

LaPera v Mack Trucks, Inc.

2011 NY Slip Op 32139(U)

July 13, 2011

Sup Ct, Nassau County

Docket Number: 11527/06

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

RICHARD LaPERA and HELENA LaPERA,

**TRIAL/IAS, PART 4
NASSAU COUNTY**

Plaintiffs,

MOTION DATE: 5/21/11

-against-

**MACK TRUCKS, INC., R&S-GODWIN
TRUCK BODY CO., LLC, and GABRIELLI
TRUCK SALES, LTD.**

**MOTION SEQ. NO.: 001,002
INDEX NO.: 11527/06**

Defendants.

GABRIELLI TRUCK SALES, LTD.,

Third-Party Plaintiff,

-against -

TOWN OF NORTH HEMPSTEAD,

Third-Party Defendant.

The following papers read on this motion (numbered 1-4):

Notice of Motion (001).....	1
Affidavit [sic] in Opposition.....	2
Reply Affirmation.....	3
Notice of Motion (002).....	4

Motion pursuant to **CPLR §3212** by defendant MACK TRUCKS, INC. ("MACK") for summary judgment dismissing the complaint and all cross-claims against it [Motion Sequence 001]; and

Motion pursuant to **CPLR §3212** by defendant the TOWN OF NORTH HEMPSTEAD (the "TOWN") for summary judgment dismissing the third-party complaint against it [Motion Sequence 002].

The Court automatically adjourns all motions that are submitted without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission. The matter was further adjourned by the Court for administrative purposes, as a result of the misdirection or misplacement of one of the foregoing motion papers within the Court system.

This action arises out of a road paving job-site accident that occurred on October 1, 2005. Plaintiff RICHARD LaPERA ("LaPERA"), was a laborer employed by the TOWN, whose duties included spreading asphalt on the roadway. LaPERA was positioned behind a dump truck containing hot asphalt, the body of which was being raised to facilitate dumping. The flow of asphalt was supposed to be directed through chutes located on the tailgate, but the tailgate itself unexpectedly opened and asphalt poured out from underneath it. LaPERA's lower extremities became immersed in the hot asphalt, causing the injuries which are the subject of this action.

LaPERA brought this action against the defendants named herein, based upon causes of action sounding in strict products liability, negligence, failure to warn and intentional tort.

Motion by MACK

MACK seeks an Order for summary judgment dismissing the action and all cross-claims against it on the grounds that it manufactured only a component part of the dump truck at issue, and supplied neither the completed vehicle nor any of the parts involved in the accident. In support of its argument, MACK submits: (i) the Affirmation in Support of Attorney Leland N. Garbus, sworn to on September 21, 2010 and Exhibits attached thereto, including, among other things, the pleadings, LaPERA's 3101(d) Expert Exchange, the transcripts of all party depositions, and the purchase order and other documents relating to the purchase and sale of the dump truck; and (ii) the Affidavit of Thomas F. Brown, a mechanical design engineer employed by MACK, sworn to on September 27, 2010 (the "Brown Affidavit").

The undisputed facts are as follows: The dump truck at issue was sold to the TOWN by defendant GABRIELLI TRUCK SALES, LTD. ("GABRIELLI"), a vendor and distributor of heavy duty vehicles. GABRIELLI arranged for the dump truck to be produced in accordance with the TOWN's specifications. The completed truck was comprised of a cab/chassis manufactured by MACK and a dump body purchased from defendant R&S-GODWIN TRUCK BODY CO., LLC ("R&S-GODWIN").

MACK contends that the product it manufactured was an incomplete vehicle, consisting of a cab, engine, chassis and frame rail with axles. This product was incapable of performing a work function without the installation, by one or more subsequent manufacturers, of additional components such as a cargo carrying body or a work performing body (dump body). MACK asserts that it had no control over the installation of additional components or the production of the completed vehicle.

MACK argues further that the allegations set forth in plaintiff's expert exchange relate solely to the parts and function of the dump body; particularly, the alleged defective design and manufacture of the tailgate latch mechanism, the absence of safety/spreader chains, and the inadequacy of warning labels affixed to the dump body. There is no evidence of negligence on the part of MACK, nor of any specific defect in the incomplete vehicle supplied by MACK.

LaPERA does not challenge MACK's factual allegations or substantive argument. Rather, LaPERA's opposition is based solely upon procedural defects: (1) that the Brown Affidavit fails to include the requisite language "under the penalties of perjury" and is not notarized; (2) that the deposition transcripts attached to the motion are not executed and lack proof that said transcripts were forwarded for review pursuant to **CPLR §3116(a)**.

With respect to the Brown Affidavit, the absence of the language "under penalties of perjury" is immaterial if the Affidavit is properly sworn. No specific form of oath is required. See **Collins v. AA Trucking Renting Corp.**, 209 A.D.2d 363.

The admissibility of the Brown Affidavit thus turns on whether or not it was properly sworn and notarized. The record on file contains two versions of the Brown Affidavit: one copy attached to the Notice of Motion, which bears Thomas Brown's signature but is not dated or notarized; and one purported "original" which bears what appears to be the identical signature, but also contains the language "sworn to before me this 27th day of September, 2010," signed by Rosemary A. Tukeva, Notary Public, Commonwealth of Pennsylvania. MACK states in its reply papers that the "original with Notary has been provided to the Court with defense counsel's papers" [Reply Affirmation, p.2]

Close examination of the two versions raises the Court's concern. The Court notes, at the outset, that there is no Certificate of Conformity, as required by **CPLR §2309(c)**. That alone is not fatal. **Smith v. Allstate Ins. Co.**, 38 A.D.3d 522. Of greater concern is the apparent discrepancy in the dates of signature by Mr. Brown and by the

Notary Public. The un-notarized copy attached to the motion papers is undated, but the motion papers were stamped as received by the Court on September 24, 2010. This means that the original affidavit must have been signed by Mr. Brown prior to that date. The notarized version, however, states that the affidavit was sworn to on September 27, 2010. Thus, it appears that the affidavit was notarized at least three days after it was signed.

This provokes the questions: (i) does this apparent discrepancy reflect misconduct on the part of the Notary or others; and (ii) if so, is the Court required to reject the Brown Affidavit as inadmissible? Alternatively, is the apparent discrepancy a technical irregularity that can be disregarded in the absence of prejudice? See **Carter v. Grenadier Realty**, 83 AD3d 640. As discussed below, the Court finds that it is not required to resolve these questions in order to determine the motion for summary judgment. Assuming, without deciding, that the Court must reject the Brown Affidavit, the Court finds sufficient remaining evidence to support MACK's position.

With respect to the deposition transcripts, MACK's reply contains proof that each of the transcripts of the depositions of Thomas Brown, Richard LaPERA, Helena LaPERA, and Randall Keith Risner (R&S-GODWIN) were executed by the relevant witness and that copies of the signature pages were forwarded to opposing counsel. The Court finds that the failure to include such proof in the original motion papers is an irregularity which could be, and was, corrected without prejudice to LaPERA. See **CPLR §2001**; Siegel, *New York Practice*, 5th Ed., §6. The equivalent proof was not provided with respect to the unsigned deposition transcripts of Philip Sarubbi (GABRIELLI) and Richard Demeo (TOWN). Accordingly, those transcripts are deemed inadmissible and are not considered by the Court. See **Pina v. Flik Intl. Corp.**, 25 AD3d 772.

The Court finds that, without considering the Brown Affidavit or the inadmissible deposition testimony, the record is sufficient to establish, *prima facie*, that MACK manufactured and sold only an incomplete vehicle, the component parts of which were not alleged to have caused or contributed to LaPERA's accident. The burden thus shifts to opponents of the motion to come forward with evidence establishing the existence of an issue of fact. Notably, none of the co-defendants have filed opposition to MACK's motion. LaPERA fails to meet this burden, having offered no evidentiary facts to contradict MACK's assertions or to otherwise support liability. Accordingly, the Court finds that MACK is entitled to summary judgment in its favor. **Alvarez v. Prospect Hosp.**, 68 N.Y.2d 320.

[* 5]

Motion by the TOWN

The TOWN moves for summary judgment dismissing the third-party claims against it on the grounds that the TOWN is not liable to GABRIELLI for contribution or indemnity because (1) LaPERA did not sustain a "grave injury" within the ambit of **Workers' Compensation Law §11**; and (2) the TOWN undertook no contractual obligation to provide indemnity or contribution to GABRIELLI.

The TOWN has demonstrated that LaPERA's injuries, as set forth in LaPERA's response to MACK's demand for a Bill of Particulars [Motion Exh. C], LaPERA's deposition testimony, [Motion Exh. D] and LaPERA's expert disclosure [Motion Exh. E], do not fall within the narrow categories of injury that qualify as "grave injury" under **Workers' Compensation Law §11**. See **Fleming v. Graham**, 10 NY3d 296. The TOWN has also shown that the documents which comprise the agreement to purchase the dump truck contain no contractual obligation on the part of the TOWN to provide indemnity or contribution to GABRIELLI. The Court has received no opposition to this motion. Accordingly, the Court determines that the TOWN is entitled to judgment as a matter of law.

Conclusion

The Court has considered the remaining arguments of the parties and finds them to be without merit. Based upon the foregoing, it is

ORDERED, that MACK's motion pursuant to **CPLR §3212** for summary judgment dismissing the complaint and all cross-claims against it [Motion Sequence 001] is **granted**. The claims against the remaining defendants are unaffected. And it is further

ORDERED, that the TOWN's motion pursuant to **CPLR §3212** for summary judgment dismissing the third-party complaint against it [Motion Sequence 002] is **granted**.

Dated: July 13, 2011


J.S.C.

ENTERED

JUL 26 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE