

**Cahn v Ward Trucking, Inc.**

2011 NY Slip Op 30366(U)

February 3, 2011

Supreme Court, New York County

Docket Number: 106110/04

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN

*Justice*

PART 7

JOHN CAHN,

Plaintiff,

-against-

Index No.: 106110/04

*Seq. #009*

WARD TRUCKING, INC., R.C. DOLNER, LLC,  
J.T. FALK COMPANY, INC., TACONIC  
MANAGEMENT COMPANY, LLC, 450 PARK, LLC,  
and 460 PARK AVENUE SOUTH ASSOCIATES,  
LLC,

Defendants.

J.T. FALK & COMPANY, LLC,

Third-Party Plaintiff,

-against-

TP Index No.: 590947/05

**FILED**

CHEMTREAT, INC.,

Third-Party Defendant.

**FEB 16 2011**

J.T. FALK & COMPANY, LLC,

Second Third-Party Plaintiff,

NEW YORK  
COUNTY CLERK'S OFFICE

-against-

2d TP Index No.:590446/07

ATLANTIC COASTAL TRUCKING, INC. and  
TRIANGLE TRUCKING, a division of  
ATLANTIC COASTAL TRUCKING, INC.,

Second Third-Party Defendant.

ATLANTIC COASTAL TRUCKING, INC. and  
TRIANGLE TRUCKING, a division of  
ATLANTIC COASTAL TRUCKING, INC.,

Third Third-Party Plaintiffs,

3d TP Index No.:490446/07

-against-

**ROBINSON BERMUDEZ,**

**Third Third-Party Defendant.**

**TACONIC MANAGEMENT COMPANY, LLC and  
450 PARK, LLC,**

**Fourth Third-Party Plaintiffs**

4<sup>th</sup> TP Index No.: 590189/09

-against-

**ATLANTIC COASTAL TRUCKING, INC. and  
TRIANGLE TRUCKING, a division of  
ATLANTIC COASTAL TRUCKING, INC.,**

**FILED**

**FEB 16 2011**

**Fourth Third-Party Defendants.**

NEW YORK

COUNTY CLERK'S OFFICE

The following papers were read on this motion for summary judgment by third-party defendant

**PAPERS NUMBERED**

Notice of Motion — Affidavits — Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits (Memo) \_\_\_\_\_  
Replying Affidavits (Reply Memo) \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Cross-Motion:**  Yes  No

Motion sequence numbers 008 and 009 are consolidated for disposition.

**BACKGROUND**

This is an action to recover for personal injuries allegedly sustained by plaintiff when he was struck in the leg by a barrel or drum that fell off a pallet in the lobby of 450-460 Park Avenue, New York, New York, where plaintiff worked. The accident occurred on March 12, 2003.

The premises are owned by 450, and Taconic is the management agent for the premises. At the time of the occurrence, plaintiff was employed by a securities firm that maintained an office at 450 Park Avenue, and 450 Park Avenue was undergoing certain construction work involving its HVAC system. Dolner was engaged as the construction manager and general contractor for the construction project. The chemicals that were being transported in the barrel or drum, needed for the HVAC system, were manufactured by

Chemtreat. The chemicals were ordered by Falk, a mechanical contractor on the construction project at the premises. Chemtreat transferred the chemicals in its Virginia facility to Ward for transportation to the project in New York. Triangle, a division of Atlantic, is Ward's delivery company, and Triangle subcontracted delivery of the barrels or drums to Bermudez.

*Motion sequence numbers 008 and 009*

In motion sequence number 008, third-party defendant Chemtreat, Inc. (Chemtreat) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims asserted against it.

Defendant, third-party plaintiff J.T. Falk & Company, LLC (Falk) cross-moves, pursuant to 22 NYCRR 202.21, to strike this matter from the trial calendar and ordering certain discovery to be furnished by plaintiff.

In motion sequence number 009, defendant/third-party plaintiff/second third-party plaintiff Falk moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint asserted as against it, as well as for summary judgment on its second third-party complaint against Chemtreat for common-law and contractual indemnification, and for summary judgment on its third third-party complaint for common-law and contractual indemnification against Atlantic Coastal Trucking, Inc. (Atlantic), Triangle Trucking (Triangle) and Ward Trucking, Inc. (Ward).

R.C. Dolner, LLC (Dolner) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing 450 Park, LLC (450) and 460 Park Avenue South Associates, LLC's (460) cross claims asserted as against it for common-law indemnification and contribution, and granting Dolner common-law indemnification and contribution from 450 and 460, including reimbursement for all reasonable attorney's fees and costs of defense incurred in this matter.

Dolner also cross-moves, pursuant to CPLR 3212, for summary judgment granting it contractual and common-law indemnification, and reimbursement for all reasonable attorney's fees and costs of defense of this matter from Falk. Dolner also cross-moves, pursuant to CPLR

3212, for summary judgment granting it common-law indemnification and contribution from Ward and dismissing all cross claims asserted by Ward as against it and for summary judgment for common-law indemnification and contribution from Chemtreat. Dolner also cross-moves, pursuant to CPLR 3212, for summary judgment granting it common-law indemnification and contribution from Atlantic and Triangle, including all reasonable attorney's fees and costs of defense in this matter, and dismissing the counterclaims asserted by Atlantic and Triangle as against it for indemnification and contribution. Finally, Dolner also cross-moves, pursuant to CPLR 3212, for summary judgment for common-law indemnification and contribution from Robinson Bermudez (Bermudez), R. Bermudez Trucking and Bermudez Trucking, LLC (together, R. Bermudez), and dismissing Bermudez and R. Bermudez' counterclaims for indemnification and contribution asserted as against Dolner.

The Court notes that R. Bermudez does not appear in any caption in this case, including the third-party action asserted against Bermudez. Previously, a default judgment was entered against 460 and Bermudez, who never appeared. In addition, the case was dismissed as time-barred as against Atlantic and Triangle.

In this matter, Mitchell Kaufman (Kaufman) was presented for an examination before trial (EBT) on behalf of Chemtreat. Kaufman testified that he was familiar with the premises at 450 Park Avenue, having provided that building with its chemical needs in the past, and that he was aware that construction was going on at the premises at the time of the delivery of Chemtreat's product. Kaufman, EBT, at 25-26. Kaufman also stated that Chemtreat packaged the chemicals ordered by Falk into five 30-gallon drums, which were then shrink-wrapped together so as to fit onto one pallet for delivery. *Id.* at 52-55, Motion, Ex. I. The shrink-wrapped drums were then picked up by Ward for transportation from Virginia to New York. Kaufman also stated that, because of the construction going on at the premises at the time of the delivery, of which he was aware, the freight elevator would not be accessible and the drums would have to be unwrapped and individually brought into the building's lobby for delivery, the final delivery being to the 16<sup>th</sup> floor of the premises. Kaufman EBT, at 50-53.

Gerard Dunleavy (Dunleavy) was deposed on behalf of Taconic. According to Dunleavy, at the time of the accident, the entire lobby of the premises was being refurbished, and a mat made of formica taped together was located on the lobby floor, running from the front doors to the elevators. Dunleavy EBT, at 25, 58-63. Dunleavy testified that he heard from someone who was present in the lobby at the time of the accident that it was this mat that made it difficult to wheel the pallet into the lobby, which, allegedly, caused the drums to rock and the barrel or drum to fall. *Id.* at 57-58, 61.

Damian Feeney (Feeney) appeared for a deposition in this matter on behalf of Falk. Feeney was Falk's project engineer at the premises. Feeney EBT, at 12-19. According to Feeney, Falk was hired by Dolner for the limited purpose of installing chillers at 450 Park Avenue, and Feeney, the only Falk representative on the site, was on site two or three times each week to make sure that the installation of the chillers was going according to plan. *Id.* at 11-12, 41.

Once the chillers were installed, chemicals were needed to clean the chillers prior to use and, towards this end, Taconic suggested that Falk purchase the chemicals from Chemtreat. *Id.* at 17-18. Feeney stated that, although he ordered the chemicals from Chemtreat, he never discussed delivery with Chemtreat or Taconic. *Id.* at 6, 27-28, 68. In addition, Feeney said that he was not required to be, nor was he, present at the time of the delivery. *Id.* at 24, 59.

Pursuant to the contract between Atlantic and Bermudez, Bermudez agreed "to hold ATLANTIC harmless from any and all liabilities of any type, kind, nature or description incurred by [Bermudez] and agrees to indemnify ATLANTIC should a judgment be entered against ATLANTIC as a result of any act of [Bermudez] without any limitation." Motion sequence number 009, Ex. R.

The actual delivery of the barrels or drums to the premises was made by Bermudez, who was assisted by Juan Camacho, an employee of Atlantic, whose role was to help Bermudez move the barrels. *Id.*, Exs. Q and S.

It is Chemtreat's contention, in motion sequence number 008, that, once the drums left

its possession in Virginia, it had nothing to do with the actual delivery of the drums to the premises, including the unloading and moving of the drums through the lobby of the building.

Atlantic, Triangle and Falk have submitted opposition to Chemtreat's motion, arguing that, since plaintiff's complaint sounds in negligence, there is a question of fact as to whether the manner in which Chemtreat packaged and shrink-wrapped the drums was the cause, or a significant contributing factor, to the barrel falling and striking plaintiff.

Falk has also cross-moved to strike the note of issue, based on allegations that plaintiff has failed to respond to certain discovery demands. However, the court notes that the relief sought is against plaintiff, who has not moved against Falk.

In motion sequence number 009, Falk contends that plaintiff's cause of action as against it, as it appears in the second amended complaint, is based on a theory of *res ipsa loquitor*, which is inapplicable as to Falk based on all of the facts presented. However, no one has provided the court with a copy of the alleged second amended complaint, and Falk has only appended to its motion what appears to be the original complaint, in which plaintiff alleges that all of the defendants, their agents, servants and/or employees were negligent in the management and control of the premises, failed to warn plaintiff of a dangerous condition, failed to exercise the care and caution required under the circumstances, and had actual and/or constructive notice of a dangerous condition. Nowhere does this complaint allege a theory of *res ipsa loquitor* as against Falk or any other defendant in this action.

In addition, Falk asserts that plaintiff's allegation as against Falk, based on a theory of negligence, must fail because Falk had nothing to do with the packaging or delivery of the barrel that fell and caused injury to plaintiff.

In opposition to Falk's motion, plaintiff argues that, according to the contract between Dolner and Falk,

"[Falk] shall be responsible for the receipt, delivery, unloading, storage, warehousing, protection, insurance, and all other risk of loss relating to any materials or equipment it is to furnish, provide or have provided to it under this Contract."

Dolner cross motion, Ex. N.

Plaintiff maintains that Falk's admitted failure to be present at the time of the delivery of the chemicals raises a question of fact with respect to Falk's own negligence.

In reply, Falk asserts that plaintiff has failed to evidence that Falk either created or had notice of improperly packaged materials, and that Falk's presence or non-presence at the time of delivery is irrelevant to the issue of negligence. Further, Falk points out that plaintiff has failed to provide any opposition to Falk's position with respect to the theory of *res ipsa loquitur*.

Dolner has submitted an amended notice of cross motion to Falk's motion; however, Falk did not request relief against Dolner in its motion. It is noted that Chemtreat, Atlantic, Triangle, and Falk have all provided opposition to Dolner's cross motion.

Taconic has submitted opposition to all of the instant motions and cross motions. Taconic contends that all of the motions must be denied in their entireties. Pursuant to the contracts entered into by and between the parties, Taconic asserts that each moving party was contractually obligated so as to be at least partially responsible for the accident.

In support of its contention, Taconic refers to the contract between it and Dolner, in which Dolner agreed to be responsible for the delivery of materials (Dolner cross motion, Ex. M), the contract between Falk and Dolner quoted above, and the purchase order between Falk and Chemtreat (Dolner cross motion, Ex. O).

In each of these documents, the contracting party assumes some responsibility for deliveries. As a consequence, says Taconic, material questions of fact exist as to which entity, if any of them, was partially or wholly responsible for the accident. Moreover, each of these agreements includes a save harmless provision concerning indemnification.

#### DISCUSSION

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's

opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Chemtreat's motion for summary judgment (motion sequence number 008) and Falk's motion for summary judgment (motion sequence number 009) are both denied. The role of a court in deciding a summary judgment motion is one of issue identification, not issue determination. *First Transcable Corp. v Avalon Pictures, Inc.*, 184 AD2d 254 (1<sup>st</sup> Dept 1992). Moreover, when there are material questions of fact, summary judgment is inappropriate. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, *supra*.

In the case at bar, too many questions of fact exist to warrant granting summary judgment to any party, i.e., whether the accident was caused by Chemtreat's negligence in the manner of its packing the barrels, was caused by Atlantic's, Triangle's or Ward's negligence in transporting the barrels, which may have caused them to loosen from the shrink-wrap, was caused by Bermudez' negligence in its manner of unloading the barrels and bringing them into the lobby of the building, was caused by Taconic's, Dolner's or 450's negligence in failing to maintain the lobby of the building in a safe condition during its renovation project, was caused by Falk failing to assist in the delivery of the barrels, or was caused by something else.

Plaintiff's causes of action are based on theories of negligence, and "negligence cases, by their nature, do not normally lend themselves to summary dismissal since the question of negligence, even if the parties agree as to the underlying facts, is a question for jury determination." *Villoch v Lindgren*, 269 AD2d 271, 272-273 (1<sup>st</sup> Dept 2000). Furthermore, "where more than one party might be responsible for the accident, summary judgment granting indemnification against one party is improper." *Freeman v National Audubon Society, Inc.*, 243 AD2d 608, 609 (2d Dept 1997).

Therefore, based on the foregoing, Chemtreat's and Falk's motions for summary

judgment are denied.

Falk's cross motion to strike the note of issue and Dolner's cross motion for summary judgment are also denied. "A cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party [internal quotation marks and citation omitted]." *Terio v Spodek*, 25 AD3d 781, 785 (2d Dept 2006). Since both Falk and Dolner, in their respective cross motions, are seeking relief as against a nonmoving party, those cross motion are denied.

**CONCLUSION**

Based on the foregoing, it is hereby

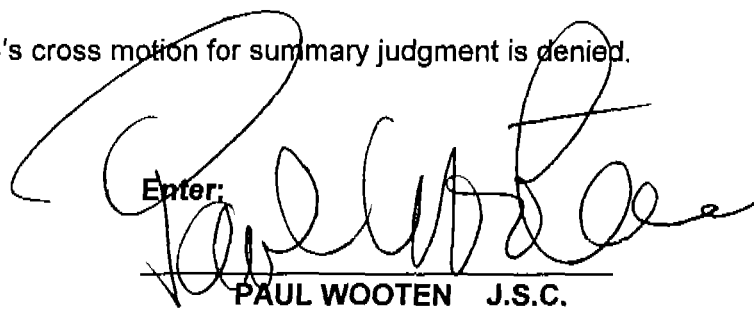
ORDERED that Chemtreat, Inc.'s motion for summary judgment (motion sequence number 008) is denied; and it is further

ORDERED that J.T. Falk & Company, LLC's motion for summary judgment (motion sequence number 009) is denied; and it is further

ORDERED that J.T. Falk & Company, LLC's cross motion to strike the note of issue is denied; and it is further

ORDERED that R.C. Dolner, LLC's cross motion for summary judgment is denied.

**Dated:** February 3, 2011

Enter:   
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: :  DO NOT POST  REFERENCE

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