable issues exist as to whether plaintiff sustained a grave injury, and whether, Hilo, which negligently repaired the forklift prior to his accident, had notice of its alleged defects.

Hilo and FALA entered a lease agreement for the subject forklift on December 19, 2001. In pertinent part, the lease agreement states:

> Lessee hereby agrees to indemnify, save and keep harmless Lessor, its agents, employees, successors and assigns from and against any and all losses, damages, penalties, injuries, claims, actions and suits, including legal expenses, of whatsoever kind and nature, in contract or tort, except to the extent the losses, damages, penalties, injuries, claims, actions, suits or expenses result solely from Lessor's gross negligence or willful misconduct.

The parties subsequently entered an Equipment Schedule/Purchase Option Agreement whereby Hilo assumed the responsibility of maintaining the forklift. The agreement states in pertinent part:

> The Lessor hereby agrees, so long as the Lesee is not in default under this Lease or the Agreement, that for the Equipment leased pursuant to this Schedule, it will assume the responsibility, at its own cost and expense, to provide (through itself or contracted independent contractors) operational maintenance, routine repairs, emergency calls, complete overhauls, periodic tire replacements, steam cleaning and other normal wear and tear repairs as would be ordinary and necessary (as determined in the sole reasonable opinion of Lessor) for equipment used in the manner as set forth in the applicable Survey Report . . . In the event that any item of Equipment shall be out of service for needed repairs, resulting from natural wear and tear, Lessor will arrange to repair such Equipment promptly after notice by Lessee, unless Lessor deems it impracticable to repair such Equipment promptly, in which event Lessor shall temporarily substitute similar Equipment in good working condition until the leased Equipment is put in proper operating condition.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). 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 issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]).

Ordinarily, a contractual obligation, standing alone, is insufficient to give rise to tort liability in favor of a non-contracting third party (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990]). The Court of Appeals, however, has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Thus, tort liability for injuries to a third person may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v Melville Snow Contrs.***, *supra*, at 140, 746 NYS2d 120, *quoting* ***H.R. Moch Co. v Rensselaer Water Co.***, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk (***Church v Callanan Indus.***, 99 NY2d 104, 110-111, 752 NYS2d 254 [2002]); (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see* ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, *supra*); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the owner's duty to safely maintain the property (*see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]).

Here, Hilo failed to establish its entitlement to summary judgment as a matter of law by eliminating all material triable issues from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Although Hilo submitted evidence it did not receive notice of defects to the forklift's control panel, tires and support pins prior to plaintiff's accident, its own submissions raises triable issues as to whether it failed to perform its contractual duty of maintaining and repairing the forklift in a manner safe for its intended use, whether plaintiff detrimentally relied on its continued performance of such duty, and whether it had actual or constructive notice of the alleged defects (*see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, *supra*; ***Verdi v Top Lift & Truck, Inc.***, 50 AD3d 574, 856 NYS2d 605 [1st Dept 2008]; ***Hopper v Regional Scaffolding & Hoisting Co.***, 21 AD3d 262, 800 NYS2d 3 [1st Dept 2005]). In particular, plaintiff testified he was aware that Hilo was solely responsible for maintaining the forklift, and that he and fellow workers complained of obvious defects to the forklift such as a defective control panel fixed with tape, rattling supports pins, and tires that were worn to the rim, for almost one year prior to his accident. Notwithstanding Hilo's assertion it did not receive notice of any such defects, its submissions include evidence it assumed the exclusive responsibility to repair and replace the subject forklift under the terms of its maintenance agreement, and that it allegedly performed repairs to the subject forklift approximately three months prior to the accident. As for the portion of Hilo's motion seeking partial summary judgment on its third-party complaint awarding it a conditional grant of common law or contractual indemnity against FALA and IWCO, the existence of triable issues as to whether Hilo negligently failed to perform its contractual duty to maintain the forklift in a manner safe for its intended use, precludes judgment in its favor on the issue of indemnity (*see* ***Edge Mgt. Consulting, Inc. v Blank***, 25 AD3d 364, 807 NYS2d 353 [1st Dept 2006]; ***Gallo v Miller Mgt.***, 208 AD2d 498, 616 NYS2d 803 [2d Dept 1994]).

