SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 23 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

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ELSER G. SAAVEDRA MATA,

Plaintiffs(s),

-against-

AHERN RENTALS, INC. and COSTCO WHOLESALE CORPORATION,

Defendants(s)

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COSTCO WHOLESALE CORPORATION,

Third-Party Plaintiff(s),

-against-

LOW BID, INC. ,

Third-Party Defendant(s).

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Index No. 600441/2017

Motion Seq. No.: 007
Motion Submitted: 10/30/18

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Defendant/Third Party Plaintiff, Costco Wholesale Corporation (Costco), moves this court for an order, pursuant to CPLR §3212, granting it summary judgment and dismissing the complaint and all cross claims against it. Plaintiff, Elser G. Saaverdra Mata (Mata) opposes the motion. Co-Defendant Ahern Rentals, Inc. (Ahern), submits no papers in support of, or in opposition to, the motion. Third-Party Defendant Low Bid, Inc., has never appeared in this action and was previously found in default by this court.

Mata commenced this action by summons and complaint, and then by amended summons and complaint dated March 8, 2017. Issue was joined by service of an answer with a cross claim by Ahern dated July 17, 2017. Costco interposed an answer with a cross claim dated September 5, 2017. The case certified ready for trial on March 1, 2018 and a note of issue was filed on September 17, 2018.

The following facts were taken from the complaint, the deposition transcripts of the parties and other annexed exhibits. Costco hired nonparty Graham to be general contractor on a construction project in the State of New Jersey. Graham hired Low Bid as a subcontractor to perform work at the site. Heavy equipment being used on the site, including the aerial lift that caused Mata's injury, was rented from Ahern. According to Mata's deposition transcript, he worked for Low Bid, and had worked at the Costco site for three months before the accident. On December 29, 2015, Mata was on the job site and was in an aerial lift. Though he had been working on the roof previously, it was raining on December 29, 2015 so he was directed to work inside removing garbage. The lift was outside. Mata performed an inspection of the lift, which consisted of ensuring all

the controls worked. He then moved the lift inside the facility. Once it was inside, he climbed into the basket and used the controls to lift himself up. There was insulation on a joist he had to remove. While he was removing some insulation, and had one hand on the joist, he suddenly felt himself be pressed up against the joist. He did not have his hands or feet on any of the controls on the basket, and no one was operating the controls at the base of the lift, but the lift still moved and pinned him against the joist. Because he was stuck in between the lift and the joist, he was unable to ask for help. Mata's uncle, who also worked for Low Bid and was at the job site, eventually lowered him to the ground. He was unable to breathe. An ambulance took him to the hospital where he remained for five days. Costco now moves for summary judgment arguing it had no control over the work Mata was performing, and did not provide the machine that caused Mata's injury.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.,* 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital,* 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center,* 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to

the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York, supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.,* 180 AD2d 579 (1st Dept 1992), and it should only be granted when there and it should only be granted when there are no triable issues of fact (*see Andre v. Pomeroy,* 35 NY2d 361 [1974]).

In support of the motion, Costco submits, *inter alia*, the deposition transcript of Eduardo Navarro. Mr. Navarro had worked for Costco, or its predecessor, for 33 years at the time of his deposition. In 2015, held the position of Project Manager, and his duties included overseeing the construction of new Costco facilities. He was the Project Manager of the site where Mata worked. His role as project manager was to "ensure that the projects are finished in a timely fashion and they meet our standards." He visited the construction site where Mata was injured approximately once every three to four weeks and would stay for approximately two to four hours to "walk the building" with someone from Graham. In general, a general contractor would be chosen for a project by the vice president or the executive vice president with input from Costco's architectural firm. Mr. Navarro did not play a role in choosing the general contractor, but once chosen he would interact with them during his visits to the site. The decision to hire subcontractors was left solely to the general contractor. Costco had no control over what subcontractors to use, and they played no role in equipment used on a particular site. During his

observation of the subject work site, Mr. Navarro never made any comments to Graham or any workers regarding the condition of the work being performed. Because their general contractors are responsible for the work sites, Mr. Navarro is generally not informed of accidents at work sites, and did not learn of Mata's injury until he was asked to appear for the deposition. Further, prior to this litigation, Mr. Navarro had never heard of Low Bid.

As this accident occurred in New Jersey, the court will apply New Jersey negligence law. New Jersey does not have an equivalent to New York's Labor Law. However, New Jersey law does hold that a landowner is under a duty to maintain safe premises for its invitees and to use reasonable care to protect invitees against known or reasonably discovered dangers. (*Rigatto v. Reddy*, 318 NJ Super 537 [NJ Super Ct App Div 1999]). However, a landowner is under no obligation to protect an employee of an independent contractor who is injured while performing the work for which it was hired. *Id.* The exception to this rule is if the landowner retained control over the means and method of the work. (*Muhammad v. New Jersey Transit*, 176 NJ 185 [2003]). The court finds, applying this law, and based upon Mr. Navarro's deposition and other exhibits submitted in support of the motion, Costco has established entitlement to summary judgment as a matter of law. Costco has established it did not know, and could not have reasonably foreseen, a danger existed with the lift. Further, they did not control the means and method of the work being performed. The burden therefore shifts to Mata to raise a material issue of fact requiring a trial of the action.

In opposition, Mata only offers the affirmation of counsel, though he does reference Mr. Navarro's deposition testimony. Mata argues that New Jersey's landowner exemption does not apply because Mata's injury was not the type of injury that is incidental to the work he was performing. He compares Mata's injury to the injury in *Rigatti, supra*. In *Rigatti*, the homeowner exemption applied because the injured plaintiff was a roofer who fell through a roof. Mata implies that falling through a roof is the type of risk that roofers face, but being hurt by a lift is not the type of injury one who uses a lift faces. The court does not see the distinction. The court can take judicial notice that, even with the proper safety equipment, using an aerial lift is a dangerous activity, and Mata was injured while doing this dangerous activity. While it is alleged that the injury was the result of the lift malfunctioning, that does not change the fact that Costco did not control the means and method of the work and had no notice that the lift was defective in some way. Further, the admissible evidence shows that Mata inspected the lift himself, and that when the lift needed repairs previously, it was Ahern who performed those repairs. None of the foregoing implicates Costco.

Finally, Mata argues that Costco is negligent because the injury was foreseeable. To support this argument, he points out that the subject lift had a history of malfunctioning. Assuming this is true, it still does not render Costco responsible. Mr. Navarro testified that he played no role in renting the lift, and was not even aware of the process in which the lift was rented from Ahern. His contact was with the general contractor, to whom those responsibilities were delegated. During Mr. Navarro's visits to

the property, he was most concerned with time deadlines being met and the quality of the work. There is no reasonable argument that can be made where Mr. Navarro was made aware of a malfunctioning lift. As Mata offers no admissible evidence to contradict Mr. Navarro's sworn testimony, the court finds Mata is unable to raise a material issue of fact.

Accordingly, it is hereby

ORDERED, that Costco's motion for summary judgment on the complaint is GRANTED. The complaint is dismissed against Costco; and it is further

ORDERED, that Costco's motion for summary judgment on the cross claim is GRANTED. Ahern's cross claims against Costco are dismissed. As the complaint and cross claims against Costco are dismissed, Costco's cross claim is dismissed as moot.

This constitutes the decision and order of the court. The court has considered the other arguments raised by the parties and finds them to be without merit.

Dated: December 5, 2018
Mineola, New York

JAMES P. McCORMACK, J.S.C.

ENTERED

DEC 11 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE