

**Andreson v Dormitory Auth. of the State of N.Y.**

2018 NY Slip Op 31361(U)

June 24, 2018

Supreme Court, New York County

Docket Number: 158223/15

Judge: Lynn R. Kotler

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

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

KEVIN ANDRESON and ALECIA FLETCHER ANDERSON

INDEX NO. 158223/15

- v -

MOT. DATE

DORMITORY AUTHORITY OF THE STATE OF NEW YORK  
et al.

MOT. SEQ. NO. **007**

The following papers were read on this motion to/for <u>summary judgment</u>	NYSCEF DOC No(s). _____
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

This action arises from a construction site accident. Defendant United Rentals (North America) Inc. s/h/a United Rentals, Inc. ("United") now moves for summary judgment "dismissing all claims against United with prejudice". Plaintiffs withdraw their labor law claims against United, only, but oppose the motion to the extent that United seeks dismissal of the negligence and products liability claims against it. The remaining defendants also oppose the motion. Issue has been joined and the motion was timely brought in accordance with the order of the Honorable Joan Kenney dated March 7, 2017. The court's decision follows.

Plaintiff Kevin Anderson's accident occurred on March 6, 2015 at a construction project at the City University of New York New Science Research Building located at 135<sup>th</sup> Street and Convent Avenue in Manhattan (the "site"). Plaintiff claims that he was injured when he was struck by the loader arm of a Bobcat S-185 Skid Loader (the "bobcat"). The bobcat was owned by United and rented to defendant Skanska USA Building, Inc. and Skanska USA, Inc. (collectively "Skanska"). Upon delivery of the bobcat to Skanska, United prepared a "condition report" which has been provided to the court. The condition report indicates that the bobcat was in "good condition" and "[s]afety devices, decals, and manuals [were] present and functional."

Plaintiff testified as follows at his deposition. Shortly before the accident, plaintiff was performing snow removal at the site. Plaintiff's foreman then called him and coworker over "because there was an issue with the bobcat." Plaintiff walked over to the bobcat and "noticed that the front glass or door of the bobcat was hanging down or came off." Paraphrasing, plaintiff testified that his foreman then said "I need assistance putting it back in." Plaintiff and his coworker "tried to put the glass door back on, on its hinges." The next thing plaintiff remembered was that the "the Bobcat arm came down on [his] hand" and plaintiff's hand was crushed.

Dated: 6/29/18

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one:                     CASE DISPOSED     NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is     GRANTED     DENIED     GRANTED IN PART     OTHER
- 3. Check if appropriate:             SETTLE ORDER     SUBMIT ORDER     DO NOT POST
- FIDUCIARY APPOINTMENT     REFERENCE

United produced Matthew Wilson, its sales representative, for deposition. Wilson testified that when a piece of equipment such as the bobcat is rented, an inspection is performed and when it is delivered, a further inspection is performed. Wilson also stated that the bobcat was equipped with an operator's manual when it was rented. Finally, Wilson testified that United did not receive any complaints about the bobcat.

United has also provided the sworn affidavit of Tadeus Dziemianczyk, who is employed by United as a Service Technician. Mr. Dziemianczyk states that he has reviewed United's repair records for the bobcat for the one year prior to plaintiff's accident. Based upon that review, Dziemianczyk claims that there was "no evidence [of] any mechanical issue with the bobcat that might have contributed to plaintiff's accident, including the operation of its Loader Arm."

United has provided the affidavit of Gregory Paulsen, professional engineer, in support of its motion. Paulsen conducted an inspection of the bobcat on March 10 and July 13, 2015. Based upon his inspection, Paulsen opines as follows:

A raising and lowering of the loader arm of the [bobcat] was performed during the inspection on July 13, 2015 revealing that the subject loader arm was in good working physical condition. The subject loader arm was safe to operate provided a user comply with all warnings and instructions posted on the unit and in the manual.

Based upon my review of written materials and the evidence inspection, I can conclude that there was no missing parts or warnings or instruction labels on the [bobcat] [and] ...all industry required manuals were on the [bobcat]

In opposition to the motion, plaintiffs have provided the affidavit of Nicholas Bellizzi, who is also a professional engineer. Bellizzi also conducted an inspection of the bobcat in July 2015. Bellizzi points out a warning on the bobcat which states: "Moving lift arm control or failure of a part can cause lift arms to drop." Bellizzi opines that the former scenario did not occur and therefore plaintiff's accident was caused by the failure of a part in the bobcat. Bellizzi also opines that the bobcat's Interlock Control System ("ICS"), which requires the operator to be seated with the seat bar lowered and engine on before the loader could be operated, must have failed at the time of plaintiff's accident. Bellizzi also points to a warning label that stated that "if the [ICS] does not work contact the dealer." The warning further indicated that ICS failure is a known even that can be expected during the operation of the vehicle.

Finally, Skanska has asserted crossclaims against United for contribution and indemnification and breach of obligation to procure insurance. There is a dispute whether the bobcat rental was pursuant to an agreement produced by United during discovery or another agreement submitted by Skanska in opposition to the motion. United's agreement does not appear to be signed but the one produced by Skanska is. The agreements also have differing indemnity provisions. pursuant to a rental agreement dated February 5, 2014 (the "agreement").

Pursuant to paragraph 3 of United's agreement:

To the fullest extent permitted by law, [Skanska] shall defend and hold United... harmless from an against any and all liability, claims, loss, damage or costs... arising out of or related to the operation, use, possession or rental of the equipment. This indemnity provision also applies to any claims asserted against United based upon strict or product liability causes of action, however, [Skanska] shall not be obligated to indemnify United for that part of any loss, damage or liability caused solely by the intentional misconduct or sole negligence of United.

Meanwhile, Skanska's agreement is authenticated by William Fulton, Skanska's Superintendent. Fulton states that he "assisted with execution of" the agreement. Paragraph 7 of Skanska's agreement provides:

To the fullest extent permitted by law, Seller shall defend, hold harmless and indemnify the Indemnitees from and against any and all Damages involving ... [a]ny actual or alleged injury or death to any person, or damage to or destruction of any property (including loss of use thereof), or any other damage or loss by whomsoever suffered resulting from or arising out of or in connection with the Goods or Services, whether or not any such damage or loss is due to the negligence of any kind or character on the part of one or more of the Indemnitees or breach of any statutory duty or other obligation by one or more of the Indemnitees...

### Parties' arguments

United argues that it is to summary judgment because the bobcat was in good working order when it delivered it to Skanska and United did not receive any complaints about the condition of the bobcat. It maintains that it does not owe a duty of care to plaintiff and that it did not launch a force or instrument of harm under *Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]. Finally, based upon the affidavit of Paulsen, United argues that there is no evidence of the bobcat having any mechanical issue.

In turn, plaintiffs argue that "there are at the least triable issues of fact for a jury to determine United's culpability for this accident" based upon Bellizzi's affidavit. United argues on reply that Bellizzi's affidavit should be rejected because plaintiffs failed to disclose Bellizzi in response to United's discovery demand for expert information on January 12, 2016. United also argues that the affidavit is procedurally defective because it was notarized out of state and does not contain a certificate of conformity and is not accompanied by a CPLR 3101 disclosure. Substantively, United contends that Bellizzi's opinion is of no moment because it is speculative and conclusory.

As for the codefendants, they argue that procedurally, United's motion is defective because United failed to specifically address their claim for contractual indemnification in their motion papers. Substantively, the codefendants argue that there are triable issues of fact as to whether United negligently owned and maintained the bobcat and whether the bobcat malfunctioned. Skanska maintains it is entitled to contractual indemnification. United, however, contends that the agreement proffered by Skanska in opposition to the motion is not properly authenticated. Therefore, United maintains that the codefendants cannot raise a triable issue of fact as to their indemnification claim.

### **Discussion**

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court will first consider plaintiffs' negligence claim. Whether a defendant owes a duty of care to a plaintiff is a question of law to be determined by the court (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136 [2002]). Generally, contractual obligations do not give rise to a duty of care in favor of third-parties and plaintiff has not demonstrated an applicable exception to that rule. (*Id.*) Those exceptions are: [1] where the contracting party fails to exercise reasonable care while performing its duties and thereby launches a force or instrument of harm; [2] where plaintiff detrimentally relies upon the contracting parties' performance of its duties; and [3] where the contracting party has entirely displaced the other's duty to maintain a premises in safe condition. (*Id.*)

Here, the only potentially applicable exception to the general rule would be that United launched a force or instrument of harm. Another way to describe this exception is whether the defendant exacerbated or created a dangerous condition (*Espinal, supra* at 142). United has come forward with its own business records which demonstrate that the bobcat was in good condition when it rented it to Skanska, and there is no proof on this record from which a reasonable factfinder could conclude that United failed to exercise reasonable care because there is no evidence that the bobcat malfunctioned for the one-year period prior to plaintiff's accident. Therefore, United has met its burden on this motion with respect to plaintiff's negligence claim.

In turn, plaintiff has failed to raise a triable issue of fact. Bellizzi's affidavit is unavailing, because as United correctly argues, it is speculative and conclusory. Bellizzi does not explain how the accident happened. Rather, Bellizzi simply opines that the bobcat lift arm dropped because of the "failure of a part in the bobcat." More importantly, Bellizzi does not offer any opinion which would support the conclusion that United exacerbated or created a dangerous condition. Accordingly, plaintiffs' negligence claim must be severed and dismissed.

Plaintiffs' remaining claim against United is for strict products liability. This claim must also be dismissed, because plaintiffs have not articulated a theory of liability: whether the bobcat was defectively designed, had a manufacturing defect or whether there was a failure to warn. Moreover, Bellizzi's affidavit is woefully insufficient to raise a triable issue of fact on any of these points. Indeed, United has demonstrated that the bobcat was in good condition when it was rented to Skanska, and further, that the bobcat contained all warnings, instruction labels and required industry manuals. Accordingly, plaintiffs' strict liability claim against United is also severed and dismissed.

The court now turns to Skanska's crossclaim for contractual indemnification. Here, the court is confronted with two different agreements covering the same subject matter. While United contends that Skanska's agreement was not exchanged during discovery, and laments that its witness was never asked any questions about the agreement, the court cannot simply disregard Skanska's agreement on that basis. Indeed, Skanska's agreement is authenticated by Fulton, who is listed as the contact person on the agreement, and is signed by Douglas C. Maines on behalf of Skanska and Harry Scardigno on behalf of United. Despite having the opportunity to do so, United has not come forward with evidence which would establish that Skanska's agreement was not properly executed and/or does not cover rental of the bobcat.

Therefore, since a triable issue of fact exists as to whether the bobcat was rented pursuant to the Skanska agreement which contains a provision requiring United to indemnify and hold Skanska harmless for personal injury "resulting from or arising out of or in connection with" the bobcat, United's motion for summary judgment dismissing the crossclaim must be denied.

## CONCLUSION

In accordance herewith, it is hereby:

**ORDERED** that United's motion for summary judgment is granted only to the extent that plaintiff's claims against it are severed and dismissed; and it is further

**ORDERED** that the motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

6/24/18  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.