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SHORT FORM ORDER

INDEX No. 10-21123
CAL No. 15-00580MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-2-14 (#005, #006)
MOTION DATE 3-7-15 (#007)
MOTION DATE 4-20-15 (#008)
ADJ. DATE 7-24-15
Mot. Seq. # 005 - MotD # 007 - MD
Mot. Seq. # 006 - XMG # 008 - XMD

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THOMAS CUCCIA,

Plaintiff,

- against -

EDWARD EHRBAR, INC., KOMATSU AMERICA CORP.; KOMATSU, LTD. and L.K. MCLEAN ASSOCIATES, P.C.,

Defendants.

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DELL & DEAN, PLLC
Attorney for Plaintiff
1325 Franklin Avenue, Suite 120
Garden City, New York 11530

L'ABBATE, BALKAN, COLAVITA & CONTINI, L.L.P.
Attorney for Defendant L.K. McLean
1001 Franklin Avenue, Room 300
Garden City, New York 11530

SEDGWICK LLP
Attorney for Defendants Komatsu
225 Liberty Street, 28th Floor
New York, New York 10281

SEGAL MCCAMBRIDGE SINGER & MAHONEY, LTD.
Attorney for Defendant Ehrbar
850 Third Avenue, 11th Floor
New York, New York 10022

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by defendant Edward Ehrbar, Inc., dated August 20, 2014, and supporting papers (including Memorandum of Law dated August 20, 2014); (2) Notice of Cross Motion by the plaintiff, dated August 25, 2014, supporting papers; (3) Notice of Motion/Order to Show Cause by defendant L.K. McLean Associates, P.C., dated February 19, 2015, and supporting papers (including Memorandum of Law dated February 19, 2015); (4) Notice of Cross Motion by the plaintiff, dated April 6, 2015, supporting papers; (5) Affirmation in Opposition by defendant L.K. McLean Associates, P.C., dated September 23, 2014, and supporting papers; (6) Affirmation in Opposition by the plaintiff, dated April 6, 2015; (7) Affirmation in Opposition by defendant Edward Ehrbar, Inc., dated March 12, 2015; (8) Affirmation in Opposition by defendant L.K. McLean Associates, P.C., dated May 26, 2015; (9) Reply Affirmation by the plaintiff, dated September 24, 2014; (10) Reply Affirmation by the plaintiff, dated July 7, 2015; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the branch of the motion (# 005) by defendant Edward Ehrbar, Inc. for summary judgment dismissing the complaint and all cross claims asserted against it is granted; and it is further

ORDERED that the branch of the motion (# 005) by defendant Edward Ehrbar, Inc. for an award of costs against L.K. McLean Associates, P.C. is denied; and it is further

ORDERED that the cross motion (# 006) by the plaintiff for an order precluding defendants from asserting article 16 defenses at trial against any other defendant who is awarded summary judgment is granted; and it is further

ORDERED that the motion (# 007) by defendant L.K. McLean Associates, P.C. for summary judgment dismissing the complaint and all cross claims asserted against it is denied; and it is further

ORDERED that the motion (# 008) by the plaintiff for an order granting summary judgment in his favor against defendant L.K. McLean Associates, P.C. pursuant to Labor Law § 240 (1) is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff when a crawler carrier which he was operating fell into a trench, causing him to be injured. The accident allegedly occurred while the plaintiff, who was a heavy machine operator employed by the Town of Brookhaven ("Town"), was working in a landfill on June 21, 2007. It is undisputed that defendant Edward Ehrbar, Inc. ("Ehrbar") sold the crawler to the Town in 2006, and that defendant L.K. McLean Associates, P.C. ("McLean"), an engineering consulting company, monitored the Town's landfill project at the time of the accident.

Ehrbar moves (# 005) for summary judgment dismissing the complaint and all cross claims asserted against it on the ground that it bears no liability for the subject accident, and that it had no obligation or responsibility to train the plaintiff to use or operate the subject crawler. In support, Ehrbar submits, *inter alia*, the pleadings; the bill of particulars; the transcripts of the deposition testimony of the plaintiff, Ehrbar's representatives, James Hogan and Matthew Ahern, and McLean's representative, Daniel Johnson; and the affidavit of Lawrence McCrann, Ehrbar's representative.

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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*see* ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521

NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interests must be viewed "in a light most favorable to the party opposing the motion" (*see* ***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

Whether the action is pleaded in strict products liability, breach of warranty or negligence, it is a plaintiff's burden to show that a defect in the product was a substantial factor in causing the injury (*see* ***Beckford v Pantresse, Inc.***, 51 AD3d 958, 858 NYS2d 794 [2d Dept 2008]; ***Rizzo v Sherwin-Williams Co.***, 49 AD3d 847, 854 NYS2d 216 [2d Dept 2008]). The plaintiff must demonstrate, at a minimum, that injuries are the direct result of a defect in the product and that the defective product is the sole possible cause of those injuries (*see* ***Beckford v Pantresse, Inc.***, *supra*; ***Clarke v Helene Curtis, Inc.***, 293 AD2d 701, 742 NYS2d 325 [2d Dept 2002]). A claim of strict products liability can assert either a (1) manufacturing defect, (2) a design defect, or (3) a failure to provide adequate warning regarding the use of a product (*see* ***Doomes v Best Tr. Corp., No. 170***, 17 NY3d 594, 935 NYS2d 268 [2011]; ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]). However, there is no duty to warn of a product's obvious danger, particularly where the injured party was fully aware of the hazard through general knowledge, observation, or common sense (*see* ***Liriano v Hobart Corp.***, 92 NY2d 232, 677 NYS2d 764 [1998]; ***Hartnett v Chanel, Inc.***, 97 AD3d 416, 948 NYS2d 282 [1st Dept 2001]).

At his deposition, the plaintiff testified that when he became a heavy equipment operator in 2004, he already knew how to operate the equipment that he was assigned to operate by the Town. At the time of the accident, he worked as a heavy equipment operator for the Town, and operated a Komatsu 110 crawler carrier in the subject landfill. About seven months prior to the subject accident, upon delivery of the carrier to the Town, Ehrbar's sales representative gave a general overview of the machine. At that time, he was not given any instructions regarding safety with respect to use of the machine. Approximately a month prior to the accident, he operated the crawler for the first time, and after that, he used it approximately 20 times before the accident occurred. He described the crawler as a dump machine which operates on tracks. The Town had other machinery with tracks, such as an excavator and skid track, and he had previously operated that equipment. He was not given any books, pamphlets, or training with regard to the crawler from the Town; there were warnings on the machine, which referred to the grades of the slopes of the hills. On the morning of the accident, he was asked to take the machine to the rear end of the landfill and work with Donald Linz, a representative from L.K. McLean, which is the general contractor hired by the Town. At 8:00 a.m., when he met Linz, he told him what work needed to be done for the day, where to bring the material once he was loaded, and where to dump it. However, Linz did not direct him as to the manner of performing his work. Linz told him to take the load from the middle of the slope, named "cell six," to transport it up to the ash pit on the top of the slope, and to dump it there. He testified that Linz "specifically" told him to "[g]o this way," and instructed him "to go up the slope and over the crest." While there was a gauge on the crawler indicating the grade of any slope, he did not look at it before his accident. When he reached the top of the slope, "the machine went up and teeter tottered and slammed down abruptly underneath [him], causing [him] to get thrown in the machine." The crawler which he operated fell into a trench, and he was not aware of its existence. He estimated that the slope between the place where he picked up the load and where he was going to deliver it would be a little bit over 45 degrees.

In his affidavit, Lawrence McCrann stated that he is the vice president of sales for Ehrbar. He assisted James Hogan with the sale of a Kamatsu crawler to the Town in 2006. In November 2005, Ehrbar provided a demonstration of the crawler to the Town. Subsequently, McLean issued a bid package for a crawler to be purchased by the Town for use at the landfill. Ehrbar submitted a bid for the crawler, which was accepted by the Town. The bid proposal and the sales contract for the crawler did not require Ehrbar to train the Town employees on the use and operation of the crawler. Prior to the purchase, the Town did not specify the intended use of the crawler. It is not the custom and practice of Ehrbar to train customers on the use and operation of the machines it sells or leases, and Ehrbar never agreed to do so with the Town. Upon request of a customer, Ehrbar will provide an instructional demonstration of the general use and/or operation of a machine. Ehrbar provided an operation and safety manual for the crawler to the Town on or about January 9, 2007. Ehrbar neither maintained a presence at the Town's landfill project, nor did it have any authority over the actions of the Town or McLean on the project.

At his deposition, James Hogan testified that he is a sales representative of Ehrbar, a company selling construction equipment, and that he sold a Kamatsu crawler to the Town in 2006. Prior to the sale, he provided the Town only with the four-page spec sheet. When he met McLean's representatives, they wrote a specification on the machine that they believe the Town should purchase. It is his custom and practice not to warn possible sellers about safety issues with a machine. He never warned a possible purchaser including the Town about any safety issues related to the subject crawler.

At his deposition, Matthew Ahern testified that he is a co-owner and the executive vice president of Ehrbar. When the subject crawler was sold to the Town, Ehrbar provided a training to the employees of the Town, and the training involved the proper operation, maintenance of the equipment, familiarity with manuals provided, and daily maintenance. He testified that Ehrbar gives a safety manual to whoever rents, buys or leases the equipment, and that the safety manual is discussed during the training session.

At his deposition, Daniel Johnson testified that he is the resident engineer of McLean. McLean performed construction monitoring through its field inspectors, who were responsible to "keep tabs of the work in compliance with the plans and specs that were designed for the job." In 2007, Donald Linz was employed as an inspector by McLean, and worked on the Town's landfill project, named "Phase C Cap." While McLean supervised the Town employees on the project by directing the Town as to the scope of work that needed to be performed, McLean did not direct the Town employees as to the manner of the work, and the Town determined how to perform the work. McLean's instruction as to the scope of work included filling, grading, cutting, movement of material, and the location of the grading. McLean instructed the Town on the overall scope of work, and the Town's foreman advised McLean's representative as to what manpower and equipment were available that day.

Here, Ehrbar has established its entitlement to judgment as a matter of law by showing that it had no duty to warn of the obvious risk and the possibility of injury to the plaintiff posed by his operating the crawler. In opposition, McLean contends that inconsistencies between McCrann' affidavit and Ahern's testimony as to whether Ehrbar trained the plaintiff on the use and operation of the crawler raise credibility issues. However, McLean has failed to present evidentiary proof as to whether Ehrbar's

alleged training on the use and operation of the crawler caused or contributed to the subject accident. The court finds that Ehrbar has demonstrated that it had no obligation or responsibility to train the plaintiff to use or operate the subject crawler, and that the plaintiff failed to raise an issue of fact as to whether the sales representative's presentation of a general overview of the crawler caused or contributed to the accident. The court has considered the remaining claims of McLean and found them to be without merit. Thus, the branch of the motion by Ehrbar for summary judgment dismissing the complaint and all cross claims as asserted against it is granted.

Moreover, the branch of the motion of Ehrbar seeking an award of costs against McLean is denied on the ground that it failed to demonstrate that McLean's claim is "completely without merit in law," or that it was made primarily to delay the resolution of the litigation, or to harass another, and thus, that the claim was "frivolous" (*see* ***Benishai v Benishai***, 83 AD3d 420, 920 NYS2d 84 [1st Dept 2011]; ***Aleksandrowicz v Cantella & Co., Inc.***, 72 AD3d 1580, 898 NYS2d 913 [4th Dept 2010]).

The plaintiff cross-moves to preclude any defendants remaining in the action after adjudication of the summary judgment motions from asserting the benefits of CPLR article 16 with respect to the acts or omissions of the defendants that were awarded summary judgment. In opposition, McLean contends that Ehrbar may be considered to be among "all persons liable" within the meaning of CPLR article 16, although Ehrbar was awarded summary judgment.

Since summary judgment is the functional equivalent of a trial, it follows that the limited liability benefits for defendants under CPLR article 16 are forfeited as to any codefendant who has been awarded summary judgment in its favor (*see* ***Hendrickson v Philbor Motors, Inc.***, 102 AD3d 251, 955 NYS2d 384 [2d Dept 2012]; ***Sellino v Kirtane***, 73 AD3d 728, 901 NYS2d 299 [2d Dept 2010]; ***Johnson v Peloro***, 62 AD3d 955, 880 NYS2d 129 [2d Dept 2009]; ***Drooker v South Nassau Communities Hosp.***, 175 Misc2d 181, 669 NYS2d 169 [Sup Ct, Nassau County 1998]). Here, McLean is precluded from asserting the benefits of CPLR article 16 with respect to the acts or omissions of Ehrbar, who was awarded summary judgment. Thus, the plaintiff's cross motion is granted.

McLean moves (# 007) for summary judgment dismissing the complaint and all cross claims asserted against it on the ground that it bears no liability for the subject accident, and that it had no obligation or responsibility to train the plaintiff to operate the subject crawler. In support, McLean submits, *inter alia*, the pleadings; the bill of particulars; the transcripts of the deposition testimony of the plaintiff, Ehrbar's representatives, James Hogan and Matthew Ahern, and McLean's representative, Daniel Johnson and Donald Linz; and the affidavit of Lawrence McCrann, Ehrbar's representative.

At his deposition, Donald Linz testified that he is an inspector for McLean. It was his responsibility to make sure that the work performed was in accordance with "the plans and specs," and he did not supervise the Town employees. In June 2007, he worked on the Town's landfill project, named "Phase C Cap." On the day of the subject accident, he was outside observing the workers perform their work including picking up debris and placing it on the top of a hill. The determination as to where to put the garbage is not dictated by the specs. At approximately 8:00 a.m., when the plaintiff asked him a question regarding the scope of the day's work, he answered that "we're taking debris from the slope and putting it in the ash." When the conversation took place at the top of the hill, the plaintiff

was in the crawler which was there from the night before. Linz testified that McLean had no responsibility to ensure that the equipment being used on the project is properly maintained; rather it was the Town's responsibility. It was not his responsibility to evaluate whether the work was being performed safely, and he did not train anyone to operate machinery that was used on the project.

Here, the deposition testimony of the plaintiff and Linz conflict as to whether Linz instructed the plaintiff specifically where to drive the crawler (*see* ***Scavelli v Town of Carmel***, 131 AD3d 688, 15 NYS3d 214 [2d Dept 2015]). At his deposition, the plaintiff testified that Linz "specifically" told him to "[g]o this way," and instructed him "to go up the slope and over the crest." At his deposition, Linz testified that while he had a conversation with the plaintiff regarding the scope of the day's work including taking debris from the slope and putting it in the ash prior to the accident, he indicated that he did not direct or instruct the plaintiff what to do. Under these circumstances, there are questions of fact as to whether Linz directed the plaintiff specifically where to drive the crawler and whether the alleged instruction caused the plaintiff's accident. Thus, McLean failed to sustain its initial burden of establishing prima facie entitlement to judgment as a matter of law. Accordingly, its motion for summary judgment on the issue of liability is denied.

The plaintiff cross-moves (# 008) for an order granting summary judgment in his favor against McLean pursuant to Labor Law § 240 (1) on the ground that the plaintiff's accident was caused by gravity related forces, that the crawler carrier which the plaintiff operated was not an adequate safety device, and that McLean was a de facto general contractor at the subject working site. In support, the plaintiff submits, *inter alia*, the pleadings; the bill of particulars; and the transcripts of the deposition testimony of the plaintiff and non-party witness Robert Dono.

Labor Law § 240 (1), commonly known as the "scaffold law," creates a duty that is nondelegable, and an owner or general contractor who breaches that duty may be held liable for damages regardless of whether it actually exercised any supervision or control over the work being performed at the time of the accident (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). The hazards contemplated by Labor Law § 240 (1) "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; *see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993]). In cases involving falling objects, a plaintiff must demonstrate that the object fell while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute (*see* ***Narducci v Manhasset Bay Assoc.***, 96 NY2d 259, 727 NYS2d 37 [2001]; ***Novak v Del Savio***, 64 AD3d 636, 883 NYS2d 558 [2d Dept 2009]). While not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240 (1) (*see* ***Narducci v Manhasset Bay Assoc.***, *supra*), a plaintiff who is injured by such an object may recover where he or she shows that the object being hoisted required securing for the purposes of the undertaking (*see* ***Quattrocchi v F.J. Sciame Constr. Corp.***, 11 NY3d 757, 866 NYS2d 592 [2008]; ***Narducci v Manhasset Bay Assoc.***, *supra*; ***Novak v Del Savio***, *supra*).

Here, the plaintiff failed to make a prima facie showing that McLean is liable pursuant to Labor Law § 240 (1) because the plaintiff's accident did not result from the type of accident "in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (***Runner v New York Stock Exch., Inc.***, 13 NY3d 599, 604, 895 NYS2d 279 [2009]; *see* ***Nicometi v Vineyards of Fredonia, LLC***, 25 NY3d 90, 7 NYS3d 263 [2015]; ***Shaw v RPA Assoc., LLC***, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010]). In driving the crawler carrier, the plaintiff was not subject to the "pronounced risks arising from construction work site elevation differentials" (*see* ***Nicometi v Vineyards of Fredonia, LLC***, *supra*; ***Runner v New York Stock Exch., Inc.***, *supra*; ***Shaw v RPA Assoc., LLC***, *supra*). In addition, the plaintiff was not exposed to any risk that the safety devices referenced in Labor Law § 240 (1) would have protected against (*see* ***Shaw v RPA Assoc., LLC***, *supra*; ***Barillaro v Beechwood RB Shorehaven, LLC***, 69 AD3d 543, 894 NYS2d 434 [2d Dept 2010]). Accordingly, the plaintiff's cross motion for summary judgment on the Labor Law § 240 (1) claim against McLean is denied.

Dated: March 2, 2016

PETER H. MAYER, J.S.C.