Short Form Order

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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JOVAN CHASE,

Plaintiff,

-against-

CIRCLE AUTOMOTIVE EQUIPMENT SPECIALISTS, INC., C.A.E.S.I. d/b/a CIRCLE AUTOMOTIVE EQUIPMENT SPECIALISTS, INC., SNAP-ON INCORPORATED and SNAP-ON TOOLS COMPANY, LLC,

Defendants.

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INDEX NO.: 1614/2009
CALENDAR NO.: 201002501OT
MOTION DATE: 6/21/2011
MOTION SEQ. NO.: 003 MD; 004 MG

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Upon the following papers numbered 1 to 46 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-28; 29-40 ; ~~Notice of Cross Motion and supporting papers~~ ___ ; Answering Affidavits and supporting papers 41-42 ; Replying Affidavits and supporting papers 43-44; 45-46 ; ~~Other~~ ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#003) by defendant Circle Automotive Equipment Specialists, Inc., and the motion (#004) by defendants Snap-On Incorporated and Snap-On Tools Company, LLC, are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Circle Automotive Equipment Specialists, Inc., for summary judgment dismissing the complaint and the cross claim against it is denied; and it is

ORDERED that the motion by defendants Snap-On Incorporated and Snap-On Tools Company, LLC, for summary judgment dismissing the complaint and the cross claims against them is granted.

In January 2009, plaintiff Jovan Chase commenced this personal injury action seeking damages for injuries allegedly sustained while at an automotive service and repair shop located on Sunrise Highway in Islip Terrace, New York. Plaintiff's injuries allegedly occurred on September 5, 2006, when a hydraulic car lift was lowered onto his foot as he was in the repair area of the shop,

speaking with an employee. The automotive shop, a franchise of Meineke Car Care Centers, Inc., is operated by the franchisee, John Grasselino, through a New York corporation, defendant Ammograss, Inc. Meineke Car Care Centers owns the property and leases it to Grasselino under the terms of the franchise agreement.

The lift at issue, known as a four-post car lift, had previously been used at another repair shop and allegedly was purchased by Grasselino from the previous owner in May 2005. Prior to its purchase, Martin Gross, the owner of defendant Circle Automotive Equipment Specialists, Inc., inspected the four-post car lift, as well as two other car lifts purchased for the automotive shop, on behalf of Grasselino. Gross allegedly arranged for the delivery to and the installation of the used car lifts at the subject automotive shop, and arranged financing for the cost of the installation. Although it is undisputed that the subject car lift was installed in June 2005 by nonparties Joe Green and Mike Bushemi, a dispute exists as to whether Green and Bushemi were working for Circle Automotive Equipment Specialists or for an independent subcontractor, Tri-Sate Automotive. It is undisputed, however, that Gross returned to the shop and inspected the lifts to make sure they were level and fully functional after the installation job was complete. Subsequently, in 2006, repairs were made to the four-post car lift, and defendant Snap-On, Inc. allegedly sold equipment to Ammograss, Inc. that was added onto the lift.

The complaint alleges, in part, that Circle Automotive Equipment Specialists (hereinafter Circle Automotive), Snap-On, Inc., and Snap-On Tools Company, LLC, were negligent in the installation, construction, maintenance, inspection and/or repair of the subject car lift, that they caused or permitted a dangerous and defective condition to exist on the subject premises, and that they failed to "reasonably anticipate that persons lawfully adjacent to said auto lift could sustain physical injuries by reason of the unsafe, dangerous and defective condition that existed." By his bill of particulars, plaintiff further alleges that Circle Automotive negligently maintained and repaired the car lift, and that it negligently trained and instructed employees and franchise owners as to the safe operation of the car lift. It is noted that prior to the commencement of this action, plaintiff brought two other personal injury actions seeking damages for the injuries to his foot. One action, assigned index number 27769/2006, was brought against Ammograss, Inc., weeks after the accident (hereinafter referred to as Action No. 1). The second action, assigned index number 1510/2008, was brought against Meineke Car Care Centers and Driven Brands, Inc., a holding company which owns Meineke Car Care Centers (hereinafter Action No. 2).

