

Sauceda-Ocampo v H&M Hennes & Mauritz LP

2018 NY Slip Op 31187(U)

June 11, 2018

Supreme Court, New York County

Docket Number: 158613/2012

Judge: Kelly A. O'Neill Levy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

KELLY O'NEILL LEVY
JSC

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 19

-----X
 REYNALDO SAUCEDA-OCAMPO,

Plaintiff,

- v -

H&M HENNES & MAURITZ LP, H&M, and DSJ ACQUISITION
 INC.. d/b/a PORT LOGISTICS GROUP. d/b/a JAFCO,

Defendants.

INDEX NO. 158613/2012

MOTION DATE 09/22/2017

MOTION SEQ. NO. 004

DECISION AND ORDER

-----X
 The following e-filed documents, listed by NYSCEF document number (Motion 004) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 146, 147, 148, 149, 150, 151, 152, 171, 172, 173, 174, 175, 176, 178

were read on this motion to/for

SUMMARY JUDGMENT

HON. KELLY O'NEILL LEVY:

This is a personal injury action arising from a fall from the back of a delivery truck.

Defendants H&M Hennes & Mauritz L.P. s/h/a H&M Hennes & Mauritz LP and H&M (collectively, hereinafter, H&M) move, pursuant to CPLR § 3212, for summary judgment in their favor dismissing plaintiff Reynaldo Saucedo-Ocampo's negligence claim. H&M also moves, pursuant to CPLR § 3212, for summary judgment on its contractual indemnification claim against co-defendant DSJ Port Logistics Group, d/b/a Port Logistics Group, d/b/a Jafco (hereinafter, DSJ). Plaintiff opposes. DSJ opposes as to the contractual indemnification branch of the motion.

BACKGROUND

On February 23, 2012, plaintiff, a truck driver, drove an empty truck to the H&M store located at 640 Fifth Avenue in Manhattan (hereinafter, the store) to pick up merchandise to return to the H&M warehouse. Plaintiff had independently contracted with DSJ to lease

plaintiff's truck, which he owned, to transport H&M merchandise to and from various H&M locations. On February 23, 2012, plaintiff was joined by Carlos Guerrero, another independent contractor associated with DSJ.

At approximately 8:30 a.m., plaintiff parked his truck on the corner of 52nd Street and Fifth Avenue and waited for H&M employees to bring out the merchandise. Plaintiff exited the truck and unfolded the truck's equipped lift gate located in the back of the truck. H&M employees brought two fully-loaded hanger cages, which H&M owned, to plaintiff's truck. H&M used hanger cages to bring hangers to the store and back to the warehouse. The hanger cages were approximately six feet tall and two and a half feet wide, metallic, had square frames with vertical bars, had four wheels, and weighed approximately sixty to sixty-five pounds when fully loaded with hangers [Deposition of Jessenia Carrillo, H&M Facilities Technician (ex. L to the Levin aff.) at 25-26, 31-32, 36-37, 40]. The first hanger cage was loaded into the truck without difficulty. Two H&M employees, Jessenia Carrillo, an H&M Facilities Technician, and a second unidentified male, placed the hanger cage onto the lift, held onto the hanger cage while Mr. Guerrero operated the lift switch until the hanger cage was fully lifted to the level of the truck bed. Plaintiff stood inside the truck, grabbed the hanger cage, pulled it in, turned it around, and rolled it inside the truck.

They used this same process for the second hanger cage. The two H&M employees loaded the hanger cage onto the lift, which raised it to the level of the truck bed. Plaintiff was unable to pull this hanger cage off the lift gate and roll it into the truck, as it felt unstable and stuck in place [Plaintiff's Deposition (ex. I to the Levin aff.) at 154]. Plaintiff went around the hanger cage onto the lift gate to push it onto the truck (*id.* at 155). He pushed and shook the hanger cage, whereupon it fell towards him and pushed him off the truck and onto the street

below, and the hanger cage fell on top of him (*id.*). Plaintiff attributes the accident to a missing wheel on the hanger cage that was later found by Mr. Guerrero on a nearby sidewalk [Deposition of Carlos Guerrero (ex. J to the Levin aff.) at 140, 150].

Ms. Carrillo and Mr. Guerrero witnessed the accident. Mr. Guerrero testified that he noticed a missing wheel on the hanger cage when plaintiff started pushing it from the lift gate (*id.* at 122). Mr. Guerrero provided an oral statement of plaintiff's counsel's office which was transcribed and signed by Mr. Guerrero, and dated March 12, 2012. Mr. Guerrero states that he and Ms. Carrillo noticed the missing wheel for the first time after they removed the hanger cage off plaintiff's body [Statement of Carlos Guerrero (ex. K to the Levin aff.)]. Ms. Carrillo testified that the wheel got stuck in the gap between the truck bed and the lift gate while the hanger cage was making its way up to the truck level and that she noticed it when the lift gate came to a complete stop (Deposition of Jessenia Carrillo at 120, 140, 149-150, 154). When Ms. Carrillo noticed that the wheel was stuck, and while plaintiff was struggling to move the hanger cage, Ms. Carrillo said "stop" several times to plaintiff before the accident occurred (*id.* at 150). Ms. Carrillo stated that there was approximately a 1 ½ to 2-inch gap between the lift gate and the truck where the wheel got stuck (*id.* at 145). Mr. Guerrero attested that there was approximately a ¼-inch gap between the lift gate and the truck (Deposition of Carlos Guerrero at 115). Plaintiff testified that there was no space or gap between the lift gate and the truck (Plaintiff's Deposition at 152).

DSJ had a contract with H&M which contains an indemnification clause in favor of H&M wherein DSJ agrees to indemnify H&M from all liability, claims and expense, including attorneys' fees, on account of injury to any person arising from the performance of services under the agreement, except for claims arising solely from the negligence or willful misconduct

of H&M [Dedicated Transportation Carrier Service Agreement (ex. N to the Levin aff.) at ¶ 6(a)].

DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

H&M contends that it did not have actual or constructive notice regarding a defect in the subject hanger cage and that if any defect existed, it was not the proximate cause of plaintiff's injuries. H&M also asserts that the accident was subject to the Dedicated Transportation Carrier Service Agreement between DSJ and H&M and that the accident did not arise out of H&M's sole negligence.

DSJ argues that the issue of whether H&M was solely negligent is a triable issue of fact precluding summary judgment on the contractual indemnification claim.

Plaintiff asserts that there are issues of fact as to whether H&M had actual or constructive notice of the defect and whether it breached its duty of care which warrant a denial of summary judgment. Plaintiff contends that the defective hanger cage and H&M's negligence were the sole

proximate cause of the accident. To support this argument, plaintiff states that it is impossible for the wheel to get stuck between the lift gate and the truck, as there was no gap between them, that the hanger cage was immovable because it was missing a wheel, and that Ms. Carrillo's testimony is suspect and does not substantiate a finding that the accident was caused by the wheel getting stuck between the lift gate and the truck.

Since there are several triable material issues of fact present, the court denies both motions for summary judgment. It is unclear based on the deposition transcripts whether the hanger cage was missing a wheel prior to the time H&M's employees put it on the lift gate or whether the wheel fell off during the process of loading the hanger cage onto the truck. There is also an issue of fact regarding whether the wheel got stuck in a gap between the lift gate and the truck bed and whether such a gap existed. Also, since H&M employees placed the hanger cage onto the lift gate, if the wheel became wedged during loading, there is a question of fact as to whether H&M was solely responsible for this accident. For this reason, there is a question of fact as to whether H&M was solely negligent in this matter. Thus, the court denies the motions for summary judgment on both the negligence claim and the contractual indemnification claim.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the branch of defendants H&M Hennes & Mauritz L.P. s/h/a H&M Hennes & Mauritz LP and H&M's motion, pursuant to CPLR § 3212, for summary judgment in their favor dismissing plaintiff Reynaldo Saucedo-Ocampo's negligence claim is denied; and it is further

ORDERED that the branch of defendants H&M Hennes & Mauritz L.P. s/h/a H&M Hennes & Mauritz LP and H&M's motion, pursuant to CPLR § 3212, for summary judgment on their contractual indemnification claim against co-defendant DSJ Port Logistics Group, d/b/a Port Logistics Group, d/b/a Jafco is denied.

This constitutes the decision and order of the court.

6/11/18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	KELLY O'NEILL LEVY
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	JSC
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER
				<input type="checkbox"/> REFERENCE