Jaspaul v Toyota Lift of N.Y.
2014 NY Slip Op 30344(U)
January 31, 2014
Supreme Court, Queens County
Docket Number: 1944/2011
Judge: David Elliot

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

DEO JASPAUL,
Plaintiff,

- against -

TOYOTA LIFT OF NEW YORK, etc., et al.,
Defendants.

MOBIL AIR TRANSPORT, INC., et ano.,
Third-Party Plaintiffs,

-against-

KAWAL TRUCKING, INC.,
Third-Party Defendant,

HI-LIFT OF NEW YORK, INC., etc., et ano.,
Second Third-Party Plaintiffs,

-against-

SUMMIT HANDLING SYSTEMS, INC.,
Second Third-Party Defendants.

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The following papers numbered 1 to 35 read on this motion by defendants Hi-Lift of New York d/b/a Toyota Lift of New York (improperly sued herein as Toyota Lift of New York a/k/a Toyota Lift of New York, Inc.) (Hi-Lift), and Forklift Headquarters, Inc. (Fork Lift Headquarters), pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and all cross-claims asserted against them, pursuant to CPLR 3212 for summary judgment in their favor on their cross-claims for breach of contract and contractual indemnification asserted against defendants Mobile Air Transport, Inc. (Mobile Air), and The Air Group, Inc. (Air Group), and pursuant to CPLR 3212 for summary judgment in their

favor on their third-party claim for common-law indemnification asserted third-party defendant Summit Handling Systems, Inc. (Summit).

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Notice of Motion - Affirmation - Exhibits.....	1-4
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Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action on January 26, 2011 for personal injuries alleged to have been sustained during the course of his employment as a dock worker for third-party defendant Kawal Trucking Inc. (Kawal), a freight/cargo shipping company.[1] Plaintiff alleges that on February 19, 2008, while he was working at the loading docks at a warehouse facility owned and operated by defendant Air Group, a wholly owned subsidiary of defendant Mobile Air, he was struck in the left foot and ankle by a forklift operated by Rajkumar Deonarine ("Raj"), his coworker, now deceased. Plaintiff also alleges that the forklift was negligently maintained and repaired by defendants Mobile Air, Air Group, Hi-Lift and Fork Lift Headquarters.

Issue has been joined in the main action, and defendants Mobile Air and Air Group asserted cross-claims against defendants Hi-Lift and Fork Lift Headquarters for common-law contribution and indemnification. Defendants Mobile Air and Air Group commenced a third-party action against third-party defendant Kawal, and third-party plaintiffs Hi-Lift and Fork Lift Headquarters commenced a second third-party action against third-party defendant Summit, asserting claims based upon common-law contribution and indemnification, contractual indemnification and breach of contract. Issue has been joined in the first and second third-party actions. Defendants Hi-Lift and Fork Lift Headquarters assert they are entitled to summary judgment dismissing plaintiff's complaint and all cross-claims asserted against them because they did not owe plaintiff a duty of care, and for summary judgment in their favor on their cross-claims for breach of contract and contractual indemnification asserted against defendants/third-party plaintiffs Mobile Air and Air Group. They also seek

1. The third-party action against Kawal has since been dismissed by order of this court dated January 28, 2014.

summary judgment in their favor on their third-party claim for common-law indemnification against third-party defendant Summit.

The court notes that by order dated October 22, 2013, of the Hon. Jeremy S. Weinstein, J.S.C., the note of issue was vacated, and the action was restored to pre-note of issue status.

It is well established that 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 demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination *(see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied *(see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If the proponent succeeds, the burden shifts to the party opposing the motion, which then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Zuckerman*, 49 NY2d 557).

"For a defendant to be held liable in tort, it must have owed the injured party a duty of care (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 N.2d 579, 584 [1994]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 13 [2d Dept 2011]; *Forbes v Aaron*, 81 AD3d 876, 877 [2d Dept 2011])" (*Suero-Sosa v Cardona*, 112 AD3d 706 [2d Dept 2013]). "The existence and extent of a duty is a question of law" (*Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d at 13).

The forklift involved in the accident was manufactured by Toyota Material Handling USA and owned by Toyota Financial Services (collectively Toyota). It was leased from defendant Hi-Lift, as an authorized Toyota dealer, by defendant Air Group, a wholly-owned subsidiary of defendant Mobile Air, along with three other Toyota forklifts, for use in Air Group's warehouse, pursuant to a three-year equipment lease dated November 30, 2005. The equipment lease included full service maintenance provisions requiring Hi-Lift to service and maintain the leased forklifts. Defendant Air Group had previously entered into a separate agreement dated March 11, 2005 with Kawal. Under the March 11, 2005 agreement, defendant Air Group permitted Kawal to use the forklifts at the warehouse facility to load Kawal's trucks, and agreed that it (Air Group) would maintain the forklifts.

In support of the motion, defendant Fork Lift Headquarters submits, among other things, a copy of the transcript of the deposition of Robert L. Riddle, Jr., its president (and

the son of Robert F. Riddle, the late owner of defendant Hi-Lift), and the equipment lease agreement between defendant Air Group and Hi-Lift. Such evidence indicates that defendant Fork Lift Headquarters did not own the forklifts supplied to Air Group, was not a party to the lease agreement, and had no involvement in the servicing or maintenance of the forklift involved in the accident (the subject forklift). Defendant Fork Lift Headquarters, therefore, has established its prima facie entitlement to summary judgment dismissing the claims asserted against it by plaintiff by showing that it owed no duty of care to plaintiff, including any duty to ensure that the forklift operated properly, or warn plaintiff of any defective condition of the forklift (*see Pulka v Edelman*, 40 NY2d at 782; *Palsgraf v Long Is. R. R. Co.*, 248 NY 339, 342 [1928], rearg denied 249 NY 511 [1928]; *Balsam v Delma Eng'g Corp.*, 139 AD2d 292 [1st Dept 1988]). Defendant Fork Lift Headquarters also has demonstrated its prima facie entitlement to summary judgment dismissing the cross-claims for common-law contribution and indemnification asserted against it by defendants Mobile Air and Air Group by establishing that it breached no duty to plaintiff (*see Martin v Huang*, 85 AD3d 1132 [2d Dept 2011]).

In opposition, plaintiff and defendants Mobile Air and Air Group have failed to raise a triable issue of fact on those issues in which defendant Fork Lift Headquarters has met its burden (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). That branch of the motion by defendant Fork Lift Headquarters for summary judgment dismissing the complaint insofar as asserted against it and cross claims asserted against it by defendants Mobile Air and Air Group is granted. However, that branch of the motion by defendant Fork Lift Headquarters for summary judgment in its favor on its cross-claims against defendants Mobile Air and Air Group is denied, as the former has made no showing of the existence of a contract between itself and these defendants requiring a defense and indemnification.

Defendant Hi-Lift asserts that it filed for bankruptcy in 2006, was removed by Toyota as the authorized Toyota dealership for the region in or around May 2007, and went out of business in May 2007. Defendant Hi-Lift also asserts that Toyota prohibited it from servicing the forklifts as of May 2007 and installed third-party defendant Summit as the exclusive authorized Toyota dealer for the region as of July 2007, and Summit assumed all maintenance responsibilities for the four forklifts leased by Air Group, including the subject forklift. Defendant Hi-Lift contends that, as a consequence of the prohibition by Toyota and the assumption of the maintenance and repair responsibilities by third-party defendant Summit, it had no reasonable opportunity as of May 2007 to maintain or repair the forklift in question, and did not in fact perform any maintenance to the forklifts during the nine-month period before the accident. Defendant Hi-Lift also contends it had no notice of any of the alleged problems with the subject forklift as of the time it stopped maintaining the forklifts in May 2007, and in the nine months thereafter. In support of the motion, defendant Hi-Lift offers, among other things, copies of its Chapter 11 bankruptcy petition, an

agreement dated May 24, 2007 entered into between defendant Hi-Lift and Toyota in relation to the bankruptcy filing on April 3, 2006, an order of the bankruptcy court dated June 21, 2007, and the transcripts of the deposition testimony of Anthony J. Mayo, III, a terminal manager for defendant Air Group, Paul Weymann, vice-president and general manager of Summit, and Robert Maher, a non-party witness produced on behalf of defendant Hi-Lift.

A lessor of equipment, which enters into an exclusive contract to render comprehensive maintenance service of such equipment, may be said to have assumed a duty of care, and thus be potentially liable in tort to third persons who use the equipment, for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found *(see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994]; *Rogers v Dorchester Assoc.*, 32 NY2d 553 [1973]). However, as a general rule, a lessor's liability does not continue after assignment of a lease, or after it is otherwise in fact relieved of, or unable to perform its prior contractual obligations, once the party assuming the contractual obligations has had a reasonable opportunity to discover the defective condition, if it was unknown, and to remedy the condition once it is known (*see Bittrolff v Ho's Dev. Corp.*, 77 NY2d 896 [1991]; *Mazurick v Chalos*, 172 AD2d 805 [2d Dept 1991]; *Camillery v Getty Ref. & Mktg. Co.*, 170 AD2d 567 [2d Dept 1991]; *Inverso v Whitestone Tr. Mix Corp.*, 30 AD2d 565 [2d Dept 1968]).

Defendant Hi-Lift has established, prima facie, that after May 2007 it could no longer perform its prior contractual obligation to service and maintain the subject forklift, upon Toyota "cancelling" or revoking its dealership, and prohibiting it from servicing or maintaining the Toyota forklifts. Defendant Hi-Lift also has shown that it had permanently ceased business operations, and performed no maintenance to the forklifts during the nine-month period before the accident. Defendant Hi-Lift further has demonstrated it lacked any notice of the allegedly defective problems with the forklift which caused injuries to plaintiff as of the time it stopped maintaining the forklifts in May 2007, or in the nine months thereafter, and that Summit exclusively maintained the forklifts from July 2007 through the accident date, and never communicated with Hi-Lift during this period regarding any repairs, maintenance, complaints, etc., concerning the forklifts. In addition, defendant Hi-Lift established that as of July 2007, third-party defendant Summit assumed the full service maintenance responsibilities with the equipment lease with defendant Air Group, including the preventative maintenance duties, and performed various repairs with respect to the forklifts prior to the accident. Defendant Hi-Lift therefore has shown that third-party defendant Summit had a reasonable opportunity during that period from July 2007 to the accident date to discover, by visual inspection, the existence of any potential defect with the forklift tires, brakes, steering and back-up alarm, and remedy it or take the forklift out of service. Under such circumstances, defendant Hi-Lift has shown its prima facie entitlement to summary judgment dismissing the complaint asserted against it (*see Bittrolff v Ho's Dev.*

Corp., 77 NY2d 896; *Mazurick v Chalos*, 172 AD2d 805; *Camillery v Getty Ref. & Mktg. Co.*, 170 AD2d 567; *Inverso v Whitestone Tr. Mix Corp.*, 30 AD2d 565). Defendant Hi-Lift also has demonstrated its prima facie entitlement to summary judgment dismissing the cross-claims for common-law contribution and indemnification asserted against it by defendants Mobile Air and Air Group by establishing that it breached no duty to plaintiff *(see Martin v Huang*, 85 AD3d 1132).

Plaintiff points to his deposition testimony to show that he complained about defective conditions with respect to the forklifts to Kawal and Mr. Mayo of defendant Air Group. He also points to the deposition testimony of Mr. Maher to show that defendant Hi-Lift should have maintained and inspected the forklifts pursuant to the equipment lease agreement, and offers the affidavit of Artie Rode, an alleged expert in forklift maintenance, to show that defendant Hi-Lift should have inspected and replaced the tires as a matter of regular maintenance during the period from December 2005 to May 2007. This evidence, however, is insufficient to raise an issue of fact as to the responsibility of defendant Hi-Lift for any alleged defective conditions which were present with respect to the subject forklift after Hi-Lift was prohibited from repairing the forklifts by Toyota and Summit assumed the maintenance obligations. That branch of the motion by defendant Hi-Lift for summary judgment dismissing the complaint insofar as asserted against it and cross-claims asserted against it by defendants Mobile Air and Air Group is granted.

In light of the above findings, that branch of the motion by defendants Hi-Lift and Fork Lift Headquarters for summary judgment in their favor against third-party defendant Summit on their third-party claim for common-law indemnification is denied as academic (*see Quintavalle v Mitchell Backhoe Serv.*, 306 AD2d 454 [2d Dept 2003]; *see also Imtanios v Goldman Sachs*, 44 AD3d 383 [1st Dept 2007]; *see generally Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 [1990]; *Kelly v Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 NY2d 1, 6 [1974]).

To the extent defendant Hi-Lift asserts that it is entitled to summary judgment in its favor on its cross-claim against defendants Mobil Air and Air Group to recover damages for breach of contract for failure to procure insurance, defendant Hi-Lift has failed to demonstrate it asserted such a cross-claim. As such, summary judgment on that issue is denied. With respect to that branch of its motion for summary judgment on its cross-claim against these defendants for reimbursement of its costs, including reasonable attorneys' fees, incurred in the defense of this action, pursuant to paragraph 8 of the Commercial Lease Agreement between Hi-Lift and Air Group, Air Group:

> "agrees to indemnify and hold [Hi-Lift], its officers, directors, stockholders, employees, agents and representatives harmless from any and all of the

> following whether the same be actual or alleged: all loss, damages, claims, suits, taxes, liens, penalties, fines, liability and expense (including attorneys' fees) arising in any manner as a result of the breach by [Air Group], any agent, employee or servant of Lessee, any assignee of [Air Group] and any other person using or in possession of the Equipment, of any term of this Agreement, or relating directly or indirectly to the possession, use and operation of th Equipment . . ."

Defendant Hi-Lift has failed to demonstrate that the lease agreement continued to bind defendants Mobil Air and Air Group after the former went bankrupt, ceased business operations, and had its dealership revoked by Toyota. The term of the equipment lease agreement was to continue for three years, but defendant Hi-Lift, by admittedly going out of business by May 2007, abandoned the lease (*see generally Hannigan v Hannigan*, 104 AD3d 732 [2d Dept 2013]). In any event, defendant Hi-Lift has failed to show that it continued to have any contractual relationship with defendants Mobile Air at that point, and through and including the date of the subject accident. Under such circumstances, defendant Hi-Lift has failed to show that it is entitled to obtain reimbursement of its defense costs from defendants Mobil Air and Air Group pursuant to the agreement.

Accordingly, that branch of the motion by defendant Fork Lift Headquarters for summary judgment dismissing the complaint insofar as asserted against it and dismissing all cross-claims asserted against it by defendants Mobile Air and Air Group is granted. That branch of the motion by defendant Fork Lift Headquarters for summary judgment in its favor on its cross-claims against defendants Mobil Air and Air Group is denied. That branch of the motion by defendant Hi-Lift for summary judgment dismissing the complaint insofar as asserted against it and dismissing all cross-claims asserted against it by defendants Mobile Air and Air Group is granted. That branch of the motion by defendant Hi-Lift for summary judgment in its favor on its cross-claims against defendants Mobil Air and Air Group is denied. That branch of the motion by defendants Hi-Lift and Fork Lift Headquarters for summary judgment in their favor against third-party defendant Summit is denied.

Dated: January 31, 2014

J.S.C.