Circle Automotive now moves for an order granting summary judgment dismissing the complaint and the cross claim against it, arguing that it had no notice that the car lift at issue was in a dangerous or defective condition, and that it cannot be held liable for the alleged negligent work performed by a subcontractor. In support, Circle Automotive submits, among other things, copies of the pleadings in this action, as well as copies of the summonses and complaints served in Action No. 1 and Action No. 2. It also submits an unsigned copy of the transcript of plaintiff's deposition testimony in Action No. 1, which was taken in April 2007; an unsigned and uncertified copy of the transcript of the deposition testimony of Edward Lindley, who appeared in April 2007 on behalf of Ammograss, Inc.; an unsigned and uncertified copy of the transcript of Grasselino's deposition testimony, which was taken in February and April 2010; and the unsigned and uncertified deposition transcript of Phil Sepulveda, a nonparty witness. In addition, Circle Automotive submits the signed and certified transcript of the deposition testimony of Gross, who testified on its behalf.

Snap-On, Inc., and Snap-On Tools Company (hereinafter collectively referred to as Snap-On) also move for summary judgment dismissing the complaint and all cross claims against them on the grounds that they did not design, manufacture, sell or maintain the subject car lift; that the automotive products sold to Ammograss, Inc., would not have affected the operation of the lift; and that there is no evidence Snap-On products, employees or agents caused or contributed to plaintiff's accident. Snap-On's submissions in support of the motion include copies of the pleadings, a copy of plaintiff's response to interrogatories, unsigned copies of deposition transcripts, and an affidavit of Michael Macomber, Snap-On's Operations Manager for North America.

In opposition, plaintiff submits an affirmation by his counsel. As to Circle Automotive's motion, plaintiff asserts that triable issues exist as to whether employees of Circle Automotive negligently installed, or negligently repaired, the four-post car lift and, if so, whether such negligence "launch[ed] an instrumentality of harm." Plaintiff also argues that a triable issue exists as to whether plaintiff "detrimentally relied on Circle [Automotive's] contractual obligations to install the lift." As to Snap-On's motion, plaintiff argues that the deposition testimony of Phil Sepulveda, a Snap-On employee who allegedly performed work on the subject car lift in 2006, demonstrates Snap-On assumed a duty to inspect the lift. Plaintiff also asserts that an issue exists as to whether Sepulveda "launched an instrumentality of harm by leveling the lift, adjusting the rear lock, and then fail[ing] to check the safety of the entire lift."

Initially, it is noted that an affirmation in opposition submitted by Meineke Car Care Centers and Driven Brands, defendants in Action No. 2, was not considered in the determination of this motion. By order dated October 5, 2009, this Court (Pines, J.) directed that Action No. 1, Action No. 2 and the instant action be joined for trial. Meineke Car Care Centers and Driven Brands, therefore, lack standing to submit papers in support of or in opposition to the instant motion (*see* CPLR 2214). Moreover, as no explanation has been provided for the failure to submit signed copies of the deposition transcript of plaintiff, and the parties in Action No. 1 differ from the parties in the instant action, the transcripts of the 2007 deposition testimony of plaintiff and Ammograss, Inc., do not constitute admissible evidence and were not considered in the determination of the motions (*see* CPLR 3116 [a], 3117 [a], [c]; *Marmer v IF USA Express, Inc.*, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]). Similarly, the unsigned deposition transcripts of Grasselino and Selpuveda are not in admissible form, as there was no showing that the transcripts had previously been forwarded to such witnesses for their review (*see Kahan v Spira*, __ AD3d __, 2011 NY Slip Op. 07611 [2d Dept, Oct. 25, 2011]; *Moffett v Gerardi*, 75 AD3d 496, 904 NYS2d 757 [2d Dept 2010]; *McDonald v Mauss*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]; *cf. Franzese v Tanger Factory Outlet Ctrs., Inc.*, __ AD3d __, 930 NYS2d 900 [2d Dept 2011]). In addition, the affidavit of Macomber, which was executed in Maryland, is not in admissible form, as it was not accompanied by a certificate of conformity (*see* CPLR 2309 [c]; Real Property Law § 299-a; *PRA III, LLC v Gonzalez*, 54 AD3d 917, 864 NYS2d 140 [2d Dept 2008]). However, the unsigned but certified deposition transcript of Michael Macomber on behalf of Snap-On was considered in the determination of Snap-On's motion, as it is an admission and no party challenged its accuracy (*see* CPLR 3116 [a]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Engelhart v County of*

Orange, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). A duty of reasonable care owed by the tortfeasor to the plaintiff is essential to any recovery in negligence (*Eiseman v State*, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393). Although juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (*Church v Callanan Indus.*, 99 NY2d 104, 110-111, 752 NYS2d 254 [2002]; *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347, 728 NYS2d 731 [2001]; *Waters v New York City Hous. Auth.*, 69 NY2d 225, 229, 513 NYS2d 356 [1987]).

Further, to establish a prima facie case based solely on circumstantial evidence, a plaintiff must present facts and conditions from which the negligence of the defendant and the cause of the accident may reasonably be inferred (*see Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 500 NYS2d 95 [1986]; *Bardi v City of New York*, 293 AD2d 505, 739 NYS2d 747 [2d Dept], *lv denied* 98 NY2d 611, 749 NYS2d 2 [2002]). To meet this burden, a plaintiff is not required to prove the exact nature of the defendant's negligence (*see Gayle v City of New York*, 92 NY2d 936, 680 NYS2d 900 [1998]), or to exclude every other possible cause for the injury-producing event (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 684 NYS2d 139 [1998]; *Bernstein v City of New York*, 69 NY2d 1020, 517 NYS2d 908 [1987]; *Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743, 500 NYS2d 95). Rather, a plaintiff must offer evidence showing that it was "more likely" or "more reasonable" that the alleged injury was caused by the defendant's negligence than by some other agency (*Gayle v City of New York*, 92 NY2d 936, 937, 680 NYS2d 900; *see North Am. Specialty Ins. Co. v Schwanter*, 39 AD3d 511, 833 NYS2d 196 [2d Dept 2007]; *Dunn v City of New York*, 301 AD3d 493, 752 NYS2d 895 [2d Dept 2003]; *Nigri v City of New York*, 294 AD2d 477, 742 NYS2d 371 [2d Dept 2002]). The plaintiff's evidence must be sufficient for a jury to determine, based on logical inferences drawn from such evidence, that causes for the injury other than the defendant's negligence are sufficiently remote (*see Gayle v City of New York*, 92 NY2d 936, 680 NYS2d 900; *Bernstein v City of New York*, 69 NY2d 1020, 517 NYS2d 908; *Bardi v City of New York*, 293 AD2d 505, 739 NYS2d 747).

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; *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 557 NYS2d 286 [1990]; *Conte v Servisair/Globeground*, 63 AD3d 981, 883 NYS2d 69 [2d Dept 2009], *lv denied* 14 NY3d 701, 898 NYS2d 96 [2010]). 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.*, 98 NY2d 136, 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); (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.*, 76 NY2d 220, 557 NYS2d 286); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the

landowner's duty to safely maintain the property (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 611 NYS2d 817 [1994]). A contractor who undertakes to provide services and then negligently creates or exacerbates a harmful condition may be found to have "launched" such condition (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120; *Richards v Passarelli*, 77 AD3d 903, 910 NYS2d 495 [2d Dept 2010]; *Haracz v Cee Jay, Inc.*, 74 AD3d 1145, 903 NYS2d 515 [2d Dept 2010]).

Circle Automotive's submissions are insufficient to establish as a matter of law that it is entitled to judgment dismissing the claims against it. Generally, a party who retains an independent contractor is not liable for injury to a third person caused by an act or omission of the independent contractor or its employees (*see Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 639 NYS2d 971 [1995]; *Kleeman v Rheingold*, 81 NY2d 270, 598 NYS2d 149 [1993]). However, one of the many exceptions to this rule provides that liability will be found if the principal hired an unqualified or incompetent independent contractor (*see Sanchez v United Rental Equip. Co.*, 246 AD2d 524, 667 NYS2d 410 [2d Dept 1998]; *Cichon v Brista Estates Assocs.*, 193 AD2d 926, 597 NYS2d 819 [3d Dept 1993]; *Wright v Esplanade Gardens*, 150 AD2d 197, 540 NYS2d 805 [1st Dept 1989]; *Del Signore v Pyramid Sec. Servs.*, 147 AD2d 759, 537 NYS2d 640 [3d Dept 1989]). Under other exceptions, liability will be imposed if the principal interfered with the independent contractor's work, if the principal assumes control of the details of the work or some part of it, or if the principal has knowledge that the independent contractor created a dangerous condition and failed to correct it within a reasonable amount of time (*see Schwartz v Merola Bros. Constr. Corp.*, 290 NY 145, 48 NE2d 299 [1943]; *Willis v City of New York*, 266 AD2d 208, 697 NYS2d 311 [2d Dept 1999]; *Sanchez v United Rental Equip. Co.*, 246 AD2d 524, 667 NYS2d 410; *Wright v Esplanade Gardens*, 150 AD2d 197, 540 NYS2d 805). "The determination of whether one is an employee or an independent contractor requires examination of all aspects of the arrangement between the parties . . . although 'the critical inquiry . . . pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results'" (*Araneo v Town Bd. for Town of Clarkson*, 55 AD3d 516, 518-519, 865 NYS2d 281 [2d Dept 2008], *quoting Bynog v Cipriani Group*, 1 NY3d 193, 198, 770 NYS2d 692 [2003]; *see Matter of Hertz Corp.*, 2 NY3d 733, 778 NYS2d 743 [2004]).

As mentioned above, Gross testified that Grasselino contacted Circle Automotive in May 2005 about purchasing equipment for the new shop. He testified that within a week of the initial conversation with Grasselino he went to the subject premised to measure the size of the garage bays so he could determine what type of car lifts would fit in the space. He testified that after the first meeting, he met Grasselino at another location to inspect used car lifts that Grasselino was looking to purchase. He testified that he checked to see that the car lifts would fit in the automotive shop, and that he recommended that Grasselino not purchase them. Gross explained that the lifts, which were disassembled, had rust on them and had been manufactured by a company that had been out of business for at least 15 years. He testified that Grasselino subsequently contacted him about installing the used car lifts, that he arranged financing for Grasselino for the cost of the installation work, and that Grasselino contacted him in 2006 when the subject car lift needed to be repaired after a metal cable snapped. Gross stated that he gave an estimate for repairing the lift, but did not perform the work, because Grasselino thought the price was too high.

Gross further testified that he retained a subcontractor to install the subject car lift at the shop, and that the subcontractor, Tri-State Automotive, was owned by Joe Green. However, he also testified that no contract exists between Circle Automotive and Tri-State Automotive, that Circle

Automotive's vehicle was used to transport the used car lifts to the automotive shop, that he had trained Green and Bushemi to install car lifts, and that Bushemi was a part-time employee of Circle Automotive, but would be "loan[ed] out" to Green. Moreover, Gross testified that he went to the automotive shop on the day of the installation job and saw one of the lifts being lifted out of Circle Automotive's truck, and that he returned to the shop after the job was complete and inspected the subject car lift to make certain it was level and functioning properly. He testified that Circle Automotive billed Grasselino for the job, and that he "added about 10 to 15 percent on [to the delivery and installation price] for myself, because I had to turn around and get it financed." In addition, he stated that after Grasselino refused to hire him in 2006 to repair the snapped cable, he learned Green had replaced cables and other equipment on the lift.

Contrary to the assertions by defense counsel, such deposition testimony is insufficient to establish that Circle Automotive could not be liable for creating the alleged dangerous condition, because the installation of the four-post car lift at issue was performed by a subcontractor (*see Hernandez v Chefs Diet Delivery, LLC*, 81 AD3d 596, 915 NYS2d 623 [2d Dept 2011]). Rather, Gross's testimony shows the existence of a triable issue as to whether Green or Tri-State Automotive acted as an independent contractor in the installation of the subject car lift (*see Anikushina v Moodie*, 58 AD3d 501, 870 NYS2d 356 [1st Dept], *lv dismissed* 12 NY3d 905, 884 NYS2d 683 [2009]; *Willis v City of New York*, 266 AD3d 208, 697 NYS2d 311; *Bermudez v Ruiz*, 185 AD2d 212, 586 NYS2d 258 [1st Dept 1992]; *see also Halpin v Hernandez*, 51 AD3d 724, 857 NYS2d 719 [2d Dept 2008]). It is noted that no admissible evidence indicates that Circle Automotive advised Grasselino that an independent contractor would be installing the car lift. Circle Automotive, therefore, failed to establish a prima facie case that it did not "launch a force of instrument of harm" by negligently installing the subject car lift.

However, the admissible evidence submitted by Snap-On is sufficient to show that the Snap-On products for car lifts sold to Ammograss, Inc., namely jacks, turntables and slip plates, would not have affected the operation of the subject car lift. Snap-On, therefore, having made a prima facie showing of entitlement to summary judgment in its favor, shifted the burden of proof to plaintiff to present evidence establishing the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In opposition, plaintiff argues an issue exists as to whether Phil Sepulveda, a Snap-On salesperson who later became an independent service contractor, either "voluntarily assumed a duty to either inspect or fix the entire lift" when he adjusted the rear locks or launched an instrument of harm by making such adjustments. Plaintiff, however, failed to present any evidence showing that Sepulveda, in his capacity as a Snap-On employee, made adjustments to the subject car lift and that such adjustments were a proximate cause of the September 2006 accident. Accordingly, Snap-On's motion for summary judgment dismissing the claims against it is granted.

Dated: November 16, 2011

PAUL J. BAISLEY, JR.

J.S.C.