Short Form Order

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SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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MICHAEL TYSON,

Plaintiff(s),

-against-

BNJ GRANITE/CABINETS, LTD., INNOVATIVE STONE DISTRIBUTION, LLC, INNOVATIVE STONE INTERNATIONAL, INC., INN OVATIVE STONE, LLC, INNOVATIVE STONE SERVICES, LLC, and INNOVATIVE STONE SURFACES, LLC,

Defendant(s).

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Index No. 6489/09

Motion Submitted: 3/7/11
Motion Sequence: 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....X
Defendant's/Respondent's.....

Motion brought by defendant, BNJ Granite/Cabinets, Ltd. ("BNJ Granite") in the above captioned negligence action for an Order of this Court, pursuant to CPLR §3212, awarding Summary Judgment and dismissing the Complaint of the plaintiff, Michael Tyson, alleging injuries sustained from a work site accident, is denied.

Plaintiffs commenced this action by filing a summons and complaint in April, 2009 alleging, inter alia, that BNJ Granite, in addition to other named defendants, was negligent

in that it failed to provide and maintain the work site in a safe and suitable manner so as not to create an unsafe and dangerous condition, and failed to exercise due care in the performance of its duties and such negligence was the proximate cause of plaintiff's injuries. Plaintiff also alleges that such negligence was in violation of New York Labor Law §§ 200, 240(1), and 241(6).

After the filing of the instant motion, plaintiff amended his complaint by withdrawing his claims alleging violations of Labor Law §§ 200, 240(1), and 241(6). As the foregoing claims have been withdrawn, the complaint is deemed amended accordingly and there is no need to dismiss those claims as requested by BNJ Granite in its Reply Affirmation. The instant motion will address the cause of action sounding in common law negligence.

On January 12, 2009, plaintiff was injured on BNJ Granite's granite manufacturing business site located in Holbrook, New York. Plaintiff, a self-employed trucker, was hired by co-defendant, Innovative Stone, to pick up two slabs of granite, each measuring about 6 feet by 10 feet, and weighing about 900 pounds, from BNJ Granite.[1] The slabs were to be transported in the flatbed of the plaintiff's truck with the use of an A-frame support which would hold the slabs in place. The A-frame was assembled by the moving defendant's employees, Manuel Zambrano and "Diego". The slabs would be lifted by a forklift and lowered onto the back of the truck and into the frame where it would lean against its beam toward the center apex.

During the loading process, the plaintiff remained positioned on the bed of the truck where he lay wood planks on the truck's base to cushion the granite from possible breakage. Manuel Zambrano, with direction and guidance from the plaintiff, lifted one slab of concrete into the A-frame and the forklift's clamp, containing a safety mechanism, released the slab once it landed on the surface of the truck. That slab was placed without incident. Zambrano repeated the same sequence with the second slab, lowering and releasing it when in came in contact with the bed of the truck; however, it suddenly fell away from the A-frame and in the direction of the plaintiff and landed on both of his legs. The plaintiff sustained injuries as his legs were crushed, resulting in three surgeries and amputation of both legs.

BNJ Granite makes the instant motion arguing that the defendant employee had properly performed his duties of loading the granite onto the truck and the accident happened after he loaded the granite slab. As plaintiff was situated on the flatbed of the truck, BNJ Granite contends that plaintiff's actions in guiding the second slab of granite and his direct

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[1]The plaintiff, in his Affirmation in Opposition, alleges that the granite slabs were each 10 feet long and weighed 2500 pounds. The defendant, although providing similar dimensions of the height, contends that the slabs weighed between 900 and 1,000 pounds each (see Notice of Motion, Exhibit E, Tr. Manuel Zambrano, p. 28, ln. 7-19).

involvement with the loading of the slab onto the truck, were the cause of the accident. The moving defendant submits as evidence in support of its motion, inter alia, transcripts of testimony from its employee, Manuel Zambrano, and plaintiff, Michael Tyson, taken at the examinations before trial.

Plaintiff, in opposition, argues that the defendant employee conceded in his testimony, that he did know whether the second slab was positioned correctly when he lowered it on the A-frame on the truck. Consequently, as its employee's actions could have been the proximate cause of the accident, BNJ Granite's entitlement to summary judgment has not been established. Even if plaintiff's actions are deemed to have contributed to the accident, it invokes a determination of comparative negligence, which does not relieve the defendant from liability. Plaintiff submits the transcripts from his and Manuel Zambrano's testimony at their examination before trial, as supporting evidence.

