

Rooney v Port Auth. of N.Y. & N.J.

2016 NY Slip Op 31366(U)

June 27, 2016

Supreme Court, Bronx County

Docket Number: 304112/2013

Judge: Julia I. Rodriguez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X **Index No. 304112/2013**

Terence Rooney,
Plaintiff,

-against-

DECISION and ORDER

Port Authority of New York and New Jersey,
Silverstein Properties, Inc., Tishman
Construction Corporation, Tishman
Construction Corporation of New York,
4 World Trade Center, LLC and United
Rentals (North America), Inc.,

Present:

Defendant(s).

Hon. Julia I. Rodriguez
Supreme Court Justice

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Port Authority of New York and New Jersey,
Silverstein Properties, Inc., Tishman
Construction Corporation, Tishman
Construction Corporation of New York and
4 World Trade Center, LLC,

Third-Party
Index No. 84097/2013

Third-Party Plaintiffs,

-against-

United Rentals (North America), Inc.,

Third-Party Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of plaintiff's motion for summary judgment and defendant/third-party defendant's motion for summary judgment.

<u>Papers Submitted</u>	<u>Numbered</u>
Pls. Notice of Motion, Affirmation & Exhibits	1
United's Affirmation in Opposition	2
Port Authority's Affirmation in Opposition & Exhibits	3
Affirmation in Further Support of Pls. Motion	4
United Rentals Notice of Motion, Affirmation & Exhibits	5
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The instant action arises from an accident in which plaintiff, an electrician, fell from a scissor-lift and was injured while working at a construction site located at 4 World Trade Center. Defendants Port Authority of New York and New Jersey, Silverstein Properties, Inc., and 4 World Trade Center, LLC own the property. Defendants Tishman Construction Corporation and Tishman Construction Corporation of New York are general contractors for the construction project.

Plaintiff now moves for summary judgment against Defendants Port Authority of New York and New Jersey, Silverstein Properties, Inc. and 4 World Trade Center, LLC (“Port Authority”), pursuant to CPLR § 3212, on the issue of liability, on his Labor Law §240(1) cause of action.¹

Defendant United Rentals (North America) Inc. (“United Rentals”) now moves for summary judgment, pursuant to CPLR § 3212, dismissing the complaint and the third-party complaints against United Rentals in their entirety.

In support of summary judgment, plaintiff contends that Port Authority is liable for his injuries under Labor Law § 240(1), as the owner of the subject property and general contractor for the construction project, because he was injured when the device he was working on either broke, collapsed or gave way causing him to fall ten feet to the ground. Plaintiff contends that the scissor-lift provided to him by his employer failed to provide adequate protection to prevent his fall.

In support of his contentions, plaintiff submitted, *inter alia*, his deposition testimony and the deposition testimony of Everol Hill, several photos, a Tishman Construction Company Accident Report, and a document entitled Tishman Construction Safety Guidelines. At his deposition, plaintiff ^{testified} as follows: He joined the electricians’ union in 2002 and had extensive construction-related work experience prior to the accident. His experience included the use of aerial lifts. His foreman instructed him that while standing inside of the platform of an aerial lift that he should wear a harness in case he had to climb out of the lift but he should not attach his

¹In his Affirmation in Further Support of Summary Judgment, plaintiff’s counsel clarifies that plaintiff does not seek summary judgment against United Rentals (North America) Inc.

harness to anything while he was inside the lift. He had never seen any worker attach his harness while working inside of a lift. "Safety guys" were "always walking by" on the job site and they never instructed him to tie off his harness. Aerial lifts have extension platforms and, on some lifts, the platform was extended simply by sliding the railings on the sides of the platform. At the time of the accident, he was working on the 64th floor of the building and was installing conduit on racks attached to the ceiling. His partner was Joe Gangi on the day of the accident. The ceiling was about 25 feet high. In order to perform this work, he used a scissor-lift provided by his employer, Allen Briteway. Gangi was using another lift about 15 feet away from him. Allen Briteway had four or five lifts on the 64th floor. He was not assigned a particular lift but used whichever lift was available. On the day of the accident, all of the lifts were being used. He had used scissor-lifts on hundreds of occasions and used a scissor lift almost every day when he was on the crew installing pipe. The lift that he was using had a platform that was about four feet by eight feet wide. It also had an extension platform that was about four feet wide. The extension platform was surrounded by three railings. There was a lower railing, mid-rail and top rail. Prior to using the lift, he did a pre-start inspection. He looked around the lift to make sure that the platform was free of debris. He checked to make sure that the controls were working. He also looked around to ensure that "everything looked okay." He did not notice any locking pins missing on the lift. If he noticed that the lift was missing a part or that a railing was warped or damaged, he would tell his foreman and not use the lift. He would look over the lift from outside as well as from inside the platform. All of the lifts provided by Allen Briteway were "banged up" because they were being used in a building that was open and exposed to the outside elements. The top rails of the lift that he was using were dented, but any damage on the lift was ordinary and normal. He drove the lift to his work area, which was a "tight area" with a lot of pipes, raised the lift and extended the platform. In order to extend the platform, he pushed the railings of the extension platform out while he stood inside of the non-extension portion of the platform. He did not have to unlock anything to push the extension platform out. This was the usual manner in which he extended the platform. As he was extending the platform, he looked at the railings which were a little banged up. He did not notice anything out of the

ordinary while pushing the platform out. He used the lift for about 3 hours without incident prior to the accident. Immediately before the accident, he was strapping conduit and had a ratchet in his right hand and a screwdriver in his left hand. In order to perform his work, he had to lean forward. His feet were on the extension portion of the platform about two feet from the edge of the platform. He was wearing a harness with a lanyard but it was not attached to the lift because he was instructed not to do so while working inside the platform. At the time of the accident, he was tightening conduit that was at his eye level. His body was slightly bent forward and his hands were over his head. As he was tightening the conduit with a strap, the ratchet slipped. He jerked back to his right side and hit the top railing on the side of the platform with his hip. The railing gave way causing him and the railing to fall. He landed in a wooden container full of brackets for the windows, rebar and other items. Gangi and his supervisor Doherty were eyewitnesses to the accident.

At his deposition, Everol Hill testified as follows: On the date of the accident, he was the assistant safety director for Tishman. He was responsible for overseeing the safety of the construction that was going on at the time. His job included performing daily inspections of the job site which included all areas of the work site. If he noticed something unsafe about a piece of equipment, he would report it and make the contractor correct the condition. He had the authority to stop a contractor from using a piece of equipment if he deemed the equipment unsafe. He believed that, prior to the accident, he had observed unsafe scissor-lifts at the site. He first became aware of the accident when he received a call on his radio. When he arrived at the scene with a paramedic, plaintiff was lying down on his side in a big wood box. A scissor-lift was adjacent to the box. Plaintiff told him that he fell out of the lift. He noticed that a section of the lift's guardrail was underneath plaintiff and that the top guardrail on the lift was missing in the area of the extension platform. Gangi told him that the accident occurred because the guardrail either broke or gave way. Doherty also told him that the accident occurred because plaintiff fell from the lift "after the rail broke off." As part of his duties, he investigated the accident and created an accident report. He examined the piece of guardrail and observed that the piece was damaged since the channel was spread out. He also determined that the lift was

missing the pins to lock the guardrail in place. He acknowledged that, pursuant to Tishman's Construction Safety Guidelines, the platform that plaintiff was standing was required to have been "guarded by standard guardrail systems" because it was over six feet above the ground. Tishman's rules provided that if a worker was inside of a platform he was not required to attach his lanyard, rather, the worker had the option to tie off or not. The fact that plaintiff did not tie off was not a cause of accident. The railing "broke for whatever reason and that's why he fell out." Even if he had tied off, plaintiff would likely have hit the ground anyway given his height and the height of the platform.

The accident report prepared by Hill notes that last annual inspection of the lift was in July of 2012. The report also indicates that Gangi stated that the accident occurred when the "side rail top of the lift gave out."

In opposition to the motion, Port Authority contends that plaintiff's own negligent actions/inactions constituted the sole proximate cause of the accident. Specifically, Port Authority contends that plaintiff's failure to inspect the lift pre-use was the cause of the accident. In support of those contentions, Port Authority submitted, *inter alia*, the deposition testimony of Anthony Raia, several photos, a safety orientation certificate signed by plaintiff and the Manual of Responsibilities for Dealers, Owners, Users, Operators, Lessors, Lessees and Brokers of Self-Propelled Elevating Work Platforms. Port Authority also points to the deposition testimony of plaintiff and Hill, submitted by plaintiff. Port Authority notes that plaintiff testified that he noticed the top railings on the lift were dented, describing them as "used and abused," yet he did not report it to the foreman or stop working on the lift in derogation of his own work practice. Port Authority further notes that plaintiff testified that he spent only 10 to 15 seconds to inspect the lift prior to using it on the day of the accident and that he was fully familiar with locking pins, the cables that they are attached to, the presence of locking pins on scissor lifts and their impact on securing railings onto scissor lifts. Further, plaintiff admitted that it was "obvious" to him that the locking pins were missing when he inspected the lift after his accident.

Port Authority also notes the following testimony provided by Hill at his deposition: The height of the lift was between 9 and 10 feet. The ceiling height was 13 feet. The channel of the

railing found in the wood box adjacent to the lift was spread out as were the holes, which is a defective condition. Several locking pins that lock the railing in place were missing. As a result of this accident, a violation was issued by Tishman to plaintiff's employer for failure to perform an inspection of the scissor lift. Following this accident, contractors were directed to retrain their workers on the use of scissor lifts and to perform inspections on site. The safety guidelines prohibit workers from tying off to structures adjacent to the basket because the basket contains anchorage points within the basket which the worker is to use for tying off. Safety orientation meetings are conducted at which the workers are instructed to inspect the scissor lifts prior to each use to make sure that all safety devices are in place.

The accident report prepared by Hill states that "the most likely cause of the accident resulted from a failure of the operator of the lift to inspect the lift prior to use as required by Tishman Towner-4 safety program."

At his deposition, Anthony Raia, United Rental's road technician, testified as follows: He is fully familiar with scissor lifts containing manual extensions such as the one involved in plaintiff's accident. In order to extend the platform out, the operator would have to first pull out the safety pins (two on each railing), then push the platform out to the desired position, and then reinsert the locking pins. The locking pins have a locking ball on them making them very hard to pull out. Simple wear and tear would not loosen a pin such that it would fall out. After reviewing photographs of the scissor lift taken after the accident, he noticed that the "loops were nice and tight" which suggested that the locking pins were purposefully removed. If all the bolts are missing but the locking pins are in place, the railing cannot be removed or detached. A pre-use inspection of the subject lift should take between 15 to 20 minutes. He inspected the lift prior to his deposition and noticed that all of the locking pins were missing. It was "very obvious" that the locking pins were missing since the cables were hanging in clear view without the pins. The rail was "wired" to prevent it from sliding out so "obviously the pins weren't there to begin with."

* * * * *

Labor Law §240(1) imposes absolute liability on owners, contractors and their agents for injuries to workers engaged in “the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure,” which results from falls from ladders, scaffolding, or other similar elevation devices that do not provide proper protection against such falls. *See Orellano v. 29 E. 37th St. Realty Corp.*, 292 A.D.2d 289, 290, 740 N.Y.S.2d 16 (1st Dept. 2002). However, where a Plaintiff’s actions are the sole proximate cause of his injuries, liability will not attach. *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958 (1998). It is sufficient for purposes of liability under section 240(1) that adequate safety devices to prevent plaintiff from falling from the scissor-lift were absent. *See Orellano, supra*. Where the owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff’s injury, negligence, if any, of the injured worker is of no consequence. *See Rococovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991). Here, it is undisputed that at the time of plaintiff’s accident, the scissor lift provided to him was missing locking pins and unsafe to use. While plaintiff’s failure to perform an adequate inspection of the lift prior to using it evidences negligence on his part, it was not the sole proximate cause of the accident and his resultant injuries. Port Authority’s contention that issues of fact exist as to how the accident occurred is speculative and insufficient to defeat summary judgment as there is no dispute that plaintiff fell from the scissor lift while performing his work. Therefore, plaintiff’s motion for summary judgment as to liability against the Port Authority defendants on his Labor Law §240(1) claim is **granted**.

In support of its motion for summary judgment defendant/third-party defendant United Rentals contends that the complaint and third-party complaint should be dismissed as against United Rentals because: (1) material alterations to the lift preclude liability on the part of United Rentals, (2) plaintiff’s negligence was the sole proximate cause of his injuries,² (3) even if an issue of fact exists as to United Rentals’ negligence, plaintiff’s negligence was a superceding event that relieves United Rentals of any potential liability, (4) United Rentals has no liability for

²Given the Court’s finding that plaintiff’s negligence was not the sole proximate cause of his injuries, no further discussion of this issue is necessary.

common law contribution or indemnification because it was not negligent and (5) United Rentals has no liability for contractual indemnification as no agreement requiring United Rentals to indemnify any of the parties exists.³

In addition to the evidence submitted by the parties in connection with plaintiff's motion for summary judgment, United Rentals submitted, *inter alia*, the deposition testimony of Jeff Attong, the affidavit of Jack W. Caloz, the rental agreement between United Rentals and Petrocelli Electric Co. Inc. ("Petrocelli"), United Rentals' work orders, the operating manual for the subject scissor-lift and several photos of the scissor-lift. United Rentals points to language in the rental agreement for the subject scissor-lift which provides that the Petrocelli inspected the equipment prior to possession and found it in good working order, that Petrocelli acknowledged all safety bulleting, operator manuals and "is fully familiar with the operation and use of this equipment." In addition, United Rentals points to language in the rental agreement which provides that should the scissor-lift be "in an accident, become unsafe, malfunction or require repair, Customer shall immediately cease using the Equipment and immediately notify United [Rentals]." Under the rental agreement, Petrocelli acknowledged that "United [Rentals] has no responsibility to inspect the Equipment while it is in [Petrocelli's] possession." Notwithstanding said language, United Rentals performed annual inspections and performed routine preventive maintenance.

The operating manual for the scissor-jack provides, *inter alia*, that "[o]nly trained and authorized persons should use this work platform. Safe use of this work platform requires the operator to understand the limitations and warnings, operating procedures, and operator's responsibility for maintenance." The operating manual also provides that "[b]efore operating this aerial platform check the guardrail system for loose or missing locking pins."

In opposition to the motion, Port Authority pointed to the following deposition testimony of Raia: United Rentals owns the scissor lifts that it rents out. United Rentals is responsible for conducting 90-day safety inspections as well as yearly inspections on its equipment. The 90-day

³Port Authority does not oppose summary judgment in United Rentals' favor dismissing its claim against United Rentals for contractual indemnification.

safety inspections are a company policy and also an industry standard under ANSI. As part of the 90-day safety inspection, United Rentals would search for missing parts and would scan for any damage. The inspection includes inspection of rails and rail pins and securing bolts. The subject lift was last inspected on July 27, 2012. The ANSI Manual of Responsibilities states that “the owner of the aerial platform shall ensure that the frequent inspection is performed in accordance with the manufacturer’s instructions for the aerial platform . . . that has been in service for three months or 150 months, whichever comes first.” United Rentals had mechanics at the subject jobsite almost every day. Had the subject lift been in the condition that it appears in the photographs taken after the accident, it would not have passed and he would have taken it out of service.

At his deposition, Jeff Attong, United Rentals’ service manager, testified as follows: He is responsible for making sure all of the equipment rented out by United Rentals is inspected, serviced and repaired. United Rentals is responsible for conducting quarterly and annual inspections on their equipment. These inspections are pursuant to both United Rentals’ own protocol and pursuant to industry (ANSI) standards. The purpose of conducting quarterly inspections “is to ensure the lift is safe and operational.” The last time the subject lift was inspected prior to plaintiff’s March 13, 2013 accident was July 27, 2012. If a lift was missing a locking pin, this would have been addressed during United Rentals’ quarterly inspection. If the scissor lift had its railing bent and channel spread wide it would have been replaced by United Rentals during the quarterly inspection. If the lift was materially altered in any way, United Rentals would have addressed it during its quarterly inspection. The longer a piece of equipment goes uninspected, the greater the chance the piece of equipment will fall into disrepair.

In his affidavit, Jack W. Caloz, a licenses professional engineer, states: He inspected and photographed the scissor lift on September 18, 2013. He also reviewed the deposition testimony of Attong and Raia, the work orders maintained by United Rentals, and the ANSI standards for self-propelled elevating work platforms. His inspection “disclosed that the railing for the left side of the extension platform looking toward the front of the lift was missing, and t hat all of the locking pins that would have secured the railing were missing as well.” In addition, “the railing

on the opposite side of the extension platform was placed backwards and secured with tie wire.” The locking pins, if they had been installed, would have secured the railings to the lift. “The missing locking pins were replaced with binding wire and in other cases the lock pins were replaced with a pair of nuts and bolts where the sets of nuts and bolts were installed in the rails, the rails were bent out to allow removal of the rails.” This “allowed the rails to spread, and to disengage from the lift guard rail system.” ANSI/SIA A92. 6 2006 requires that all aerial lifts be inspected by the owner every 90 days or 150 hours whichever comes first. Based upon the inspection records provided by United Rentals, United Rentals failed to complete two inspections, required in accordance with ANSI A92.6, prior to the date of the accident. Plaintiff failed to adhere to the ANSI standards by failing to conduct a safety inspection on the subject lift. The ANSI-mandated 90-day safety inspections are designed as a deterrent against scissor lifts falling into disrepair. Caloz concluded that the “nearly eight-month period where the scissor lift went uninspected by United Rentals substantially heightened the risk that the lift would fall into disrepair. It was the disrepair of the lift, including the absence of locking pins and otherwise unsecured state of the extension railing, that ultimately led to the railing giving way and plaintiff falling off the side of the lift.”

* * * * *

As a general rule, a manufacturer or distributor of a product may not be cast in damages, either on a strict products liability or negligence cause of action, where, after the product leaves the possession and control of the manufacturer or distributor, there is a subsequent modification which substantially alters the product and is the proximate cause of plaintiff’s injuries. *See Patino v. Lockformer Co.*, 303 A.D.2d 731, 732, 757 N.Y.S.2d 107 (2nd Dept. 2003). However, contrary to the cases cited by United Rentals, here, United Rentals had a duty to inspect the scissor lift after it left its possession under its own policy and pursuant to the ANSI standards. Also, unlike the cases cited by United Rentals, here, United Rentals could have exercised a greater degree of care by performing the required inspections which may have prevented the accident. Inasmuch as United Rentals failed to perform two required inspections prior to plaintiff’s accident over a course of eight months, triable issues of fact exist as to its negligence

and whether its negligence, if any, was a proximate cause of plaintiff's injuries. Nor can it be said as a matter of law that plaintiff's injuries were not a foreseeable consequence of United Rentals' negligence in not performing the required inspections, maintenance and repairs so as to preclude any potential liability on the part of United Rentals. *See Rivera v. City of New York*, 11 N.Y.2d 856, 182 N.E.2d 284 (1962).

Based on the foregoing, United Rentals' motion for summary judgment is **granted solely to the extent that all claims and cross-claims for contractual liability as against United Rentals are hereby dismissed.**

Dated: Bronx, New York
June 27, 2016



Hon. Julia I. Rodriguez, J.S.C.