

Dagan v Walker & Zanger, Inc.

2011 NY Slip Op 31184(U)

April 26, 2011

Sup Ct, NY County

Docket Number: 107132/07

Judge: Alice Schlesinger

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.

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

PRESENT: ALICE SCHLESINGER

PART ~~IA~~ PART 16

Index Number : 107132/2007
DAGAN, JACLIN
 vs.
LEMERY, JOHN
 SEQUENCE NUMBER : 003
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant Walker & Zanger, Inc. is granted in accordance with the accompanying memorandum decision.

FILED

APR 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

APR 26 2011

Dated: April 26, 2011

Alice Schlesinger
ALICE SCHLESINGER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

-----X
JACKLIN DAGAN and RAFAEL DAGAN,

Plaintiffs,

-against-

WALKER & ZANGER, INC., ROADRUNNER EXPRESS
COURIER SYSTEM, INC., KRUNFOL MARBLE
CONSTRUCTION, INC., JOHN LEMERY, M.D.,
KEITH HENTEL, M.D., AREMA ANTONIA
PEREIRA, M.D., and NEW YORK-PRESBYTERIAN
HOSPITAL,

Defendants.
-----X

Index No. 107132/07
Motion Seq. No. 003

FILED

APR 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

SCHLESINGER, J.:

This is a case about extraordinarily heavy Alhambra limestone floor tiles, one of which fell out of a crate placed on the sidewalk near a curb and hit the plaintiff on the foot, causing her injury. The defendant moving here for summary judgment is Walker & Zanger, Inc., the distributor of these tiles.

Walker & Zanger received an order for the tiles from the plaintiff Jacklin Dagan as part of a gut rehabilitation of her townhouse on East 51st Street. The tiles were 24" x 24" and were packed vertically into six boxed crates. Five out of six of the crates were packed fully and contained fifty tiles. The sixth crate held the remainder, or thirty-eight tiles. That was the crate from which the tile fell landing on Ms. Dagan's foot.

According to the sworn testimony given at a deposition by Jeff Lupica, branch manager of Walker & Zanger, his company situated in Perth Amboy, New Jersey, received the crates already packed from the tile manufacturer. It then arranged with defendant Roadrunner Express Courier System, Inc. ("Roadrunner") to take the crates and deliver them "curbside" to 331 East 51st Street. He also approximated the weight of each tile to be about forty-five pounds.

James Delaney, a truck driver for Roadrunner, picked up the crates. He testified at a deposition on April 27, 2010 that after he went to Walker & Zanger's warehouse for the pick-up, one of the men brought the crates on a "hi-lo" to his truck and placed the crates on "to the back of the truck." He continued: " Then I put my jack in, put it into the truck. Before I do that I take a quick look at the crates". He looked in a general way at the tiles to see if they were cracked or damaged. Then he placed them into his truck (pp 105-106). He first drove the truck to his facility in Bohemia, Long Island. On the following day, he went back to the facility to get the truck and make the delivery. He stated that the truck was in the same condition as the day before and he drove to the East 51st Street site. To prevent the crates from shifting, he placed a load bar in the back behind the load (p 107). Finally, after arriving at East 51st Street, he testified he knew for certain that the contents of the six crates had not shifted or moved from the time he had first picked them up in Perth Amboy (pp 109-111).

The crates were removed from the truck by Delaney. At the address, Mrs. Dagan was waiting together with stone installer subcontractors for the crates to arrive. The plaintiff, who gave testimony on February 24, 2010, said that the tiles were inside wooden boxes that had wooden slats on them and were wrapped in plastic bands (pp 33-34).

The subcontractors began unpacking the boxes, starting with those closest to the house. There were three close to the building and three were placed at the edge of the sidewalk. The crate with the 38 tiles was the one near the curb. The workers then cut the plastic straps and removed the slats of wood from the boxes on all the crates. While the workers were taking the tiles from one of the boxes closest to the building and plaintiff was standing in the street watching, a limestone tile from a crate located near the curb fell on plaintiff's left foot.

Walker & Zanger argues that on these facts, the company is entitled to summary judgment because there is no evidence of negligence on its part. Counsel argues that even if Walker & Zanger had some part in packing the crates, which it does not concede, the evidence still shows that the boxes were loaded and unloaded onto and off the truck without incident and without any of their contents shifting. Counsel urges that whatever happened after that had nothing to do with the tile distributor. In other words, the placement of the crates on the sidewalk and what the workers did to open the crates were activities far removed from any responsibility by Walker & Zanger as the distributor of the tiles.

In this regard, counsel cites the recent First Department case, *Moncion v. Infra-Metals Corp.*, 29 AD3d 310 (2005). In addition to arguing that Walker & Zanger owed no duty to the plaintiff here, moving counsel also urges that two separate acts by others — the way in which Roadrunner off loaded the truck and its placement of the crates, as well as the subcontractor's opening and dismantling of those crates — broke any causal connection between Walker & Zanger and the injury suffered by plaintiff.

Two of the parties oppose the motion, the plaintiff in a substantial way and the medical defendants. Included in the plaintiff's papers is an affidavit from Stanley Fein, a Licensed Professional Engineer. He states that he was retained to investigate and opine about the cause of the accident. Mr. Fein based his opinion on the pleadings and depositions, which he read. He neither inspected any of the crates nor the sidewalk/curb where the accident occurred.

Fein's opinion is that both Roadrunner and the movant Walker & Zanger share responsibility for the accident. With regard to the latter, he says (¶10) that since the crate

from which a tile fell was unbalanced and "inherently unstable" the distributor Walker & Zanger "should have packed the tiles in a smaller crate or used a container that contained warnings about the imbalance of the crate".

Counsel for the plaintiffs initially argues that the moving papers are insufficient because they rely on unsigned transcripts and because the witness at the deposition, Lupica, did not have any real knowledge of the facts here, such as who packed the crates. Their second argument is that Walker & Zanger was in fact negligent. Here plaintiffs rely on Fein's affidavit. They also urge that the moving defendant in fact did have a duty to the plaintiff here and as to causation, they say that is commonly a factual question to be decided by a trial jury. Finally, they attempt to distinguish *Moncion (supra)* as well as other cases cited by the defense.

In reply, counsel clears up any problems with the depositions, discounts the importance of the Fein affidavit, and emphasizes that Walker & Zanger was not in any way negligent and breached no duty to the plaintiff as the crates were completely safe and stable when loaded into the truck and taken off the truck. Under these circumstances, his client did nothing wrong and did not cause injury to Ms. Dagan.

I agree with moving counsel on all points, including the similarity of *Moncion (supra)* to the circumstances here. In that case, Infra-Metals, the defendant moving for summary judgment, was a steel distributor whose employees had loaded steel onto a tractor that was to be delivered to several companies. After the metal was loaded at Infra-Metals, the driver of the tractor Angel Figuero secured the load and checked that it was safe. That is precisely what happened here. Walker & Zanger was the distributor, and Delaney, another defendant's driver, made sure that the crates had been properly loaded onto his truck.

In *Moncion*, at the first drop off at the customer Hunterspoint, their (Hunterspoint's) employees unloaded the truck, took out what was their steel and then reloaded the non-Hunterspoint material back on the trunk. Figuero once again inspected it. This scenario is arguably similar to Delaney checking the crates upon arrival at East 51st Street. What happened in *Moncion* was that at the second stop at Koenig Iron Works, one of Koenig's employees, Arsenio Moncion, was injured when he was struck by steel beams that rolled off the truck as it was being unloaded at Koenig.

Summary judgment was awarded to Infra-Metals by the Appellate Division, stating that: "Nothing in the record evidences that the original loading was done negligently or that the steel was improperly secured when it left Infra-Metals ..." 20 AD3d at 312 (citations omitted). The same thing could be said here. There was nothing to suggest that the packing or loading was negligently done. The fact that Lupica did not know precisely who had packed the crates or how does not allow one to jump to the conclusion that there was something wrong with the packing or securing or that it was not balanced. Delaney, not an employee of moving defendant, said that the tiles had been checked and were secure, and Lupica discussed how efforts were always made to make them secure.

No one here says anything contrary to that. Fein merely speculates that the unfilled crate was unbalanced, but he certainly does not know that to be the case. Here, as in *Buchholz v. Trump 767 Fifth Avenue LLC*, 5 NY3d 1 (2005), the opinions reached by Fein have no factual support. Fein merely read the deposition testimony of the witnesses and gave his opinion that defendant breached its duty. But this opinion, that the one crate was unevenly loaded and thereby unbalanced and unstable, is completely speculative.

Finally, in *Moncion (supra)*, the Appellate Division reminded us all that a duty only arises when the risk of harm is "reasonably foreseeable". *Id.* at 312. In other words, one

[* 7]
must be able to anticipate a harm to another unless appropriate care is taken and thus avoid it occurring. Finally, the risks of injury must be probable and not merely possible.

Here, no one could say that it was reasonably foreseeable that the crates would have insufficient room on the sidewalk so that the unfilled crate would have to be placed precariously on the edge of a curb or that workers would have unwrapped and opened all the crates before beginning to empty individual ones. Thus, under these circumstances, I find that it was not foreseeable or probable that the simple decision by the tile distributor Walker & Zanger to send off a partially filled crate would cause injury to the customer receiving the tiles. Therefore, the distributor had no duty to the plaintiff in the first instance.

Under all the circumstances and based on the above discussion, I find that defendant Walker & Zanger is entitled to summary judgment and a dismissal of the action.

Accordingly, it is hereby

ORDERED that the motion by defendant Walker & Zanger, Inc. for summary judgment dismissing the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants, who shall appear in Room 222 for a pre-trial conference on May 4, 2011 at 9:30 a.m. as previously scheduled.

Dated: April 26, 2011

APR 26 2011 **FILED**

APR 28 2011

NEW YORK
COUNTY CLERK'S OFFICE


ALICE^{J.S.C.} SCHLESINGER