It is noted that neither party is claiming any defect to the forklift's clamp and safety mechanism, or in the construction of the A-frame.

The proponent of a motion for summary judgment must establish, *prima facie,* its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); ***Walden Woods Homeowners Assn. v. Friedman***, 36 A.D.3d 691, 828 N.Y.S.2d 188 [2d Dept., 2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. The burden of proof then shifts to the opposing party to produce admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests (***Zuckerman v. City of New York***, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

To hold a defendant liable in common-law negligence, a plaintiff must demonstrate: a duty owed by the defendant to the plaintiff; a breach of that duty; and that the breach constituted a proximate cause of the injury (see ***Ingrassia v. Lividikos***, 54 A.D.3d 721, 864 N.Y.S.2d 449 [2d Dept., 2008]). Generally, the existence of a defendant's duty is a legal question to be determined by the court in the first instance. In making such a determination, courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was reasonably foreseeable (see ***Lynfatt v. Escobar***, 71 A.D.3d 743, 896 N.Y.S.2d 450 [2d Dept., 2010]).

The scope of the duty owed by the defendant is defined by the risk of harm reasonably to be perceived (see ***Mays v. City of Middletown***, 70 A.D.3d 900, 895 N.Y.S.2d 179 [2d

Dept., 2010]). Even when no original duty is owed to the plaintiff, once a defendant undertakes to perform an act for the plaintiff's benefit, the act must be performed with due care for the safety of plaintiff (see ***Ruiz v. Griffin***, 71 A.D.3d 1112, 898 N.Y.S.2d 590 [2d Dept., 2010]). In the case at bar, even accepting the moving defendant's contention that no duty was owed to the plaintiff, the defendant performed the act of loading the granite onto the truck for the plaintiff's benefit and its employee was fully aware of plaintiff's presence in the back of the truck. As such, he owed a duty to the plaintiff to perform that task with due care as the plaintiff was within the zone of foreseeable harm given the size and weight of the two slabs. Additionally, a failure to perform the loading task in a safe manner would certainly constitute a breach of that duty.

As the moving defendant's duty to the plaintiff has been established, the defendant is required to show that its alleged breach of duty was not a substantial cause of the events that produced the injury (see ***Cruz v. City of New York***, 6 A.D.3d 644, 775 N.Y.S.2d 549 [2d Dept., 2004]). The deposition testimony upon which it relies presents triable issues of fact as to whether the defendant employee was negligent in the performance of his duties when he loaded the slab onto the A-frame of the truck and whether such negligence caused the accident. According to Zambrano's deposition testimony, he "didn't know" whether the second slab was positioned correctly when he lowered it. Further, the testimony of both parties, indicates that the accident happened in a matter of seconds and neither party was able to recall the facts and circumstances giving rise to the unfortunate ensuing accident. As such, the facts adduced by the defendant in testimony, are insufficient to meet its burden of proof that its actions were not a proximate cause of plaintiff's injuries.

Ordinarily, it is for the trier of fact to determine the issue of proximate cause. The issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts; however, this is not the case in the instant matter (see ***Gestetner v. Teitelbaum,*** 52 A.D.3d 778, 860 N.Y.S.2d 208 [2d Dept., 2008]). Further, there may be more than one proximate cause of an accident and here, the plaintiff alleges that the accident was caused by, inter alia, Zambrano's failure to load the granite in a safe manner, while BNJ Granite contends that plaintiff's actions were the cause. As such, this issue must be determined by the factfinder at trial and not as a matter of law at the summary judgment stage (*see* ***Stephenson v. Barrasso and Sons, Inc.***, 81 A.D.3d 809, 917 N.Y.S.2d 242 [2d Dept., 2011]).

The Court has considered BNJ Granite's remaining contentions and has determined that they are without merit. Here, the defendant failed to make a prima facie showing of its entitlement to summary judgment and in light of this determination, this Court need not examine the sufficiency of the plaintiff's opposition papers (*see* ***Alvarez v. Prospect Hosp.***, 68 N.Y.2d at 324).

BNJ Granite's motion for Summary Judgment is denied in its entirety.

The foregoing constitutes the Order of this Court.

Dated: April 11, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.