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At **PART 50** of the Supreme Court in and for the County of Suffolk, at One Court Street, Annex Building, Riverhead, New York, on MAY 08 2015.

PRESENT
HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

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Index No. 21600/2013

ROBERT W. BEIRNE,

Plaintiff(s)

Motion seq. **002: MD**
Orig. Date: 1/12/2015
Adj. Date: 2/24/2015

-against-

COCA-COLA REFRESHMENTS USA, INC., and THE COCA-COLA COMPANY,

Defendant(s).

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ORDER DENYING SUMMARY JUDGMENT

Upon consideration of the Notice of Motion for summary judgment in favor of the defendant Coca-Cola Refreshments USA, Inc. ["CCR" or "the defendant"], [1] dismissing the complaint of the plaintiff Robert W. Beirne ["the plaintiff" or "Beirne"], the supporting affirmation, exhibits and memorandum of law, the plaintiff's affirmation in opposition, the opposing affidavit and exhibits, and the defendant's reply memorandum of law, it is now

ORDERED that the defendant's motion for summary judgment is denied.

This action for personal injuries arises out of accident on April 5, 2011, when the plaintiff, an employee of Shark Lines, Inc., was delivering a shipment of Coca-Cola soft drink products to a CCR warehouse in Hauppauge, New York. The plaintiff was injured when he stepped into a four inch gap between the rear of his delivery truck and the floor of the loading dock in the warehouse.

According to CCR's Hauppauge warehouse supervisor, the procedure used for making deliveries of Coca-Cola soft drink products is the same for all trucks. The warehouse is equipped with thirteen identical loading dock bays and consists of an opening in the exterior of the wall of the warehouse with an overhead door to close the bay when not in use. Below each bay, two rubber dock bumpers are affixed to the exterior warehouse wall. When a delivery is made, the bay door is opened, the truck driver opens the rear of the truck, and then backs up the truck until the truck's rear bumper rests up against the rubber dock bumpers. The bumpers prevent the truck from being damaged or from damaging the warehouse wall.

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[1] The claims against The Coca-Cola Company were dismissed by stipulation dated October 2, 2013.

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The dock bumper creates a gap of approximately four inches between the rear of the truck and the edge of the floor of the loading dock bay. A forklift is used to move pallets containing product from the truck into the warehouse. Each bay is equipped with a mechanized dock leveler embedded into the warehouse floor consisting of a steel plate extending out from the floor of the bay and on to the floor of the truck creating a bridge over the gap to allow the forklift to be driven from the warehouse into the truck. Without the dock plate, the forklift can not be driven into the truck. The dock leveler is controlled by a series of buttons located on the inside wall of each bay. According to the defendant, the truck driver making the delivery operates the dock leveler.

According to CCR's warehouse supervisor, when product falls off of a pallet while still in the truck, it is the driver's responsibility to re-stack the product either on the pallet inside the truck or on the warehouse floor immediately inside the bay. Once any spilled product is re-stacked, the remaining pallets are off-loaded using a forklift. The accident occurred when the plaintiff was hand-carrying spilled six-packs of soft drink product from the truck so that it could be re-stacked on a pallet located on the warehouse floor when the dock leveler had not yet been engaged. The plaintiff was going back and forth from the truck to the warehouse stepping over the four inch gap each time he went into and out of the truck for approximately thirty minutes before the accident occurred. The plaintiff testified he had no trouble seeing the gap. On one of the trips, the plaintiff stepped into the gap and alleges he was injured.

The plaintiff testified that after he backed the truck up to the bay on the night of the accident, he was approached by someone from the warehouse's receiving crew who advised him that at least four skids worth of product had spilled in the truck and that the plaintiff would have to remove the spilled Coca-Cola cans from the truck before the forklift would be permitted to unload the remainder of the delivery. According to the plaintiff, the same individual instructed the plaintiff to put the spilled cans on skids that were on the platform approximately fifteen feet from the back of the truck. The plaintiff testified that the warehouse crew had placed the skids to be used by the plaintiff on top of the dock plate or leveler. The plaintiff did not attempt to operate the dock plate to cover the gap before the accident occurred. It was his first time at that particular warehouse and the plaintiff assumed that this was their procedure.

In opposing summary judgment, the plaintiff proffered the affidavit of his expert, who attested, inter alia, to his thirty years of experience in trucking, distribution, logistics, and warehousing, as well as his twenty year experience in safety and generally accepted industry practices and standards, including those of the Occupational Safety and Health Administration ["OSHA"]. The expert affidavit described several OSHA regulations which together are referred to as the Multi-Employer Doctrine. According to this doctrine, CCR, as the entity owning, running, or otherwise controlling the warehouse, had absolute authority over the procedures, protocol, equipment, and actions at the facility, and was the only entity with the power to correct any unsafe conditions at the facility.

According to plaintiff's expert's affidavit, the four inch gap between the loading platform and the back of the truck was a hazard and based on accepted industry practice and OSHA regulations CCR had a duty to remediate or guard the four inch gap and failed to do so. The expert

attested that the CCR employee who placed pallets on the warehouse floor should have set the dock leveler first to provide Beirne with a safe walkway between his trailer and the pallets and that it was a deviation from accepted warehouse/trucking practice to place pallets on top of a leveler that would have prevented its use.

The defendant argues that it is entitled to summary judgment as the four inch gap was well known to the plaintiff as he proceeded to step over it multiple times while re-stacking the spilled soft drink product on to the pallets. In addition, the plaintiff testified that he was aware that a dock leveler was available for his use, he was familiar with how to use it, and had operated similar dock plates during the course of his career as a truck driver. In any event, the purpose of the dock leveler is to enable forklifts to be driven over the four inch gap. Its purpose is not to enable people to traverse the gap.

The defendant further argues that it owed no duty to the plaintiff and that its conduct was not a proximate cause of the accident. The defendant urges that its actions "merely furnished the condition or occasion for the occurrence of the event ...[but was not] one of its causes", *citing Sheehan v City of New York*, 40 N.Y.2d 496, 354 N.E.2d 832, 387 N.Y.S.2d 92 (1976).

Paragraph 20 of the Amended Verified Complaint alleges that the defendants, their agents, servants, and/or employees had a duty to provide the plaintiff with a safe place to work. The Amended Complaint further alleges that the defendants caused the accident by failing to place a metal plate or cover over the gap between the end of the plaintiff's trailer and the [loading] dock (¶ 28), and that the defendants had actual and constructive notice of the dangerous and defective condition existing at the work site. No bill of particulars was included in the moving papers.

Labor Law § 200 is a codification of the common-law duty to exercise due care in providing a safe place to work (*see Dunham v. Hilco Constr. Co.*, 89 N.Y.2d 425, 428, 676 N.E.2d 1178, 654 N.Y.S.2d 335 [1996]). Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed (*see Ortega v. Puccia,* 57 A.D.3d 54, 866 N.Y.S.2d 323 [2d Dept. 2008].

Where a premises condition is at issue as alleged in the Amended Verified Complaint, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Azad v. 270 5th Realty Corp.*, 46 A.D.3d 728, 730, 848 N.Y.S.2d 688; *Kerins v. Vassar Coll.*, 15 A.D.3d 623, 626, 790 N.Y.S.2d 697; *Kobeszko v. Lyden Realty Invs.*, 289 A.D.2d 535, 536, 735 N.Y.S.2d 189; *Giambalvo v. Chemical Bank*, 260 A.D.2d at 433, 687 N.Y.S.2d 728).

"To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have 'authority to exercise supervision and control over the work' " (*Rojas v. Schwartz*, 74 A.D.3d 1046, 1046, 903 N.Y.S.2d 484, *quoting Gallello v. MARJ Distribs., Inc.*, 50 A.D.3d 734, 735, 855 N.Y.S.2d 602; *see Chowdhury v. Rodriguez*, 57 A.D.3d at 127–128, 867 N.Y.S.2d 123).

When an accident is alleged to involve defects in both the premises and the equipment used at the work site, a defendant moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards (*see DiMaggio v. Cataletto,* 117 A.D.3d 984, 986 N.Y.S.2d 536 [2d Dept. 2014]; *Reyes v. Arco Wentworth Mgt. Corp.*, 83 A.D.3d 47, 52, 919 N.Y.S.2d 44). A defendant moving for summary judgment in such a case may prevail "only when the evidence exonerates it as a matter of law for all potential concurrent causes of the plaintiff's accident and injury, and when no triable issue of fact is raised in opposition as to either relevant liability standard" (*Reyes*, *supra* at 52, 919 N.Y.S.2d 44).

The Court rejects the defendant's contention that it had no duty to the plaintiff as owner of the premises where the accident occurred. On the contrary, as the owner of the premises, the defendant had a duty to provide a reasonably safe place to work. Labor Law § 200 entitled "General duty to protect health and safety of employees; enforcement" provides:

> 1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

Whether the defendant fulfilled its duty to provide the plaintiff with a reasonably safe place to work, in light of the plaintiff's unrefuted testimony that he was instructed by the defendant's employee to stack the soft drinks on pallets that the defendant's employees placed over the dock leveler, is an issue of fact precluding summary judgment. Similarly, whether the gap between the truck and the loading bay platform was a dangerous condition is likewise an issue of fact. That the plaintiff was aware of the gap only has a bearing on the plaintiff's comparative negligence; it does not exonerate the defendant from injuries arising out of a dangerous condition which it either created or about which it had actual or constructive notice (*Zastenchik v. Knollwood Country Club,* 101 A.D.3d 861, 955 N.Y.S.2d 640 [2d Dept. 2012]).

Here, CCR did not establish, prima facie, its entitlement to judgment as a matter of law dismissing the causes of action to recover damages for common-law negligence and/or a violation of Labor Law § 200, as it failed to demonstrate that the alleged defect, the four inch gap, did not constitute a dangerous condition as a matter of law (*see Zastenchik v. Knollwood Country Club, supra, citing Cupo v. Karfunkel*, 1 A.D.3d 48, 53, 767 N.Y.S.2d 40).

Moreover, CCR did not establish as a matter of law that it did not exercise supervisory control over the means and methods as to how and where the plaintiff was to re-stack the spilled product, particularly in light of the undisputed testimony that the defendant's employee(s) placed the pallets on top of the dock leveler and instructed the plaintiff to offload there (*see Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352–353, 670 N.Y.S.2d 816, 693 N.E.2d 1068; *Ford v. HRH Constr. Corp.*, 41 A.D.3d 639, 838 N.Y.S.2d 636; *Gasques v. State,* 59 A.D.3d 666, 873 N.Y.S.2d 717). In any event, the plaintiff's expert affidavit raised a triable issue of fact as to whether as owner of the warehouse CCR had supervisory control over the work site, including the use or non-use of the dock leveler by the plaintiff, and the manner in which the plaintiff was to stack the spilled product precluding summary judgment.

Thus, the plaintiff's motion for summary judgment is denied.

Dated: MAY 08 2015

ANDREW G. TARANTINO, JR., A.J.S.C.

___ FINAL DISPOSITION **XX__NON-FINAL DISPOSITION**