FALA's cross motion for summary judgment in its favor dismissing Hilo's third-party complaint for indemnification also is denied. While Workers' Compensation Law § 11 shields employers from third-party actions seeking contribution or indemnification (*see* ***Schramm v Cold Spring Harbor Lab.***, 17 AD3d 661, 793 NYS2d 530 [2d Dept 2005]), the statute allows a third party claim against an injured worker's employer either where the injured worker has suffered a "grave injury" or the employer has expressly agreed to indemnification pursuant to a written contract (*see* ***Flores v Lower East Side Serv. Ctr.***, 4 NY3d 363, 795 NYS2d 491 [2005], *rearg. den.* 5 NY3d 746 [2005]). Here, notwithstanding its submission of expert affidavits stating plaintiff did not sustain a grave injury as defined by Workers' Compensation Law § 11, FALA's own submissions indicate the parties' lease agreement contained an indemnity provision whereby it expressly agreed to indemnify Hilo for any injuries arising from use of the leased forklifts. A review of the abovementioned provision reveals that unlike hold harmless agreements that impermissibly seek to shift liability to a lessee regardless of the lessor's own negligence (*see* General Obligations Law § 5-321; ***Rego v 55 Leone Lane, LLC***, 56 AD3d 748, 871 NYS2d 169 [2d Dept 2008]), the parties' indemnity provision specifically exempts FALA from liability where the alleged injuries are related to Hilo's own gross negligence or wilful misconduct (*see* ***Great N. Ins. Co. v Interior Constr. Corp.***, 7 NY3d 412, 823 NYS2d 765 [2006]). Thus, inasmuch as triable issues exist as to whether Hilo negligently failed to perform its contractual duty to maintain the forklift in a manner safe for its intended use, or whether it had actual or constructive notice of the forklift's alleged defects and failed to repair it, summary judgment in FALA's favor dismissing the third-party complaint against it for

indemnification also is precluded (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; *see also* ***Ben Lee Distribs., Inc. v Halstead Harrison Partnership***, 72 AD3d 715, 899 NYS2d 301 [2d Dept 2010]).

Furthermore, IWCO failed to establish that its agreement for the purchase of FALA's assets exempts it from liability predicated upon the indemnity provision contained in FALA's previous lease agreement with Hilo. A successor corporation may be held liable for the torts of its predecessor where, among other things, the purchasing corporation is a mere continuation of the selling corporation, or where the purported sale of the corporation was simply a consolidation or merger of the seller and purchaser (*see* ***Schumacher v Richards Shear Co.***, 59 NY2d 239, 464 NYS2d 437 [1983]; ***Nationwide Mut. Fire Ins. Co. v Long Is. A.C., Inc.***, 78 AD3d 801, ___ NYS2d ___ [2d Dept 2010]). Although IWCO submitted evidence that its purchase agreement specifically sought to exempt it from liability for FALA's torts, it failed to establish as a matter of law that IWCO is not a mere continuation of FALA's business (*see* ***NTL Capital, LLC v Right Track Rec., LLC***, 73 AD3d 410, 901 NYS2d 4 [1st Dept 2010]; ***Nationwide Mut. Fire Ins. Co. v Long Is. A.C., Inc.***, *supra*; ***Koss v Leach Co.***, 6 AD3d 665, 776 NYS2d 590 [2d Dept 2004]; ***Burgos v Pulse Combustion***, 227 AD2d 295, 642 NYS2d 882 [1st Dept 1996]). Specifically, Section 1.1 of the purported Asset Purchase Agreement indicates IWCO purchased all of FALA's assets, including its real and intellectual property, its goodwill and customer list, as well as the right to continue use of its trade name. Accordingly, the cross motion by FALA and IWCO for summary judgment dismissing Hilo's third-party complaint against them is denied.

Dated: 1-10-2011

Hon. Denise F. Molia
J.S.C.

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