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ORIGINAL

SHORT FORM ORDER

INDEX No. 11-31979
CAL. No. 18-00222OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 6-28-18 (007, 008 & 009)
MOTION DATE 7-12-18 (010 & 011)
ADJ. DATE 10-18-18
Mot. Seq. # 007 - MG # 010 - MG
008 - MG # 011 - MD
009 - MG; CASEDISP

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ROBERT J. SCHUTT and DEIDRE SCHUTT,

Plaintiffs,

- against -

DYNASTY TRANSPORTATION OF OHIO, INC., T.G. NICKEL & ASSOCIATES, LLC, HABBERSTAD SUNRISE REALTY, LLC and CANTON ELEVATOR, INC.,

Defendants.

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T.G. NICKEL & ASSOCIATES, LLC.,

Third-Party Plaintiff,

- against -

NOBLE ELEVATOR COMPANY, INC.,

Third-Party Defendants.

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HABBERSTAD SUNRISE REALTY, LLC,

Second Third-Party Plaintiffs,

- against -

ELEVATOR EQUIPMENT CORPORATION,

Second Third-Party Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by defendant Canton Elevator, Inc. (Seq. 007), dated May 25, 2018, and supporting papers; (2) Notice of Motion/Order to Show Cause by defendant/third-party plaintiff T.G. Nickel & Associates, LLC (Seq. 008), dated May 31, 2018, and supporting papers; (3) Notice of Motion/Order to Show Cause by defendant Dynasty Transportation of Ohio, Inc. (Seq. 009), dated June 4, 2018, and supporting papers; (4) Notice of Motion/Order to Show Cause by defendant/second third-party plaintiff Habberstad Sunrise Realty LLC (Seq. 010), dated June 1, 2018, and supporting papers; (5) Notice of Motion/Order to Show Cause by second third-party defendant Elevator Equipment Corporation (Seq. 011), dated May 31, 2018, and supporting papers; (6) Affirmation in Opposition (Seq. 007) by third-party defendant Noble Elevator Company, Inc., dated July 10, 2018, by Plaintiffs, dated July 12, 2018, by defendant/second third-party plaintiff Habberstad Sunrise Realty LLC, dated July 13, 2018, by defendant/third-party plaintiff T.G. Nickel & Associates, LLC, dated August 15, 2018, and by defendant Dynasty Transportation of Ohio, Inc., dated September 6, 2018, and supporting papers; (7) Affirmation in Opposition (Seq. 008) by third-party defendant Noble Elevator Company Inc., dated July 10, 2018, by Plaintiffs, dated July 12, 2018, by defendant Dynasty Transportation of Ohio, Inc., dated September 6, 2018; (8) Affirmation in Opposition (Seq. 009) by third-party defendant Noble Elevator Company, Inc., dated July 10, 2018, by Plaintiffs, dated July 12, 2018, by defendant Canton Elevator, Inc., dated July 12, 2018, by defendant/second third-party plaintiff Habberstad Sunrise Realty LLC, dated July 13, 2018, and by defendant/third-party plaintiff T.G. Nickel & Associates, LLC, dated August 15, 2018; (9) Affirmation in Opposition (Seq. 010) by third-party defendant Noble Elevator Company, Inc., dated July 10, 2018, by Plaintiffs dated July 12, 2018, and by defendant Dynasty Transportation of Ohio, Inc., dated September 6, 2018; (10) Affirmation in Opposition (Seq. 011) by defendant Noble Elevator Company Inc., dated July 10, 2018, by defendant/second third-

party Habberstad Sunrise Realty LLC, dated July 12, 2018, by defendant Canton Elevator, Inc., dated July 12, 2018, by defendant/third-party plaintiff T.G. Nickel & Associates, LLC, dated August 15, 2018, by defendant Dynasty Transportation of Ohio, Inc., dated September 18, 2018; (11) Reply Affirmations by defendant Canton Elevator, Inc. (Seq. 007), dated August 14, 2018, and October 17, 2018; (12) Reply Affirmations by defendant/third-party plaintiff T.G. Nickel & Associates, LLC (Seq. 008), dated September 18, 2018, and supporting papers; (13) Reply Affirmations by defendant Dynasty Transportation of Ohio, Inc.(Seq. 009), dated October 12, 2018; (14) and Reply Affirmations by defendant/second third-party Habberstad Sunrise Realty LLC (Seq. 010), dated August 15, 2018, and October 16, 2018; it is

ORDERED that the motions by defendants Canton Elevator Inc., T.G. Nickel & Associates, LLC, Dynasty Transportation of Ohio, Inc., and Habberstad Sunrise Realty LLC for summary judgment, and the motion by second third-party defendant Elevator Equipment Corporation for summary judgment, are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (seq. #007) by defendant Canton Elevator, Inc. for summary judgment dismissing the claims against it is granted; and it is further

ORDERED that the motion (seq. #008) by defendant T.G. Nickel & Associates, LLC for summary judgment dismissing the claims against it is granted; and it is further

ORDERED that the motion (seq. #009) by defendant Dynasty Transportation of Ohio, Inc. for summary judgment dismissing the claims against it is granted; and it is further

ORDERED that the motion (seq. #010) by defendant Habberstad Sunrise Realty, LLC for summary judgment dismissing the claims against it is granted; and it is further

ORDERED that the motion (seq. #011) by second third-party defendant Elevator Equipment Corporation for summary judgment is denied as moot.

Plaintiffs Robert Schutt ("Schutt") and his wife Diedre Schutt derivatively, commenced this action to recover damages for injuries that Schutt allegedly sustained while he was unloading a hydraulic elevator jack from a delivery truck at a construction site. The construction site was owned by defendant/second third-party plaintiff Habberstad Sunrise Realty, LLC ("Habberstad"), which hired general contractor defendant/third-party plaintiff T.G. Nickel & Associates, LLC ("TG Nickel"), to complete the construction project. TG Nickel, in turn, hired third-party defendant Noble Elevator Company, Inc. ("Noble"), Schutt's employer, to install elevators in the building being constructed. The elevator jack was manufactured by second third-party defendant Elevator Equipment Corporation ("Elevator Corp."), and it was shipped to the construction site by defendant Canton Elevator, Inc. ("Canton"). Defendant Dynasty Transportation of Ohio, Inc. ("Dynasty"), was hired to transport the elevator jack from Ohio to the construction site in Bay Shore, New York. Plaintiffs alleged that when Schutt, who was one of the elevator installers, was unloading the elevator jack from Dynasty's truck, he slipped on oil that leaked from the elevator jack onto the bed of the truck, injuring his back, neck and shoulders when he fell.

Plaintiffs instituted an action against defendants Dynasty, TG Nickel, Habberstad, and Canton, alleging that they were negligent in failing to provide him with safe work place in violation of Labor Law §§ 200, 240, 241, and the applicable provisions of the Industrial Code of the State of New York. Subsequently, TG Nickel commenced an action against Noble sounding in contribution and indemnification, and Habberstad commenced an action against Elevator Corp. for contribution, among other things. The defendants also filed various cross claims against each other.

All of the defendants, and the second third-party defendant, now move for summary judgment dismissing the claims against them on various grounds. Canton contends that plaintiffs' Labor Law claims do not apply to it and should be dismissed, and that inasmuch as it did not transport the elevator jack, it was not negligent as a matter of law. TG Nickel contends that Labor Law §§ 240 and 241 do not apply to Schutt's accident, and that his Labor Law § 200 claim should be dismissed inasmuch as TG Nickel did not direct or supervise his work. Dynasty contends that it did not perform any work at the construction site, and that it was only involved in transporting the elevator jack. Dynasty further claims that it did not load or unload the jack, and did not supervise or control Schutt's work. Habberstad contends that it did not play any role in the work that Schutt performed, and that the record establishes its entitlement to judgment as a matter of law with regard to all of the Schutt's claims. Elevator Corp. contends, among other things, that it played no role in Schutt's accident; thus, it is entitled to summary judgment dismissing the claims against it.

In opposition, plaintiffs assert that the motions of TG Nickel and Dynasty were untimely and should be denied as a matter of law, and that there are questions of fact with regard to each of the defendants' negligence and whether such negligence was a proximate cause of Schutt's injuries.

At the outset, the Court finds that the motions of TG Nickel and Dynasty were timely. It is well-established that a motion for summary judgment that is made more than 120 days after the filing of the Note of Issue cannot be considered by the court absent good cause shown (***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 726 [2004]; ***Brill v City of New York***, 2 NY3d 648, 652 [2004]). Here, the 120-day deadline was on June 2, 2018, which was a Saturday. Thus, by operation of law, the motions needed to be made by Monday, June 4, 2018 (*see* General Construction Law § 20). TG Nickel served its motion on June 1, 2018, and Dynasty served its motion on June 4, 2018.

At his deposition, Schutt testified that at the time of the accident, he was an elevator installation mechanic for Noble, and that he had been working in the elevator installation industry since 1984. On the day of the accident, he was sent to the construction site with two other Noble workers to install elevators. When he arrived at the work site, other trades were working on their various projects, and Dynasty's delivery truck was parked at the site. He testified that as an elevator mechanic, part of his job included unloading the material used for the installation. On the day of the accident, Schutt was provided with a dolly and a "Johnson bar" to help move items from a delivery truck into the work site, and he was assisted by two of his co-workers. Schutt testified that he "had the nylon straps that [he] put around []

—what we call [] the head of the jack, [and he] tried to get [his] foot in and set up. In the process of preparing to do it, getting to start the process, [his] foot slipped and the jack fell down off of what it was on top of and yanked [his] arms down. It was headed for [his] foot. So [he] held on so it wouldn't crush [his] foot." After he fell, Schutt observed that there was a five-inch oil stain on the floor where he slipped. Schutt had planned to use the nylon strap provided by his employer to guide the jack to the floor, and he and his co-workers intended to pull the jack from the truck thereafter. He did not intend to lift the jack to carry it, and he did not lift the jack prior to slipping. Schutt had moved elevator jacks from delivery trucks on multiple occasions in the same manner without incident. According to Schutt, the jack was approximately 20 feet long and weighed approximately 2,000 to 2,500 pounds. It was laid along the length of the truck, it was strapped to "blocks of wood," and approximately two feet off the floor of the truck.

Robert Kazar, Canton's CEO, testified the jacks were manufactured by Elevator Corp., and Canton ordered the jacks from Elevator Corp. when the order was placed by Noble. Canton did not test any equipment it received, and it did not contract with Dynasty to transport the jacks to Noble. He further testified that "someone wrote [in the shipping file] that one of the bases of the jack units were bent," but Kazar was not aware of any returns made to Canton for damaged equipment. David Zimmerman was responsible for shipping the elevator equipment to Noble, and he testified that he could not recall whether he observed any condition on the floor of the truck while loading the elevator jacks. He recalled that the base of the jack was not bent when it was loaded into the truck, and that he had no issues when loading the equipment. Richard Statterfield, the shipping and receiving manager for Canton, testified that after loading the truck, Canton employees captured photos to have a proof that the equipment was properly loaded and not damaged. In his 12 years with the company, he had not observed any oil leak from the equipment that he loaded. According to Statterfield, Canton employees inspected the trucks before each shipment, and he would not have authorized the shipment to Noble if there was a "foreign substance" on the floor.

Kevin Antrim, the plant manager for Elevator Corp., testified that the jacks were manufactured when ordered. The jacks were shipped to Canton with oil in them, and the chambers where the oil was placed were "completely sealed" during the manufacturing process. "Bleeders" were placed on the head of the chambers to allow the air to be let out of the system, and oil could come out of those bleeders when the system was pressurized. Antrim testified that none of the jacks that Elevator Corp. manufactured had leaked oil while they were in the company's possession. He further testified that Canton did not notify Elevator Corp. concerning any leakage from the equipment that it received.

Bob Pribanic, the president of Dynasty, testified that Dynasty was hired by Canton to transport elevator equipment from Ohio to a job site in New York. Dynasty was not responsible for loading the equipment onto the truck, but it verified that the load was secure before the truck left the loading dock. Pribanic testified that the driver of the truck was not aware that Schutt had slipped and fell inside of the truck, and that he did not learn of the incident until suit was filed. Jeffery Bender testified that he was the

Dynasty driver who transported the elevator equipment to the work site, and that he was not involved in loading or unloading the equipment. He recalled that he had observed oil leaks on at least two prior occasions during his employment, and that those leaks resulted when a cardboard cover was "knocked" off the jacks. He testified that based on pictures captured of the jack that fell, the cardboard cover was in place when the jacks were loaded onto the truck. After the equipment was unloaded at the work site, Bender entered the truck and he did not recall seeing oil on the floor.

Sean Payton testified on behalf of TG Nickel, and stated that he was the project manager at the construction site on the date of Schutt's accident. TG Nickel contracted with Noble to install elevators in the building that it was constructing, and Payton was on the job site on a daily basis to coordinate with various subcontractors. Noble was contracted to supply the elevator equipment and to deliver the equipment to the project. Payton administered meetings with the subcontractors, which covered a broad range of topics, and Habberstad visited the project once per week to get updates on the progress of the work. Payton did not instruct or direct Noble employees concerning the work they were hired to perform, and, although he was at the work site on the day of the delivery of the equipment, he testified that he did not observe how the delivery was effectuated.

Kevin Elbert testified that he and Schutt worked for Noble, and that Noble provided them with equipment such as dollies and straps to unload the delivery truck. He was not aware that Schutt was injured while unloading the jacks, and he, Schutt, and another worker completed the unloading process by noon. He recalled that they used straps to drag the elevator jacks to the end of the truck and placed them on a dolly. He testified that Schutt did not slip or fall during the process, that there was proper lighting inside of the truck, and that he could not recall observing any substance on the floor.

Stephen Dutton, the president of Noble, testified that Noble provided its technicians with the necessary equipment to unload the delivery truck. A few days after Schutt's accident, he reported that he injured his back while offloading the equipment. Schutt continued to work after the accident, and approximately one month later, Schutt was fired from his position because he refused to attend a safety course without pay. He recalled that Schutt had complained about back pain for the duration of his approximately 15-year employment with Noble. According to Dutton, Noble was responsible for the elevator installation portion of the project, and employees received instruction directly from Noble.

The plaintiffs' Labor Law claims must be dismissed against Canton and Dynasty. The record is clear that Canton was merely a shipper of the materials, while Dynasty delivered the materials to the job site. Neither acted as agents for the owner or the general contractor on the project (*see* Labor Law §§ 200, 240, 241).

With respect to the remaining defendants, Labor Law § 240 (1) provides, in part, that:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"[N]ot every hazard or danger encountered in a construction zone falls within the scope of Labor Law § 240 (1) as to render the owner or contractor liable for an injured worker's damages" (***Misseritti v Mark IV Const. Co.***, 86 NY2d 487, 490, 634 NYS2d 35 [1995]), and where a worker was exposed to the usual and ordinary dangers of a construction site, the plaintiff may not recover (***Toefer v Long Is. R.R.***, 4 NY3d 399, 408, 795 NYS2d 511 [2005]). Strict liability under the statute may be imposed only in situations where the worker is injured because he or she fell from an elevated work area or was injured by an object falling from an elevated work area (***Misseritti v Mark IV Const. Co.***, 86 NY2d 487, 490, 634 NYS2d 35). Courts have found that in certain instances, loading and unloading of materials from a truck is protected activity under Labor Law § 240 (1) where such work is necessary and incidental to the construction project (***Curley v Gateway Communications Inc.***, 250 AD2d 888, 890, 672 NYS2d 523 [3d Dept 1998]; *see generally* ***Rivera v Squibb Corp.***, 184 AD2d 239, 240, 584 NYS2d 239 [1st Dept 1992]).

Here, the evidence demonstrates that Schutt was unloading materials necessary to complete the elevator installation on the project, and that, while he was effectuating that task, he slipped and fell inside of the delivery truck. He testified that he did not lift the elevator jack before he fell, and that the jack was stored approximately two feet from the floor of the truck. Based upon these facts, Schutt was not entitled to the extraordinary protections of Labor Law § 240 (1) (***Cabezas v Consol. Edison***, 296 AD2d 522, 523, 745 NYS2d 210 [2d Dept 2002]; ***Jacome v State***, 266 AD2d 345, 346, 698 NYS2d 320 [2d Dept 1999]; *see generally* ***Grabar v Nichols, Long & Moore Const. Corp.***, 147 AD3d 1489, 1490, 47 NYS3d 201 [4th Dept 2017]). Schutt did not fall from an elevated level, nor did an object fall on him from an elevated work area (*see* ***Misseritti v Mark IV Const. Co.***, 86 NY2d 487, 490, 634 NYS2d 35; ***Amantia v Barden & Robeson Corp.***, 38 AD3d 1167, 1168, 833 NYS2d 784 [4th Dept 2007]).

"Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to all persons employed in areas in which construction, excavation, or demolition work is being performed" (***Miranda v City of New York***, 281 AD2d 403, 404, 721 NYS2d 391 [2d Dept 2001]). In support of their Labor Law § 241 (6) claim, plaintiffs assert that the defendants violated multiple sections of the Industrial Code. Nevertheless, the only violation alleged that could, arguably, be applicable to the facts herein is 12 NYCRR 23-1.7 (d), which provides: "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow,

water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Plaintiffs' allegations center on the existence of a dangerous condition inside of the truck that delivered materials to the construction site. Based upon the facts and circumstances of this case, the inside of the subject truck was not the sort of working area contemplated by the statute (*see* ***Farrell v Blue Circle Cement, Inc.***, 13 AD3d 1178, 1179, 787 NYS2d 773 [4th Dept 2004]; ***Barnes v DeFoe/Halmer***, 271 AD2d 387, 388, 705 NYS2d 628 [2d Dept 2000]; *see generally* ***Jock v Fien***, 80 NY2d 965, 968, 590 NYS2d 878 [1992]; ***Dacchille v Metro. Life Ins. Co.***, 262 AD2d 149, 149, 692 NYS2d 47 [1st Dept 1999]). The truck in which Schutt fell belonged to Dynasty, and arrived from Ohio to the work site where it remained just for the short period of time required to unload the materials therefrom. After the delivery was made, the Dynasty driver returned the truck to the company's warehouse. Thus, contrary to plaintiffs' position, 12 NYCRR 23-1.7 (d) is not applicable to the facts of this case inasmuch as the bed of the delivery truck was not a floor or passageway at the construction site within the meaning of 12 NYCRR 23-1.7 (d) (***Farrell v Blue Circle Cement, Inc.***, 13 AD3d 1178, 1179, 787 NYS2d 773; *see generally* ***Erickson v Cross Ready Mix, Inc.***, 75 AD3d 524, 525, 906 NYS2d 54 [2d Dept 2010]; ***Bond v York Hunter Const., Inc.***, 270 AD2d 112, 113, 705 NYS2d 40 [1st Dept 2000]; ***Rose v A. Servidone, Inc.***, 268 AD2d 516, 518, 702 NYS2d 603 [2d Dept 2000]; ***Sprague v Louis Picciano, Inc.***, 100 AD2d 247, 250, 474 NYS2d 591 [3d Dept 1984] ["While . . . section 241 (subd. 6) is to be liberally construed to protect workers engaged in hazardous occupations, it may not be so implemented by decisional law as to establish a cause of action and right of recovery not contemplated by the Legislature"]; *cf.* ***Cafarella v Harrison Radiator Div. of Gen. Motors***, 237 AD2d 936, 938, 654 NYS2d 910 [4th Dept 1997]).

Labor Law § 200 is a codification of landowners' and general contractors' common law duty to maintain a safe workplace (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (***Messina v City of New York***, 147 AD3d 748, 46 NYS3d 174 [2d Dept 2017], quoting ***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). Where the condition of the premises is at issue, the property owner or general contractor may be held liable for a violation of Labor Law § 200 if it either created the dangerous condition or had actual or constructive notice of the dangerous condition that caused the accident (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323). When the methods or materials of the work are at issue, the owner or general contractor may be held liable where it "had the authority to supervise or control the performance of the work" (*id.*). General supervisory authority at a work site is not enough; rather, a defendant must have had the responsibility for the manner in which the plaintiff's work is performed (*see id.*). Thus, to establish a claim under Labor Law § 200, plaintiffs are required to show that the defendants had actual or constructive notice of the unsafe condition and exercised sufficient control over the work being performed to correct or avoid the

unsafe condition (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323; ***Monroe v Bardin***, 249 AD2d 650, 652 [3d Dept 1998]).

The facts herein establish that a defective condition at the work site is at issue, and with respect to notice of such condition, both TG Nickel and Habberstad have met their burden by showing that neither had actual or constructive notice of the condition. The shipping and receiving personnel at Canton testified that he entered the truck both before and after the elevator equipment was loaded for shipment, and that another employee captured photographs after the items were loaded inside of the truck prior to the truck's departure. He could not recall observing any leaky elevator jack, or oil on the floor of the truck prior to shipment of the materials. Additionally, when the Dynasty truck arrived in New York, Noble's employees, Schutt included, entered the truck to unload the items. According to Schutt, he did not observe the oil until after he slipped on it, and thus, he did not notify his employer or the general contractor of the condition. Payton, the general contractor's project manager, testified that he did not observe how the delivery of the elevator equipment was effectuated, and Habberstad's representative only occasionally visited the work site to receive updates on the progress of the work (*see* ***Phillip v 525 E. 80th St. Condominium***, 93 AD3d 578, 579-580, 940 NYS2d 631 [1st Dept 2012]). There is no indication that either representative entered the truck during the short period of time that it was at the job site, or that TG Nickel or Habberstad were otherwise notified that there was oil on the bed of the truck. Plaintiffs failed to raise an issue of fact in opposition.

Based upon the foregoing, plaintiffs' first and second causes of action, to the extent that they claim negligence on the part of the defendants on the basis that they violated the Labor Law and the Industrial Code, are dismissed.

Canton and Dynasty also move for summary judgment with regard to plaintiffs' third and fourth causes of action respectively, in which plaintiffs alleged that both defendants negligently failed to properly load and secure the elevator equipment. In general, to prevail on a negligence cause of action, a plaintiff must demonstrate that the negligence of the defendant proximately caused his or her injuries (***Downey v Beatrice Epstein Family Partnership, L.P.***, 48 AD3d 616, 617, 853 NYS2d 108 [2d Dept 2008]). The defendants have met their burden on their respective motions, and plaintiffs failed to raise an issue of fact in opposition. Schutt's own testimony revealed that he was injured because he slipped on oil inside of the truck. He testified that the elevator equipment was strapped to wood planks, and that he and his co-workers cut the straps when they started to remove the items from the truck. At least two hydraulic jacks and other items were removed without issue before Schutt slipped. Plaintiffs' contention that there is some indication that one of the four jacks was damaged before it left Canton's facility does not raise a triable issue of fact.

Even assuming that the jacks were not properly secured prior to reaching the construction site, the facts clearly show that Schutt's accident resulted because he slipped on oil on the bed of the truck. "In order for a plaintiff in a 'slip and fall' case to establish a *prima facie* case of negligence, the plaintiff must

demonstrate that the defendant created the condition which caused the accident, or that the defendant had actual or constructive notice of the condition" (***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 281, 619 NYS2d 760 [2d Dept 1994]). The shipping and receiving personnel at Canton testified that he entered the truck both before and after the elevator equipment was loaded for shipment, and that another employee captured photographs after the items were loaded inside of the truck prior to the truck's departure. He could not recall observing any leaky elevator jack or oil on the floor of the truck prior to shipment of the materials. Additionally, the Dynasty truck driver testified that when he arrived at the construction site, he sat in the cab of the truck to wait for Noble's employees to arrive and unload the equipment. He opened the tailgate for the men, and inasmuch as he did not participate in the unloading process, he did not enter the truck. Noble's employees, Schutt included, entered the truck to unload the items. The men started unloading and shifting items from the tailgate area of the truck and worked their way toward the elevator jacks closer to the front of the truck. During that process, neither Schutt nor his co-workers observed oil on the bed of the truck. Schutt and his co-workers removed elevator equipment prior to his accident, and he testified that he did not observe the oil until after he slipped on it. There was no oil on his boot, but he observed some oil on his pant. "In the absence of proof that the defendant[s] created the dangerous condition which caused [Schutt] to fall or had actual notice of the condition, and in the absence of evidentiary facts from which a jury could infer constructive notice" (***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 281 619 NYS2d 760), summary judgment in favor of the defendants is warranted.

Lastly, in light of the Court's determination that the motions by all of the defendants dismissing plaintiffs' claims are granted, the motion by Elevator Corp. – the second third-party defendant – seeking summary judgment with respect to the claims and cross claims against it, is denied as moot.

Dated: March 27, 2019

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION