SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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TODD WADSWORTH,

Plaintiff,

-against-

VERIZON NEW YORK INC., WHOLE FOODS MARKET GROUP, INC. and ABC CORPORATIONS 1-5 who are unknown factious entities that own, manage, operate, repair and/or maintain the sidewalk outside of 228 East 56th Street, New York, N.Y,

Defendants.

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DECISION/ORDER

Index No.: 160150/2014

Mot Seq. 005

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is a personal injury action. Defendant Whole Foods Market Group, Inc. ("Whole Foods") now moves pursuant to CPLR 3212 for summary dismissal of the amended complaint ("Complaint") of plaintiff, Todd Wadsworth ("Plaintiff") and the cross-claims of co-defendant Verizon New York Inc. ("Verizon").

Factual Background

Plaintiff alleges that on August 18, 2014, he became injured when he tripped and fell on a sidewalk outside of Verizon's building located as 228 East 56th Street, New York, New York. Plaintiff further alleges that Whole Foods operated a supermarket, and received deliveries *via* a loading dock located on 56th street between Second and Third Avenues in New York, directly across the street from the subject sidewalk (Compl., ¶¶31-32). Plaintiff further claims that Whole Foods drove its trucks onto the subject sidewalk (*id.*, ¶33) and directed vehicles making deliveries at the loading dock to drive onto the subject sidewalk (*id.*, ¶34) creating the defective

condition that caused Plaintiff's accident. Verizon filed the cross-claim against Whole Foods for contribution and indemnification.

Whole Foods' Motion

In support of its motion for summary judgement of the Complaint and cross-claims, Whole Foods argues that it did not create the defect that caused Plaintiff's accident. Specifically, Whole Foods contends that there is no evidence that it owned, operated or controlled any truck that mounted Verizon's curb. Whole Foods submits the deposition testimony of Lorenzo Pace ("Pace"), Verizon's watch engineer, wherein he testified that on February 23, 2014, he observed a truck mount the subject curb and create a crack in it (Levine Aff., Ex. J, 40:10-19). Whole Foods argues that Pace's testimony, and cell-phone video he recorded on February 2014, fail to demonstrate that the subject truck was owned, operated or controlled by Whole Foods.

Instead, Whole Foods contends that the trucks that made deliveries to the Whole Foods were owned and operated by two companies: Lily Transportation ("Lily") and UNFI. Whole Foods contends that it does not employ the drivers of either trucking company. In support of its position, Whole Foods submits the testimony of Trevor Smith ("Smith"), a receiving team leader at the subject Whole Foods (Levine Aff., Ex. K). Whole Foods also submitted the affidavit of Smith, wherein he affirmed that the Lily and UNFI trucks were not owned, operated or controlled by Whole Foods and that the drivers were not employed by Whole Foods (Levine Aff., Ex. P, ¶¶6-9). Whole Foods also argues that the Distribution Contract Agreement entered into between Whole Foods and Lily demonstrates that Lily is an independent contractor. Whole Foods further contends that there is no evidence that it created the condition that caused Plaintiff's accident, and that the condition that caused Plaintiff's accident is different from the defect that appeared after the subject truck mounted the sidewalk in February 2014.

Plaintiff's Opposition

In opposition, Plaintiff argues that there is a question of fact as to whether the trucks that delivered to Whole Foods' loading dock were independent contractors. Plaintiff contends that the Distribution Contract Agreement is missing all of its exhibits, including those that relate to the "operational parameters" and "rates and charges," which would provide insight as to the level of control asserted by Whole Foods over Lily. Moreover, Plaintiff contends that Paragraph 4 of the Distribution Contract Agreement contemplates the use of Whole Foods trailers. Further, the agreement requires that Lily obtain insurance and places qualifications on the type of employees that may be hired. Plaintiff also argues that Whole Foods fails to submit evidence that UNIF is an independent contractor.

Plaintiff also argues that Smith's testimony raises an issue of fact as to Whole Foods' control over Lily. Specifically, Plaintiff argues that: Smith referred to Lily trucks delivering to the Whole Foods as "Whole Food Distribution" in his deposition; the Whole Foods trucks have "Whole Foods" written on the trailer; the Lily trucks deliver exclusively to Whole Foods; the Lily trucks solely make deliveries of Whole Foods merchandise from warehouses to Whole Foods stores; the Lily trucks make deliveries under the Whole Foods umbrella; and Whole Foods directs the delivery of the trucks into the Whole Foods loading dock. Plaintiff also claims that Pace's testimony demonstrates that Whole Foods directed the unloading and backing up of Lily vehicles, including in February 2014.

Next, Plaintiff argues that Whole Foods' negligence created the condition that caused Plaintiff's injury, since a Whole Foods employee instructed the truck into the loading dock. Plaintiff contends that Smith's testimony demonstrates that Whole Foods actively participated in deliveries to its loading dock by: providing drivers with instructions as to how to enter the dock;

requiring drivers to check in with the Whole Foods' receiving team; requiring that Whole Foods' receiving team to be present to help drivers back into the loading dock. Plaintiff also submits the affidavit of Albert Lopez, a Verizon security guard who observed trucks making deliveries to Whole Foods mounting Verizon's sidewalk (Wyatt Opp. Aff., Ex., C). Plaintiff further contends that the testimony of Pace indicates that trucks delivering to Whole Foods continued to drive on Verizon's sidewalk after the February 2014 crack.

Plaintiff next argues that Whole Foods acknowledged responsibility for the sidewalk defect, since when it agreed to repair the subject sidewalk. Finally, Plaintiff argues that Whole Foods is liable for its negligent failure to repair Verizon's sidewalk in a timely manner. Plaintiff contends that Whole Foods agreed to fix the defective sidewalk, but that it failed to make the repairs.

Verizon's Opposition

In opposition to Whole Foods' motion, Verizon argues that Whole Foods failed to demonstrate that it did not cause the defective condition. Verizon contends that Whole Foods bears responsibility for the creation of the condition since Whole Foods agreed to undertake repair of the damaged sidewalk after Plaintiff's accident. Further, Verizon contends that e-mail communication between Whole Foods employees about damage being done to "the sidewalk," demonstrates that Whole Foods was aware that trucks delivering to Whole Foods would be required to go onto Verizon's sidewalk two years prior to Plaintiff's accident. Verizon also submits the April 22, 2014 e-mail from Verizon to an employee of Whole Foods, wherein a Verizon indicates that trucks delivering to Whole Foods have mounted and damaged Verizon's sidewalk. Verizon further contends that Whole Foods was involved in directing and supervising the truck drivers and their deliveries. Specifically, Whole Foods employees stopped traffic and

directed the truck drivers on their backing up maneuvers. Verizon also contends that the truck drivers delivered exclusively for, and at the direction of, Whole Foods.

Further, Verizon argues that a question of fact is raised by Whole Foods' failure to provide documents in response to Verizon's post discovery demands that Whole Foods previously claimed to possess.

Whole Foods' Reply

In reply to Plaintiff opposition, Whole Foods argues that there is no evidence that a truck making a delivery to the Whole Foods loading dock created any of the defects that Plaintiff identified as the condition that caused him to fall. Moreover, Whole Foods argues that there is no evidence that it guided the trucks onto Verizon's sidewalk. Further, Whole Foods argues that there is no evidence suggesting that the individual guiding the truck on February 11, 2014 was a Whole Foods employee. Next, Whole Foods argues that its decision to repair the subject sidewalk after Plaintiff's accident does not constitute an acknowledgment of responsibility.

In response to Verizon's opposition, Whole Foods argues that Lopez's affirmation provides no probative value. Specifically, the Lopez affidavit does not indicate the dates which he observed trailers mount Verizon's curb and whether the trucks caused any damages to the sidewalk. Moreover, Whole Foods argues that the Lopez affidavit does not establish that the trucks Lopez observed mounting Verizon's sidewalk were owned, operated or directed by Whole Foods.

Discussion

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact (*see Wayburn v. Madison Land Ltd. P'ship.*, 282 A.D.2d 301 [1st Dept 2001]). Summary judgment should not be granted

where there is any doubt as to the existence of a material issue of fact (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (*id.*).

To establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, *inter alia, Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]).

Typically, a party who retains an independent contractor has no duty to third-parties harmed by the third-party's negligence (*see Kleeman v Rheingold*, 81 NY2d 270, 273-74 [1993] ["party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligence"]; *Tytell v. Battery Beer Distributing, Inc.*, 202 A.D.2d 226 [1st Dept 1994]). Control of the method and means by which the work is to be done is the critical factor in determining whether one is an independent contractor or an employee for purposes of tort liability (*Goodwin v. Comcast Corp.*, 42 A.D.3d 322, 322 [1st Dept 2007]). The determination of whether one is an independent contractor typically involves a question of fact concerning which party controls the methods and means by which the work is to be done, "[h]owever, where the proof on the issue of control presents no conflict in evidence the matter may properly be determined by the court as a matter of law" (*Melbourne v. New York Life Ins. Co.*, 271 A.D.2d 296, 297 [1st Dept 2000], citing *Lazo v. Mak's Trading Co.*, 199 A.D.2d 165, 166 [1st Dept 1993], *aff'd*, 644 N.E.2d 1350 [1994]).

Moreover, the mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal (*Melbourne*, 271 A.D.2d at 297; *Santella v. Andrews*, 266 A.D.2d 62, 63 [1999], *lv. denied* 94 N.Y.2d 762, [2000]).

Here, Whole Foods has met its *prima facie* burden demonstrating that Lily and UNFI were independent contractors. The affidavit Smith, Whole Foods' receiving leader, indicates that from August 18, 2013 through August 18, 2014, only Lily and UNFI made nightly deliveries to the subject Whole Foods. Smith further indicates that Whole Foods did not have any ownership interest in either the tractor cab or trailer portion of either the Lily or UNFI trucks. Smith also indicates that the drivers for the Lily and UNFI trucks were not employed by Whole Foods. Moreover, the Distribution Contract Agreement provides that "Lily shall perform the transportation services provided for . . . as an independent contractor and shall have exclusive control and direction of, and be solely responsible for, the persons operating the [trucks] or otherwise engaged in such transportation services" (Distribution Contract Agreement ¶9).

In opposition, Plaintiff and Verizon fail to raise an issue of fact as to whether the truck driver was an independent contractor. As to ownership, Pace, Verizon's watch engineer, testified that on February 23, 2014, approximately six months prior to Plaintiff's accident, he observed a truck on Verizon's sidewalk while the truck driver was "trying to back his trailer into the Whole Food loading dock" (Levine Aff., Ex. J, 38:9-14). However, Pace's testimony does not identify anything about the driver of the truck or about the truck itself sufficient to demonstrate that truck was owned operated or controlled by Whole Foods. In fact, when reviewing the cell-phone video he recorded on February 23, 2014, Pace testified that he observed "Lily," but no other lettering, on both the cab and trailer of truck that allegedly caused the crack on the subject sidewalk (*id.*, 102:4-12).

Moreover, there is no evidence that Whole Foods' controlled the methods and means by which the truck driver makes deliveries to Whole Foods. While Pace testified that he observed an individual he "believed" to be employed by Whole Foods' "trying to assist the driver to pull into the loading dock" (*id.*, 38:23-25), there is no indication that the worker was directing or guiding the driver onto the sidewalk. Moreover, Smith's testimony that prior to entering the loading dock, the drivers "have to check in with us and we have to be present on the street or sidewalk to help them back in" (Levine Aff., Ex. J, 21:3-5), and that "[Whole Foods'] team members who assist in backing in the driver would also stop traffic too" (*id.*, 26, 5-6) does not indicate that Whole Foods controlled the method in which the driver performed his work.

In any event, even assuming that the truck that mounted the sidewalk six months prior to Plaintiff's accident was owned by Whole Foods, there is no evidence that Whole Foods created the condition that caused Plaintiff's accident. Pace testified that after the truck dismounted the sidewalk, he observed a single crack in the sidewalk which had and slight "separation" without any appreciable depth (*id.* 40:15-19), but the condition identified by Plaintiff as the defect that caused his accident consisted of three cracks in the sidewalk.

Additionally, the affidavit of Lopez, Verizon's security guard, is insufficient to demonstrate that Whole Foods' caused the subject sidewalk to become damaged, since the affidavit does not indicate whether the trucks were owned, operated or controlled by Whole Foods, or describe the damage that the trucks caused to the subject sidewalk, if any. Likewise, Pace's testimony does not indicate that the trucks that drove onto the subject sidewalk after February 11, 2014, were owned, operated or controlled by Whole Foods. The Court also notes that Whole Foods decision to repair the subject sidewalk subsequent to Plaintiff's accident is not

a basis to prove an admission of negligence (*see e.g., Fernandez v. Higdon Elevator Co.*, 220 A.D.2d 293, 293 [1st Dept 1995])

Here, Whole Foods cannot be liable in negligence to Plaintiff as it has no duty to plaintiff with respect to the actions of independent contractors who delivered food to its store. As Whole Foods is not negligent, the cross-claims for indemnification and contribution must also be dismissed (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374- 375 [2011] [liability for common-law negligence hinges on active wrongdoing]; *Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2nd Dept 2003] [contribution hinges on active wrongdoing]).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Defendant Whole Foods Market Group, Inc. is granted, and the Complaint and cross-claims are dismissed against Defendant Whole Foods Market Group, Inc. It is further

ORDERED that the Clerk enter judgment accordingly. It is further

ORDERED that the action is severed and continues against remaining defendants; and it is further

ORDERED that of Defendant Whole Foods Market Group, Inc. shall serve a copy of this order with notice of entry upon all parties within fourteen (14) days of entry.

This constitutes the decision and order of the Court.

Dated: May 23, 2018

Hon. Carol Robinson Edmead, J.S.C.
HON. CAROL R. EDMEAD
J.S.C.