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SHORT FORM ORDER

INDEX No. 15-668
CAL. No. 18-01048OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 11-7-18 (002)
MOTION DATE 12-12-18 (003)
ADJ. DATE 12-12-18
Mot. Seq. # 002 - MD
003 - MD

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LARRY ROSEN,

Plaintiff,

- against -

HILO MAINTENANCE SYSTEMS, INC.,

Defendant.

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Upon the following papers numbered 1 to 65 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 32; 33 - 62; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 63 - 35; Replying Affidavits and supporting papers ___; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Hilo Maintenance Systems, Inc. and the motion by plaintiff Larry Rosen are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Hilo Maintenance Systems, Inc. for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross-motion by plaintiff Larry Rosen for summary judgment in his favor on the issue of liability and for an adverse inference charge for spoliation is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Larry Rosen on August 16, 2014, when he fell off a loading dock ramp during the course of his employment at non-party

Harold Levinson Associates, LLC ("HLA"). Plaintiff alleges that defendant Hilo Maintenance Systems, Inc. ("Hilo"), was negligent in its repair of the ramp's hold-down mechanism.

Plaintiff testified that he worked for HLA, a distributor for convenience stores and gas stations, in the return department processing and crediting returns. Plaintiff testified that after a truck backs up to the loading bay wall to return goods to the warehouse, he then must pull on a chain to release the loading dock ramp, which goes up and then must be walked on to bring it down flush to the floor of the truck. Plaintiff testified that immediately before the accident, he was unloading cargo from a truck in loading bay two. He explained that while standing on the ramp near the truck to make sure it was empty, the lip of the ramp "just sprang up by itself," causing him to fall and land in the back of the truck. Plaintiff further stated that he did not see, hear, or feel anything unusual with the ramp prior to the accident on the subject day. In addition, he was not notified about anything unusual occurring with the ramp prior to the accident.

Hilo now moves for summary judgment dismissing the complaint on the ground that it did not have a duty to plaintiff, as it did not replace or repair the hold-down on the subject loading bay ramp. Hilo submits, in support of the motion, copies of the pleadings, photographs, copies of invoices, the affidavits of Robert Peloke, Douglas Rowland, and Nicholas Viccaro, and the transcripts of the deposition testimony of plaintiff, Nicholas Viccaro, and Chris Hatzfeld.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

The mere happening of an accident, in and of itself, does not establish the liability of a defendant (***Scavelli v Town of Carmel***, 131 AD3d 688, 15 NYS3d 214 [2d Dept 2015]). To establish a prima facie case of negligence under the common law, a plaintiff must demonstrate the existence of duty owed by defendant to plaintiff, a breach of that duty, and resulting injury which was proximately caused by the breach (***Pasternack v Laboratory Corp. of Am. Holdings***, 27 NY3d 817, 825, 37 NYS3d 750 [2016]; ***Greenberg, Trager & Herbst, LLP v HSBC Bank USA***, 17 NY3d 565, 934 NYS2d 43 [2011]; ***Mendez-Canales v Agnelli Macchine S.R.L.***, 165 AD3d 646, 85 NYS3d 188 [2d Dept 2018]). A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 140, 746 NYS2d 120 [2002]; ***Castillo v Port Auth. of New York***, 159 AD3d 792, 72 NYS3d 582 [2d Dept 2018]; ***Bryan v CLK-HP 225 Rabro, LLC***, 136 AD3d 955, 26 NYS3d 207 [2d Dept 2016]). There are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the

contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (***Espinal v Melville Snow Contrs.***, *supra*, at 140 [internal quotation marks and citations omitted]).

Hilo failed to establish a prima facie case of entitlement to summary judgment dismissing the complaint, as it failed to demonstrate that as a third-party contractor, it owed no duty to plaintiff. Through its submissions, Hilo demonstrated that it was an independent contractor hired by HLA for the limited purpose of repairing its loading dock ramps. However, Hilo failed to establish that it did not launch an instrument of harm, that plaintiff did not detrimentally rely on its contractual duties, and that it did not displace the property owner's duty to safely maintain the premises (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Marasco v C.D.R. Electronics Sec. & Surveillance Sys. Co.***, 1 AD3d 578, 768 NYS2d 18 [2d Dept 2003]).

By his affidavit, Mr. Viccaro, the loading dock and door division manager of Hilo, stated that Hilo did not perform any work on the subject ramp's hold-down prior to the date of plaintiff's accident. He stated that the shortening of the pull chain on July 16, 2013 and the welding of a dock leg into place and installation of a new spring on February 18, 2014 had "nothing to do with the hold-down and would not have affected the hold-down in any way." Mr. Viccaro stated that "failure of a hold-down would not cause a loading dock ramp to raise up while a person was standing on [it]." Mr. Viccaro explained that when the hold-down is disengaged and the ramp is raised, the ramp is lowered when walked on. He stated that because body weight pushes the ramp down, the "ramp would not raise up while someone was standing on it, regardless of whether the hold-down was engaged or not."

Based on the invoices dated July 16, 2013 and February 18, 2014, Mr. Rowland opined that Hilo's work on the subject ramp prior to August 16, 2014 did not involve the hold-down. He also opined that defendant's work could not have adversely affected the hold-down's operation, and that Hilo's actions did not cause or contribute to plaintiff's accident. Mr. Rowland explained that the hold-down is disengaged when the ramp is raised and reengages when a person walks on top of the ramp to lower it. He opined that even with the hold-down disengaged, the springs that raise the ramp are not strong enough to keep the ramp up under the weight of a human, making it "very unlikely" that the springs are strong enough to raise the ramp with a person on top of it if the hold-down suddenly disengaged.

Such affidavits are conclusory, lacking in foundation, and speculative (*see* ***Wass v County of Nassau***, 166 AD3d 1052, 87 NYS3d 310 [2d Dept 2018]; ***Burch v Village of Hempstead***, 139 AD3d 778, 32 NYS3d 247 [2d Dept 2016]). A triable issue remains as to whether Hilo installed a McGuire MMF3052 hold-down in the subject ramp on February 14, 2014. While Mr. Viccaro and Mr. Rowland addressed Hilo's work performed on July 16, 2013 and February 18, 2014, they failed to address the February 14, 2014 invoice, which states that a spring and hold-down were broken, and that the hold-down was removed and replaced with a McGuire MMF3052, but does not identify the loading dock number. The invoice, deposition testimony, and affidavits failed to demonstrate that this work was not performed on the ramp in loading bay two. While Mr. Viccaro testified that the February 14, 2014 work was done at another HLA location, Mr. Hatzfeld testified that HLA has two addresses for one building. Mr. Hatzfeld explained that the loading docks identified by Carolyn Boulevard have electric-operated docks, and that the docks identified by Banfi Plaza have mechanical docks, which is where the incident undisputably occurred. The submissions indicate

that a MMF3052 hold-down is used on mechanical docks. As Hilo did not meet its prima facie burden, its motion for summary judgment dismissing the complaint must be denied regardless of the sufficiency of plaintiff's opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Plaintiff also moves for summary judgment in his favor on the issue of Hilo's negligence on the ground that it improperly installed a McGuire MMF3052 hold-down on the subject loading dock ramp on February 14, 2014. In addition, plaintiff also seeks an adverse inference charge against Hilo for spoliation of the subject loading dock ramp. Plaintiff submits, in support of the motion, among other things, copies of the pleadings, the bill of particulars, photographs, copies of invoices, the affidavits of Chris Hatzfeld and Robert Peloke, and the transcripts of the deposition testimony of himself, Nicholas Viccaro, Chris Hatzfeld, Robert Durusell, Jr., and Ryan Amador.

CPLR 3212 (a) provides that if no date for making a summary judgment motion has been set by the Court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (*see also* ***Caban v Mastrosimone***, 129 AD3d 757, 10 NYS3d 615 [2d Dept 2015]). Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). The "good cause" requirement set forth in CPLR 3212 (a) "requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, non-prejudicial filings, however tardy" (***Brill of City of New York***, *supra* at 652).

Here, the statutory 120-day period for making a summary judgment motion expired on October 3, 2018. In this case, plaintiff's motion was made on November 27, 2018, the date it was served (*see* CPLR 2211). While plaintiff has not shown "good cause" for his delay in seeking summary judgment, the Court may consider plaintiff's motion, because defendant's timely motion for summary judgment on nearly identical grounds is simultaneously pending (*see* ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]).

By his affidavit, Robert Peloke stated that he is a loading dock design engineer and set forth his qualifications in offering an expert opinion in the subject matter. He explained that dock leveler platforms raise out and extend before lowering into the back of the truck, so the trucks may be loaded and unloaded. Mr. Peloke explained that in order to raise the platform, the worker pulls the chain on the top of the platform, which causes the release arm to swing and disengage the stop-tooth in the hold-down. The springs then pull back and cause the dock to raise all the way up. Mr. Peloke stated that when the worker releases the chain and walks onto the platform, his or her weight should cause the platform to fall until the lip is level with the truck. The tooth in the hold-down then catches a slot on the flat bar riding the hold-down, so the dock floor remains level when the worker goes into the truck and until the chain is again pulled to raise the platform. The hold-down then maintains the lowered position of the ramp, as the counterbalance spring system is constantly attempting to raise the leveler.

Mr. Peloke also explained that when using an Atlantic hold-down, the arm moves up in the same direction as the chain when it is pulled. However, when the chain is pulled on a McGuire MMF3052 hold-

down used on an Atlantic dock, "the release arm swings down first, then around and then swings to the back wall inviting the chain to get stuck either between the release arm and the ground or base frame top or side." He stated that the chain could also "get stuck on the clevis and cotter pin that attaches the hold-down to the base frame." Mr. Peloke stated that using an MMF3052 hold-down in an Atlantic dock "prevents the release arm from fully engaging after the worker lets the chain go and the tooth in the hold-down does not fully engage with the tooth slot on the ratchet bar that rides within the hold-down." Any bouncing or vibrations from walking on the dock platform would disengage the tooth from its slot and the springs would force the platform upwards. The worker's weight and positioning on the dock would dictate how high the dock raised. Mr. Peloke opined that in this case, the worker would have to be on the very end of the dock to counteract the springs.

Mr. Peloke deduced that a McGuire MMF3052 hold-down was installed in the subject ramp on February 14, 2014, despite the lack of loading dock number on the corresponding invoice. Mr. Peloke reached this conclusion through the lack of evidence of another hold-down being installed in loading bay two between February 14, 2014 and September 25, 2015, when photographs depicting an MMF3052 hold-down in loading dock two were taken. Mr. Peloke opined, based on the work orders and invoices, which identify operating issues with the hold-down and its release chain, that defendant misapplied the intended design of the MMF3052. Mr. Peloke concluded that the accident was caused by defendant's installation of a McGuire MMF3052 hold-down on February 14, 2014 on an Atlantic ML 7840 dock leveler rather than the proper Atlantic hold-down. Mr. Peloke stated that the McGuire MMF3052 hold-down was made to be used only in McGuire dock levelers. Mr. Peloke also opined that the MMF3052 is "an entirely contrary design that caused the well-documented problems of the chain getting stuck," and that the movements of its release arm are "entirely contrary and opposite to the design of the Atlantic hold-down that [he] designed for this Atlantic dock leveler." He further opined that use of the proper Atlantic hold-down with a long release arm attached to the hold-down would have eliminated the possibility of the chain getting stuck. Mr. Peloke opined that using parts with different mechanisms that operate in different and opposite fashions violates the industry standard to respect the original design.

Mr. Peloke concluded that Hilo violated industry standards by using unapproved parts with contrary operational mechanics to the original design, namely, force-fitting an MMF3052 hold-down into the Atlantic dock leveler. Mr. Peloke stated that the chain got stuck and prevented the arm from fully engaging when plaintiff released the chain, preventing the hold-down tooth from engaging in the tooth slot and allowing the tooth's premature release, which disengaged the hold-down and allowed the springs to force the platform upwards. Mr. Peloke opined that the force of the springs was sufficient to raise the platform while plaintiff was standing towards the end of the ramp. He opined that being one step in from the end of the ramp would be sufficient for the ramp platform to raise. He further opined that any upward movement is sufficient to cause a person to fall, because the ramp is already at an angle.

Plaintiff failed to establish his prima facie entitlement to summary judgment on the issue of liability, as he failed to demonstrate that any of the three ***Espinal*** exceptions apply to this case, as Mr. Peloke's affidavit is speculative and conclusory (*see* ***Wass v County of Nassau***, *supra*; ***Burch v Village of Hempstead***, *supra*). Notably, a triable issue remains as to whether defendant installed a McGuire MMF3052 hold-down in loading dock two on February 14, 2014, as the invoice does not specify the loading dock number and Mr. Viccaro denies that the installation was done in loading dock two. In addition, Mr. Peloke

based his opinion on photographs of the dock leveler in loading bay two taken over a year after the subject accident. Mr. Peloke only inspected loading bay three on November 2, 2016 and January 20, 2018, and stated that it "indisputably had the same equipment and parts" as loading bay two on the day of the accident. As plaintiff did not meet his prima facie burden, the portion of his motion for summary judgment on the issue of liability must be denied regardless of the sufficiency of defendant's opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

The Court now turns to the portion of plaintiff's motion seeking an adverse inference charge against defendant for spoliation of the subject loading dock ramp. Hilo replaced the subject ramp in loading bay two in December 2015, after issue was joined, but before the bill of particulars was served. "[W]hen a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" (***Samaroo v Bogopa Serv. Corp.***, 106 AD3d 713, 713, 964 NYS2d 255 [2d Dept 2013]; *see* ***Saeed for Rashid v City of New York***, 156 AD3d 735, 67 NYS3d 36 [2d Dept 2017]; ***Ortiz v Bajwa Dev. Corp.***, 89 AD3d 999, 933 NYS2d 366 [2d Dept 2011]; ***Gotto v Eusebe-Carter***, 69 AD3d 566, 892 NYS2d 191 [2d Dept 2010]). The Court has broad discretion in the determination of sanctions for spoliation (*see* ***Golan v North Shore-Long Is. Jewish Health Sys., Inc.***, 147 AD3d 1031, 48 NYS3d 216 [2d Dept 2017]; ***Lentini v Weschler***, 120 AD3d 1200, 992 NYS2d 135 [2d Dept 2014]; ***Gotto v Eusebe-Carter***, *supra*). Sanctions may include preclusion of favorable proof to the spoliator, requiring the spoliator to pay costs associated with replacement evidence, employing an adverse inference instruction at trial, or striking a pleading (***Ortega v City of New York***, 9 NY3d 69, 845 NYS2d 773 [2007]). The party seeking sanctions "must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense (***Pegasus Aviation I, Inc. v Varig Logistica S.A.***, 26 NY3d 543, 547, 26 NYS3d 218 [2015] [internal quotation marks omitted]). "The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party" (***Samaroo v Bogopa Serv. Corp.***, *supra* at 714; *see* ***Rokach v Taback***, 148 AD3d 1195, 50 NYS3d 499 [2d Dept 2017]; ***Morales v City of New York***, 130 AD3d 792, 13 NYS3d 548 [2d Dept 2015]). Relevance is presumed where evidence is determined to have been intentionally or willfully destroyed (***Pegasus Aviation I, Inc. v Varig Logistica S.A.***, *supra*; ***Saeed for Rashid v City of New York***, *supra*). Where evidence is determined to have been negligently destroyed, the party seeking spoilation must establish that the destroyed evidence was relevant to that party's claim or defense (***Saeed for Rashid v City of New York***, *supra*).

In this case, the Court declines to exercise its discretion at this time in allowing an adverse inference charge at trial to the spoliation of the subject ramp. Plaintiff seeks an "adverse inference charge for spoilation against defendant to the extent defendant argues testing on Bay #2 is required." However, defendant does not argue in its motion that testing on loading bay two is required and even seeks summary judgment based on other evidence. In addition, plaintiff does not argue that the subject ramp is relevant or that he is prejudiced by his inability to inspect the subject ramp, and attempts to meet his burden on summary judgment through an inspection of the ramp in loading bay three, as it "indisputably had the same equipment and parts" as loading bay two on the day of the accident (*see* ***Gaoming You v Rahmouni***, 147 AD3d 729, 46 NYS3d 211 [2d Dept 2017]; ***Barone v City of New York***, 52 AD3d 630, 861 NYS2d 709 [2d

Dept 2008]). Finally, it is unclear whether plaintiff is arguing intentional or negligent spoliation of evidence. Therefore, the portion of plaintiff's motion seeking an adverse inference charge against defendant for spoliation is denied without prejudice to renew at the time of trial.

Accordingly, the motions are denied.

Dated: August 22, 2019

J.S.C.
HON. DAVID T. REILLY

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION