Cabrera v United Parcel Serv., Inc.
2020 NY Slip Op 32367(U)
July 20, 2020
Supreme Court, New York County
Docket Number: 453205/2015
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 47

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WILMER CABRERA, as ADMINISTRATOR of the ESTATE of HENRY ESTEBAN SALINAS CERRATO, Deceased,

Plaintiff,

Index No. 453205/2015

Motion Sequence Nos. 001, 002, 003

-against-

UNITED PARCEL SERVICE, INC., ROBERT A. KREITZER, JR., CREATIVE CHRISTMAS, INC., and LINCOLN SQUARE CONDOMINIUM, and ALTITUDE EQUIPMENT RENTALS, LLC,

Defendants.

UNITED PARCEL SERVICE, INC. and ROBERT A. KREITZER, JR.,

Third-Party Plaintiffs,

-against-

ALTITUDE EQUIPMENT RENTALS, LLC,

Third-Party Defendant.

ALTITUDE EQUIPMENT RENTALS, LLC

Second Third-Party Plaintiff,

-against-

CREATIVE CHRISTMAS, INC.,

Second Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 151-187, 212-249, 284-291, 315-317, 320; (Motion 002) 76-92, 194-211, 292-299, 302, 303, 321; (Motion 003) 93-141, 256-283, 300, 304-314

were read on this motion to/for SUMMARY JUDGMENT.

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This action stems from an accident that occurred on November 5, 2013, when Henry Esteban Salinas Cerrato (the decedent) was thrown from the bucket of a telescopic boom lift he was working in while installing holiday lights on trees located in front of a building on Columbus Avenue between West 67th and West 68th Streets in Manhattan (the Premises). The decedent died as a result of the injuries he sustained in the accident. By order dated December 8, 2015, this action was joined for the purposes of discovery and trial with a related action arising out of the same accident captioned *Alterra America Insurance Company v. Creative Christmas Inc.*, Index No. 152547/2015.

In motion sequence number 001, Altitude Equipment Rentals, LLC (Altitude), moves, pursuant to CPLR 3212, for summary judgment dismissing (1) the amended complaint and the third-party complaint insofar as asserted against it in the action bearing Index No. 453205/2015 (the Cabrera Action), (2) the third-party complaint insofar as asserted against it in the action bearing Index No. 152547/2015 (the Alterra Action), and (3) all cross claims asserted against it in both actions.

In motion sequence number 002, Wilmer Cabrera, as the administrator of the decedent's estate (Cabrera), moves for a default judgment against Creative Christmas, Inc. (Creative) in the Cabrera Action. In a second, separate motion denominated motion sequence number 002, Lincoln Square Condominium (Lincoln) moves, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint insofar as asserted against it and all cross claims asserted against it in the Cabrera Action.

In motion sequence number 003, United Parcel Service, Inc. (UPS) and Robert A. Kreitzer, Jr. (Kreitzer) (together, the UPS Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing (1) the amended complaint insofar as asserted against them in the

Cabrera Action, (2) the complaint insofar as asserted against them in the Alterra Action, and (3) all counterclaims and cross claims asserted against them in both actions.

Motion sequence numbers 001, 002, and 003 are consolidated for disposition.

BACKGROUND

On the date of the accident, Lincoln owned the Premises and, pursuant to a contract, hired Creative to hang holiday lights on the trees located along the sidewalk of Columbus Avenue and West 67th Street. Creative employed the decedent and Christian Baquedano to install the lights using a telescopic boom lift provided to them by Creative. Creative leased the boom lift from Altitude.

The decedent parked the boom lift next to a tree, in the parking lane on Columbus Avenue near the corner of 67th Street, with the bucket hanging partially over the right travel lane of traffic in order to reach the tree branches. Adjacent to the base of the boom lift were three orange traffic cones. At approximately 1:30 a.m., a UPS tractor trailer operated by Kreitzer struck the bucket that the decedent and Baquedano were working in. As a result of the collision, they were thrown from the bucket and sustained injuries. The next day, the decedent died as a result of his injuries.

The Cabrera Action

Cabrera filed the Cabrera Action in the Supreme Court, Kings County under Index No. 503785/2015. By order dated December 18, 2015, the Cabrera Action was transferred to the Supreme Court, New York County, and joined with the Alterra Action for the purposes of discovery and joint trial (*see* Amended Dec & Order, NYSCEF Doc. No. 48 [Index No. 152547/2015]).

In the amended complaint, Cabrera alleges causes of action against UPS, Kreitzer, Creative, Lincoln, and Altitude, seeking damages for common-law negligence, wrongful death, and punitive damages (Supplemental Summons and Amended Complaint, NYSCEF Doc. No. 22 [Index No. 453205/2015]).[1] Altitude answered and asserted cross claims against UPS, Kreitzer, Creative, and Lincoln for contribution and indemnification (Altitude's Answer to Amended Complaint, NYSCEF Doc. No. 23 [Index No. 453205/2015]). UPS and Kreitzer separately answered and asserted cross claims against Creative and Lincoln for contribution (UPS Answer to Amended Complaint, NYSCEF Doc. No. 26; Kreitzer's Answer to Amended Complaint, NYSCEF Doc. No. 25 [Index No. 453205/2015]). Lincoln answered and asserted cross claims against UPS, Kreitzer, Creative, and Altitude for contribution and/or indemnification (Lincoln's Answer to Amended Complaint, NYSCEF Doc. No. 33 [Index No. 453205/2015]).

UPS and Kreitzer also initiated a third-party action against Altitude for contribution (Third-Party Complaint, NYSCEF Doc. No. 16 [Index No. 453205/2015]). Altitude asserted cross claims against Creative and Lincoln and counterclaimed against UPS and Kreitzer for contribution and/or indemnification (Altitude's Answer to Third-Party Complaint, NYSCEF Doc. No. 18 [Index No. 453205/2015]).[2]

The Alterra Action

In the Alterra action, Alterra America Insurance Company (Alterra), the insurer of the boom lift, alleges that it reimbursed Altitude the sum of $80,166.00 for the damage sustained to

[1] As reflected in Ecourts, it appears that the cause of action for punitive damages was dismissed insofar as asserted against the UPS Defendants by an order of the Supreme Court, Kings County, dated September 24, 2015.
[2] Altitude initiated a second third-party action against Creative, which Altitude voluntarily discontinued on October 3, 2019 (Second Third-Party Summons and Complaint, NYSCEF Doc No. 52; Notice of Discontinuance, NYSCEF Doc. No. 322 [Index No. 453205/2015]).

the boom lift and seeks reimbursement of that sum from Creative,[3] UPS, and Kreitzer (Summons and Complaint, NYSCEF Doc. No. 1 [Index No. 152547/2015]).[4] UPS and Krietzer each answered and asserted cross claims against Creative for, inter alia, contribution (UPS's Answer, NYSCEF Doc. No. 7; Kreitzer's Answer, NYSCEF Doc. No. 9 [Index No. 152547/2015]).

UPS and Kreitzer initiated a third-party action against Altitude and Lincoln seeking damages for negligence on behalf of UPS and contribution on behalf of UPS and Kreitzer (Third-Party Summons and Complaint, NYSCEF Doc. No. 20 [Index No. 152547/2015]). In the third-party action, Lincoln cross-claimed against Creative and Altitude for contribution and/or indemnification (Lincoln's Answer, NYSCEF Doc. No. 34 [Index No. 152547/2015]) and Altitude asserted cross claims against Creative and Lincoln and counterclaimed against UPS and Kreitzer for contribution and/or indemnification (Altitude's Answer, NYSCEF Doc. No. 35 [Index No. 152547/2015]). Altitude also initiated a second third-party action against Creative for contribution and/or indemnification (Second Third-Party Summons and Complaint, NYSCEF Doc. No. 139 [Index No. 152547/2015]).

On April 8, 2019, Cabrera, Alterra, UPS, Kreitzer, Altitude, and Lincoln stipulated that "in the interest of judicial economy and time," they would "accept and apply the determination as to culpable conduct and allocation of liability reached in the . . . Cabrera Action for all purposes in the [Alterra] action" (Stipulation, NYSCEF Doc. No. 141 [Index No. 152547/2015]).

[3] Creative failed to appear or answer the complaint in the Alterra Action. By order dated May 13, 2016, the court granted Altera's motion for a default judgment against Creative in the Alterra Action (NYSCEF Doc. No. 61 [Index No. 152547/2015]).

[4] Alterra also named United Parcel Service General Services Co., d/b/a/ UPS (UPSGS) as a defendant in the Alterra action, but has discontinued all claims against UPSGS (*see* Stipulation of Discontinuance, NYSCEF Doc. No. 17 [Index No. 152547/2015]).

DISCUSSION

Summary Judgment Standard

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The "movant bears the heavy burden of establishing 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1106 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made . . . , the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see Zuckerman v City of New York*, 49 NY2d at 562).

"[T]he court's function is issue finding rather than issue determination" (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 481 [1st Dept 2018]). "[S]ummary judgment is a drastic remedy that should be employed only when there is no doubt as to the absence of triable issues" (*Aguilar v City of New York*, 162 AD3d 601, 601 [1st Dept 2018]).

Altitude's Motion for Summary Judgment

Altitude now moves for summary judgment dismissing (1) the amended complaint and the third-party complaint insofar as asserted against it in the Cabrera Action, (2) the third-party

complaint insofar as asserted against it in the Alterra Action, and (3) all counterclaims and cross claims asserted against it in both actions.

Altitude contends that it played no role in the occurrence of the accident. It merely rented the boom lift to Creative. It did not supervise, direct and/or control Creative's work or its use of the boom lift, and it did not have any employees at the site where the accident occurred. Altitude asserts that it agreed to rent the boom lift to Creative based on conditions including that only properly trained personnel would be allowed to operate it. As such, Altitude claims that there is no basis for any negligence or negligent entrustment claims against it.

Altitude further contends that it is not subject to vicarious liability under Vehicle and Traffic Law (VTL) § 388 because, among other things, the boom lift is not a "motor vehicle" under the VTL. Moreover, even if the court were to find that the boom lift should be classified as a "motor vehicle," then Altitude would be immune from vicarious liability under the Graves Amendment (49 USC § 30106 [a]).

In opposition, Cabrera and the UPS Defendants maintain that Altitude failed to satisfy its prima facie burden to judgment as a matter of law. They contend, for various reasons, that the court should not consider certain affidavits submitted by Altitude in support of its motion. They further argue that Altitude concedes that the American National Standards Institute's (ANSI) standards for renting boom-supported elevating work platforms represent the industry's custom and practice, but that Altitude provided no evidence that it complied with these standards.

Cabrera and the UPS Defendants also argue that Altitude failed to demonstrate that there are no material issues of fact regarding negligent entrustment inasmuch as it rented the boom lift to Creative when it should have known that the decedent was incompetent to operate it. In addition, they contend that VTL § 388 applies to impose vicarious liability on Altitude inasmuch

as the boom lift is a "motor vehicle" under the VTL given that it is a self-propelled vehicle being operated or driven upon a public highway.

Finally, Cabrera and the UPS Defendants argue that Altitude is not immune from vicarious liability under the Graves Amendment inasmuch as it has not demonstrated that it is engaged in the trade or business of renting or leasing motor vehicles that are manufactured primarily for use on public streets, roads and highways and that, in any event, Altitude is not entitled to the protections of the Graves Amendment for its own negligence. In this regard, Cabrera and the UPS Defendants point out that Altitude is being sued for its own negligence, including violations of ANSI standards and negligent entrustment. For the reasons set forth below, Altitude's motion is granted.

It is axiomatic that "[i]n order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In the absence of a duty, as a matter of law, there can be no liability" (*CB v Howard Sec.*, 158 AD3d 157, 164 [1st Dept 2018] [internal quotation marks and citations omitted]). "The existence and scope of a duty of care is a question of law for the courts entailing the consideration of relevant policy factors" (*Church v Callanan Indus.*, 99 NY2d 104, 110-111 [2002]).

Here, Cabrera is not proceeding on a theory that Altitude was negligent in maintaining the boom lift in good working order and repair, or that the accident was caused by any defect in the boom lift. Rather, he alleges that Altitude breached a duty of care to ensure and/or verify that the person operating the boom lift was properly trained. However, Altitude established, as a matter of law, that it used reasonable care to ensure that the person operating the boom lift would

be properly trained. In this regard, Altitude submits a copy of the rental agreement between it and Creative, which provides in relevant part:

> "[Creative] is prohibited from authorizing or permitting other than properly trained personnel or any third party to operate the equipment. [Creative] warrants that: . . . (d) [it] has received from Altitude all information needed or requested regarding the operation of the Equipment; (e) Altitude is not responsible for providing operator or other training. ([Creative] being responsible to obtain all training that [Creative] desires prior to the Equipment's use); (f) only authorized individuals shall use and operate the Equipment ('authorized individuals' being those who are properly trained to use the Equipment . . . ; (g) the Equipment's use shall be implemented in a careful manner, in compliance with all operational and safety instructions provided on, in or with the Equipment and all Federal, State and local laws and licenses, including but not limited to, OSHA; and Renter is responsible for providing their operators with all (PPE) personal protection equipment to include but not limited to harness and lanyards"

(Rental Agreement at § 2, NYSCEF Doc. No. 172 [Index No. 453205/2015]). By including the this provision in the rental agreement, Altitude expressly conditioned Creative's use of the boom lift on proper training and PPE being provided to the operator of the machine. Cabrera and the UPS Defendants cite no authority for the proposition that Altitude had a further duty to investigate whether the employees used by Creative were, in fact, properly trained to operate the boom lift.

Altitude also submits the affidavit of engineer Peter Chen, who conducted an inspection of the boom lift and reviewed "the documentary evidence developed in this action" (Chen Affidavit, ¶ 5, NYSCEF Doc. No. 189 [NYSCEF Doc. No. 453205/2015]). Chen opines that the rental agreement "contained standard industry conditions for the rental of lift equipment and, as per industry custom and practice, the lessee and operator of the equipment, in this case Creative, remained responsible to take all necessary safety precautions and to use only properly trained operators to operate the rented equipment" (*id.* at ¶ 14). Chen also opines that "[a]s per industry custom and practice and ANSI 92.5, Altitude, as the renter of the equipment, would not

retain responsibility over its operation and use while it was in possession of the lessor" (*id.* at ¶ 15).[5]

Cabrera and the UPS Defendants argue that Altitude's motion must be denied because Altitude failed to demonstrate that it complied with ANSI standards A92.5 § 5.2.1, A92.5 § 5.2.2, A92.5 § 5.7, A92.5 § 5.8, and A92.5 § 5.11.1, and therefore failed to establish its prima facie entitlement to judgment as a matter of law on the negligence claim against it (*see* ANSI Standards, NYSCEF Doc. No. 246 [Index No. 453205/2015]). These standards pertain to "dealers," such as Altitude, who rent boom-supported elevating work platforms (A92.5 §§ 3, 5). Broadly stated, they require dealers to keep, among other things, copies of the Operating Manual and Manual of Responsibilities in each rental, and to offer training to owners, users, and operators. They also require dealers to maintain records of the names of those trained, the names of persons providing the training, the date of training, and the names "of person(s) receiving familiarization with the aerial platform upon each delivery unless this individual has been provided with familiarization on the same model, or one having characteristics consistent with the one being delivered, within the prior 90 days" (A92.5 § 5.11.1).

ANSI requirements may "be considered . . . as some evidence of negligence if it is first found that the standards set forth … [represent] the general custom or usage in the industry" (*Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 337 [1986][emphasis added]). Here, even assuming ANSI 92.5 represents the general custom or usage in the industry, viewing these standards as a whole, they place the responsibility on Creative for training and assuring that

[5] Cabrera and the UPS Defendants argue that Altitude should be precluded from introducing Chen's affidavit because it did not disclose him as an expert under CPLR 3101 (d) before the notes of issue were filed or since then. "However, CPLR 3212 (b) expressly permits the submission of expert affidavits in connection with a summary judgment motion, even where an expert exchange pursuant to CPLR 3101 (d) was not furnished prior to the affidavit's submission" (*Brown v 43-25 Hunter, L.L.C.*, 178 AD3d 493, n 1 [1st Dept 2019]).

persons directed to operate the boom lift are trained. Specifically in this regard, section A 92.5 defines "user" as "[p]erson(s) or entity(ies) that has care, control, and custody of the aerial platform," which "may also be the employer of the operator, a dealer, employer, owner, lessor, lessee, or operator" (A92.5 § 3). In this case, Creative (not Altitude) had the care, control, and custody of the boom lift and served as the decedent's employer, and therefore falls under the definition of "user." The standards state that "[s]ince the user has direct control over the application and operation of aerial platforms, conformance with good safety practices in this area [it] is the responsibility of the user and the operating personnel" (A92.5 § 7.1). Further, as the "user," Creative "shall ensure" that the person directed to operate the aerial platform has been "trained" and "familiarized" with the equipment (A92.5 § 7.6 [1], [2]) and "shall permit only properly trained personnel to operate an aerial platform" (A92.5 § 7.7). Importantly, the standards also specify that a dealer "shall assume the responsibilities of users" when the dealer "directs personnel to operate an aerial platform" (A92.5 § 5.9). Therefore, the standards place the responsibility for safety practices and training on the user (in this case, Creative), and only shifts this responsibility to the dealer (in this case, Altitude) when the dealer directs the personnel to operate the equipment. This is consistent with Chen's opinion that as per industry custom and practice, the lessee and operator remains responsible to take all necessary safety precautions and to use only properly trained operators to operate the rented equipment.

Altitude established that it did not direct the decedent or Baquedano to operate the lift by submitting, among other things, the rental agreement pursuant to which Creative agreed that "Altitude has no control over the manner in which the Equipment is operated during the Rental Period by [Creative]" (Rental Agreement at § 2, NYSCEF Doc. No. 172 [Index No. 453205/2015]). Altitude also submits the affidavit of Darren Levine, Altitude's Vice President

during the time relevant to this action (Levine Affidavit, NYSCEF Doc. No. 181 [Index No. 453205/2015]). Levine states that "Altitude did not retain possession, custody, care or control of the Boom Lift at any time during the rental term after delivery on November 1, 2013 or during any of the four (4) days leading up to the collision . . . did not supervise or direct the means or methods of Creative's work and it assumed no duty to do so" (*id.* at ¶¶ 18-19, 28).[6] In opposition, Cabrera and the UPS Defendants proffer no evidence indicating that Altitude directed the decedent or Baquedano to operate the lift. As such, Cabrera and the UPS Defendants' reliance on the ANSI standards is misplaced.

With respect to the claim for negligent entrustment, the tort "is based on the degree of knowledge the supplier of a chattel has or should have concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 237 [2001]). "To establish a cause of action under a theory of negligent entrustment, the defendant must either have some *special knowledge concerning a characteristic or condition peculiar to the [person to whom a particular chattel is given]* which renders [that person's] use of the chattel unreasonably dangerous . . . or some special knowledge as to a characteristic or defect peculiar to the chattel which renders it unreasonably dangerous" (*Byrne v Collins*, 77 AD3d 782, 784 [2d Dept 2010] [internal quotation marks and citations omitted] [emphasis in original]).

Here, Altitude demonstrated its prima facie entitlement to judgment as a matter of law dismissing the negligent entrustment claim through the affidavit of Levine, wherein he states

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[6] Cabrera and the UPS Defendants contend that Levine's affidavit should be disregarded because Altitude failed to disclose Levine as a possible fact witness during the discovery process. However, they were aware, prior to the filing of the note of issue, that Levine was identified as Altitude's former Vice President who handled rentals and ran its day to day operations at the time of the accident and at the time of its closure. This fact had been testified to by Altitude employee, Scott Robinson, during his May 4, 2017 deposition (Robinson EBT tr at 14-15, NYSCEF Doc. No. 217 [Index No. 345205/2015]). Cabrera or the UPS Defendants could have, if desired, sought a deposition from Levine. Therefore, Levine's affidavit will be considered.

that Altitude had leased similar telescoping boom lifts to Creative on several prior occasions between November 7, 2012 and April 15, 2013 (Levine Affidavit at ¶ 6, NYSCEF Doc. No. 181 [Index No. 453205/2015]). He avers that during these prior rentals on "November 7, 2012, November 8, 2012, December 28, 2012, January 13, 2013 and April 15, 2013, Altitude was not made aware and received no complaints from any source that Creative was using Altitude's equipment in an improper or unsafe manner or that it was not complying with the terms of the rental Agreement" (*id. at* ¶ 7). Further, he states that "Altitude was also not aware of any prior accidents or incidents involving Creative's rental and use of Altitude's equipment" (*id.* at ¶ 8). In opposition to Altitude's prima facie showing, Cabrera and the UPS Defendants fail to raise a triable issue of fact as to whether or not Altitude possessed special knowledge concerning a characteristic or condition peculiar to Creative that rendered its use of the boom lift unreasonably dangerous.

> As to the issue of vicarious liability, VTL § 388 (1) provides"
>
> "every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner."

The statute does not apply to the facts of this case because the boom lift is "a machine that has multiple functions" and was not functioning as a "vehicle" at the time of the accident (*Monell v International Bus. Machs. Corp.*, 47 AD2d 637, 638 [2d Dept 1975], *affd* 38 NY2d 888 [1976]). Moreover, even assuming that under the circumstances of this case, the boom lift is properly characterized as a "motor vehicle," the Graves Amendment would apply to shield Altitude from vicarious liability (*see generally Olmann v Neil,* 132 AD3d 744, 745 [2d Dept 2015] ["Pursuant to the Graves Amendment (49 USC § 30106), generally, the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle if: (1)

the owner is engaged in the trade or business of renting or leasing motor vehicles, and (2) there is no negligence or criminal wrongdoing on the part of the owner"]).

Cabrera's and the UPS Defendants' remaining arguments with respect to Altitude's motion for summary judgment have been considered and they are without merit.

Accordingly, Altitude's motion for summary judgment will be granted.

Lincoln's Motion for Summary Judgment

Lincoln moves for summary judgment dismissing the amended complaint insofar as asserted against it and all cross claims asserted against it in the Cabrera Action.

In support of its motion, Lincoln argues that Creative was in the business of placing lights in trees and took no direction or instruction from Lincoln. Creative hired its employees and gave them whatever instruction it felt was required. Creative rented the boom lift and provided its employees with all the materials they required such as the lights and extension cords. Lincoln asserts that it provided no materials, supervision, direction or control over the manner and method of the work performed by Creative. Therefore, it asserts, it was not negligent and cannot be vicariously liable for any alleged negligence on the part of Creative.

In opposition, Cabrera and the UPS Defendants contend that Lincoln's argument that it had no direction or control over the decedent's work is contrary to the evidence. They argue that the contract between Creative and Lincoln specifically required Lincoln to provide a location to park the boom lift during light installation and removal. They further argue that the contract's express terms conflict with Lincoln's testimony that it did not provide a parking location for the boom lift. This conflict, they assert, involves a material issue of fact because the boom lift's location proximately caused the accident, and therefore Lincoln is not entitled to summary judgment. For the reasons that follow, Lincoln's motion is denied.

"A party who hires an independent contractor is generally not liable for the independent contractor's negligence" (*Flaherty v Fox House Condo.*, 299 AD2d 448, 448 [2d Dept 2002]). "Although several justifications have been offered in support of this rule, the most commonly accepted rationale is based on the premise that one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor" (*Kleeman v Rheingold*, 81 NY2d 270, 274 [1993]). Exceptions to the rule include situations where the party

> "(1) is under a statutory duty to perform or control the work, (2) *has assumed a specific duty by contract*, (3) is under a duty to keep premises safe, or (4) has assigned work to an independent contractor which the employer knows or has reason to know involves special dangers inherent in the work or dangers which should have been anticipated by the employer"

(*Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992] [emphasis added]; *see Flaherty v Fox House Condo.*, 299 AD2d at 449). "In such instances, the employer cannot insulate itself from liability by claiming that it was not negligent: the employer is vicariously liable for the fault of the independent contractor because a legal duty is imposed on it which cannot be delegated" (*Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d at 668).

Here, in support of its motion, Lincoln relies on the deposition testimony of William Murphy, Lincoln's Residence Manager, who served as Lincoln's contact with Creative (Murphy EBT tr, NYSCEF Doc. Nos. 83-84 [Index No. 453205/2015]). Murphy testified that no one from Lincoln had any contact with Creative's workers during the hours they did their work on the trees and that Lincoln did not provide a location to park the boom lift (*id.* at 37, 29). Lincoln asserts that this demonstrates that it did not control or supervise the work at issue. However, Lincoln also annexes the contract between Lincoln and Creative, pursuant to which Lincoln specifically agreed to "[p]rovide location to park boom lift *during installation* & removal" (Creative/Lincoln Contract at p. 1, NYSCEF Doc. No. 86 [Index No. 453205/2015][emphasis

added]). Since a question of fact exists as to whether the location of the boom lift was a proximate cause of the accident, Lincoln's submissions fail to establish prima face that it may not be subject to liability.

Moreover, even assuming Lincoln satisfied its prima face burden, in opposition to the motion, Cabrera and the UPS Defendants rely on the deposition testimony of Creative's President, Robert Catalano, and Vice President, Joseph Capone, wherein they testified that Lincoln, not Creative, was responsible for finding a spot for the boom lift to be parked during the work (Catalano EBT tr, at 31, 33-35, 98, NYSCEF Doc. No. 89; Capone EBT tr, at 36, 39-40, 53, 159, NYSCEF Doc. No, 90 [Index No. 453205/2015]). This testimony also raises an issue of fact as to whether Lincoln may be subject to liability.

Accordingly, Lincoln's motion for summary judgment will be denied.

The UPS Defendants' Motion for Summary Judgment

The UPS Defendants move, pursuant to CPLR 3212, for summary judgment dismissing (1) the amended complaint insofar as asserted against them in the Cabrera Action, (2) the complaint insofar as asserted against them in the Alterra Action, and (3) all counterclaims and cross claims asserted against them in both actions. For the following reasons, the motion is denied.

In support of their motion, the UPS Defendants argue that Kreitzer did not have a duty to see the basket of the boom lift which was suspended over his lane of travel on a designated truck route. He was given no warning of its presence and it is unreasonable to expect him to have detected it and to have avoided the crash, given the nighttime visibility and illumination at the time of the accident. The UPS Defendants assert, therefore, that they owed no duty to the decedent and are not liable for the accident.

The UPS Defendants also argue that the accident was caused by the decedent, Baquedano, Creative, Lincoln, and Altitude's failure to have a safe work zone with trained workers. They created a hazardous situation by using the boom lift over an open travel lane without providing any warning to oncoming traffic. The decedent and Baquedano were allowed to use the boom lift in the path of traffic without having formal training in using it, or in guarding the work zone with traffic control devices and a flag person. They also were allowed to work in the boom lift's basket without being attached to it. Their conduct violated numerous regulations and standards and they cannot avoid responsibility by expecting southbound drivers to detect, identify and respond to a low contrast target that was unmarked, unexpected and existed in an area where hazards rarely, if ever, appear (i.e., above the roadway).

Finally, the UPS Defendants argue that Cabrera cannot recover for the decedent's conscious pain and suffering because there is no evidence that he was conscious after the accident. Further, they contend, Cabrera has failed to produce any competent evidence that the decedent's children sustained any pecuniary loss as a result of his death.

In opposition, Cabrera asserts that Kreitzer's negligent operation of the tractor trailer was a proximate cause of the accident. Cabrera also asserts that contrary to the UPS Defendants' contention, the decedent experienced conscious pain and suffering prior to his death and that there is evidence that decedent's children sustained pecuniary loss as a result of his death.

Both parties offer conflicting expert opinions as to whether Kreitzer could reasonably be expected to have detected the presence of the boom lift's bucket over his lane of travel given the conditions that existed at the time of the accident (*see* Kuzel Affidavit, NYSCEF Doc. Nos 142-143; Neale Affidavit and Report, NYSCEF Doc. Nos. 144-147; Roddy Affidavit, NYSCEF Doc. No. 267 [Index No. 453205/2015]). They also offer conflicting expert opinions as to whether the

decedent experienced pain and suffering prior to his death (*see* Reiser Affidavit, NYSCEF Doc. Nos. 148, 149; Pugh Affidavit, NYSCEF Doc. No. 271 [Index No. 453205/2015]).

In their reply, the UPS Defendants raise several arguments as to why the expert affidavits submitted by Cabrera should be rejected, all of which lack merit. First, they assert that Cabrera did not disclose these individuals as experts under CPLR 3101 (d). However, as previously noted, "CPLR 3212 (b) expressly permits the submission of expert affidavits in connection with a summary judgment motion, even where an expert exchange pursuant to CPLR 3101 (d) was not furnished prior to the affidavit's submission" (*Brown*, 178 AD3d at 493, n 1).

The UPS Defendants also assert that Cabrera's experts are not qualified to render an opinion on the issues in question. An expert is qualified to proffer an opinion if he or she is "possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable" (*Matott v Ward*, 48 NY2d 455, 459 [1979]). An expert "need not be a specialist in a particular field if he nevertheless possesses the requisite knowledge necessary to make a determination on the issues presented" (*Estate of Lawler v Mt Sinai Med Ctr, Inc.*, 115 AD3d 620, 621 [1st Dept 2014] [internal quotation marks and citations omitted]). "The competence of an expert in a particular subject may derive from long observation and real world experience, and is not dependent upon formal training or attainment of an academic degree in the subject" (*Miele v American Tobacco Co.*, 2 AD3d 799, 802 [2d Dept 2003][citation omitted]). "[W]hether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court" (*Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 [1st Dept 2008]).

Here, Cabrera's expert, James Roddy, has real world experience and therefore, is qualified to opine as to whether Kreizer could reasonably be expected to have detected the

presence of the boom lift's bucket over his lane of travel. Roddy has 42 years of experience in the interstate operation of commercial vehicles, including tandem tractor trailers, and 34 years of experience as an instructor of truck drivers and those seeking to obtain their commercial driver's license (Roddy Affidavit at ¶ 1, NYSCEF Doc. No. 267 [Index No. 453205/2015]). In addition, he is a CDL Professional Safety Consultant and was the director of training and safety at the New England Tractor Trailer Training School (*id.*).

Cabrera's expert, James Pugh, P.E., Ph.D., is qualified to give an opinion as to the decedent's conscious pain and suffering after the accident. In addition to holding a Ph.D. degree in Biomedical Engineering from MIT, he has served as the Director of Biomedical Engineering/Materials Science and Engineering at Inter-City Testing and as a Staff Specialist in Scientific Accident Reconstruction (Pugh Affidavit at ¶ 2, NYSCEF Doc. No. 271 [Index No. 453205/2015]). He has also held academic positions at the Hospital for Joint Diseases in Biomechanics and Bioengineering and the State University of New York at Stony Brook in the field of Orthopedic Engineering (*id.*; *see Plate v Palisade Film Delivery Corp.*, 39 AD3d 835, 837 [2d Dept 2007] ["The Supreme Court erred in its determination that the defendants' biomechanical engineering expert was not qualified to testify regarding whether the force of the impact in the subject accident could have caused a serious injury or exacerbated a preexisting injury to the plaintiff's cervical spine and in precluding that testimony"]; *see also Guerra v Ditta*, __ AD3d __, 2020 NY Slip Op 03771 [2d Dept 2020]; *Gonzalez v Palen*, 48 Misc 3d 135[A], 2015 NY Slip Op 51101[U] [App Term, 1st Dept 2015]).

Having determined these witnesses qualify as experts, the extent of their qualifications will be a matter to be weighed by the trier of fact (*see McLamb v Metropolitan Suburban Bus Auth.*, 139 AD2d 572, 573 [2d Dept 1988]). Moreover, the UPS Defendants' assertion that the

expert affidavits submitted by Cabrera have no probative value because they make bare conclusory assertions that are not supported or explained is without merit. As such, Cabrera's expert affidavits will be considered.

In light of the conflicting expert opinions on the issues as to whether Kreitzer could reasonably be expected to have detected the presence of the boom lift's bucket over his lane of travel and as to whether the decedent experienced conscious pain and suffering prior to his death, the UPS Defendants are not entitled to summary judgment on these issues (*see Hornsby v Cathedral Parkway Apts. Corp.*, 179 AD3d 584, 584 [1st Dept 2020] ["If we were to reach the merits, we would find that summary judgment should also be denied in light of the conflicting expert opinions"]; *Pinto v Putnam Hosp. Ctr., Inc.*, 107 AD3d 869, 870 [2d Dept 2013]["Where the parties offer conflicting expert opinions, issues of credibility arise requiring jury resolution"] [internal quotation marks and citations omitted]; *Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 25 [1st Dept 2009] ["Resolution of issues of credibility of expert witnesses and the accuracy of their testimony are matters within the province of the jury"]).

As to the UPS Defendants' contention that Cabrera did not identify any evidence that the decedent's children sustained pecuniary loss as a result of his death, "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment" (*Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; s*ee Vazquez v 3M Co.*, 177 AD3d 428, 429 [1st Dept 2019]; *see also Ricci v A.O. Smith Water Prods. Co.*, 143 AD3d 516, 516 [1st Dept 2016]). Therefore, the UPS Defendants are not entitled to summary judgment on this issue regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

Accordingly, the UPS Defendants' motion for summary judgment will be denied.

Cabrera's Motion for a Default Judgment Against Creative

In October 2015, Cabrera filed a motion for a default judgment against Creative in the Supreme Court, Kings County, upon Creative's failure to appear or answer the complaint (Notice of Motion, NYSCEF Doc. No. 27 [Index No. 453205/2015]). On May 4, 2016, the Supreme Court, Kings County issued an order transferring the motion to the Supreme Court, New York County (*see* Order, NYSCEF Doc. No. 002 under Kings County, Index No. 503758/2015). The motion is unopposed.

An applicant for a default judgment against a defendant satisfies the requirements of CPLR 3215 (f) by providing "proof of service of the summons and complaint and proof of the facts constituting the claim, the default and the amount due" (*Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016]). "To demonstrate the facts constituting the cause of action, the plaintiff need only submit sufficient evidence to enable a court to determine if the cause of action is viable, since 'defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them'" (*Vanderbilt Mtge. & Fin., Inc. v Ammon*, 179 AD3d 1138 [2d Dept 2020], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). The record satisfies these requirements.

Accordingly, Cabrera's motion for a default judgment against Creative in the Cabrera Action will be granted.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Altitude Equipment Rentals, LLC's motion, pursuant to CPLR 3212, for summary judgment dismissing (1) the amended complaint and the third-party complaint insofar as asserted against it in the action bearing Index No. 453205/2015, (2) the third-party complaint

insofar as asserted against it in the action bearing Index No. 152547/2015, and (3) all cross claims asserted against it in both actions, is granted (motion sequence no. 001); and it is further,

ORDERED that the motion of Wilmer Cabrera, as the administrator of the decedent's estate, for a default judgment against Creative Christmas, Inc., pursuant to CPLR 3215, in the action bearing Index No. 453205/2015, is granted without opposition (motion sequence no. 002); and it is further

ORDERED that Lincoln Square Condominium's motion, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint insofar as asserted against it and all cross claims asserted against it in the action bearing Index No. 453205/2015, is denied (also denominated motion sequence no. 002); and it is further,

ORDERED that the motion of United Parcel Service, Inc. and Robert A. Kreitzer, Jr., pursuant to CPLR 3212, for summary judgment dismissing (1) the amended complaint insofar as asserted against them in the action bearing Index No. 453205/2015, (2) the complaint insofar as asserted against them in the action bearing Index No. 152547/2015, and (3) all counterclaims and cross claims asserted against them in both actions, is denied (motion sequence no. 003).

This constitutes the decision and order of the court.

7/20/20
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	x OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE