

Obst v American Trucking Servs., Inc.

2020 NY Slip Op 34973(U)

July 24, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 610752-15

Judge: Robert F. Quinlan

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SHORT FORM ORDER

INDEX No. 610752-15
CAL. No. 19-01649OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE 1-10-20
ADJ. DATE 6-18-20
Mot. Seq. # 002 - MD

-----X	
RICHARD W. OBST,	SIBEN & SIBEN, LLP
	Attorney for Plaintiff
	90 East Main Street
	Bay Shore, New York 11706
Plaintiff,	
- against -	
	HAMMELL, O'BREIN, CROUTIER, DEMPSEY,
AMERICAN TRUCKING SERVICES, INC.,	PENDER & KOEHLER, P.C.
	Attorney for Defendant
Defendant.	6851 Jericho Turnpike, Suite 250
	Syosset, New York 11791
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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant, filed December 13, 2019; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by plaintiff, filed February 11, 2020; Replying Affidavits and supporting papers by defendant, filed March 11, 2020; Other ____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by defendant American Trucking Services, Inc. for summary judgment dismissing the complaint is denied.

Plaintiff Richard Obst commenced this action to recover damages he allegedly sustained as a result of an accident that occurred at 1101 Oak Point Avenue in Bronx, New York, on January 21, 2014, at approximately 11:30 a.m., during his employ for nonparty Cassone Leasing. The accident allegedly occurred when plaintiff fell while attempting to ascend into the rear of a box truck owned by defendant American Trucking Services, Inc. By the complaint, as amplified by the bill of particulars, plaintiff alleges that defendant was negligent in, among things, failing to maintain its vehicle in a safe condition and creating a dangerous condition, namely certain steps located at the rear of the subject box truck used for stepping up and gaining access into the rear of it. Plaintiff further alleges that such steps were "bent in and under the subject truck rendering them ineffective and unusable."

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Defendant now moves for summary judgment dismissing the complaint. It argues, in part, that it did not owe a duty to plaintiff, that it neither created nor had notice of the alleged dangerous condition, and that the “storm in progress” rule precludes it from being held liable for his injuries. Defendant also argues the plaintiff is unable to identify the cause of his accident, and that the alleged dangerous condition was open and obvious, and not inherently dangerous. Defendant further argues that its alleged negligence was not the proximate cause of the accident. In support of its motion, defendant submits, among other things, the transcripts of the deposition testimony of plaintiff and Brian DeHaven, and various certified weather records.

Plaintiff testified that prior to the accident, “[i]t just started to snow,” and that there was only light flurries. He further testified that there was no accumulation of snow on the pavements or roadways, but it was “sticking.” According to plaintiff’s testimony, two box trucks were used during his employment by Cassone Leasing. Plaintiff explained that the rear of the subject box truck had a step, located on each side, to gain access to the rear of it, where supplies were stored. He further explained that both steps “were pushed under the truck, making them inoperable,” and that they were “[p]robably about 18 inches under the truck.”

Plaintiff testified that the accident occurred when he was in the process of ascending into the rear of the truck to gather supplies. He explained that the accident occurred when his left foot was on the trailer hitch and his right foot was on the platform. He explained that he lost his balance when he was attempting to reach for a grab handle located on his right side. He testified that the platform was “maybe 40 inches” from the ground. According to his testimony, prior to the accident, he climbed up and down into the rear of the box truck to gather supplies between 5 and 10 times, in the same manner, without incident. He also testified that he did not know whether he told anyone that the accident occurred when he slipped and fell on snow after the accident.

According to plaintiff’s deposition testimony, prior to the accident, he did not recall how long the steps had been pushed underneath the subject box truck. Plaintiff allegedly had seen the steps damaged in this manner on prior occasions. Plaintiff stated that the steps were repaired by defendant a couple of times during his employment by Cassone Leasing. He explained that when the steps previously were damaged, he would step onto the trailer hitch of the box truck, then step onto the platform, and then reach for a grab handle. He described the hitch as “[a] regular commercial ball hitch” and stated that both of his feet could not fit on it. Plaintiff allegedly made complaints regarding the condition of the steps to John Spence, who was a foreman, but he allegedly did not recall the last time that he made such a complaint before the accident.

Brian DeHaven testified that at the time of the accident he was employed as a controller for defendant, working on financial aspects of the business. According to DeHaven defendant was owned by Lisa Fenimore and Cassone was owned by her father, Peter Kunz. DeHaven testified that defendant owned one or two box trucks in January 2014, which were stored in its lot when they were not in use. Cassone Leasing allegedly used the box trucks to deliver tools to its work sites but no logs were maintained by defendant on the use of the truck nor did defendant maintain any records of damage caused to the box trucks utilized by Cassone. DeHaven stated he did not know whether inspections of the body of the trucks were performed by defendant or who performed structural repairs to the body of

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the box trucks. He stated that no one employed by defendant was responsible for examining the trucks before or after use. DeHaven stated that he was unaware of whether repairs were made to the body of the box trucks before January of 2014.

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 (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 87 NYS2d 316 [1985]). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, 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 requires a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]).

Contrary to defendant's contention, it failed to establish, prima facie, that it did not owe any duty to plaintiff (*see Burke v Yankee Stadium, LLC*, 146 AD3d 720, 47 NYS3d 261 [1st Dept 2017]). As the owner of the subject box truck, defendant had a duty to maintain it in a reasonable safe condition (*see Burke v Yankee Stadium, LLC*, 146 AD3d 720, 47 NYS3d 261 [1st Dept 2017]; *cf. Maschio v Builders Transport, Inc.*, 201 AD2d 627, 609 NYS2d 618 [2d Dept 1994]). The Court finds there is no basis for the argument by defendant's counsel that it cannot be held liable for plaintiff's alleged injuries on the basis that he was not its employee.

Defendant also failed to establish, prima facie, it neither created the alleged dangerous condition nor had actual or constructive notice of its existence (*see Davis v Sutton*, 136 AD3d 731, 26 NYS3d 100 [2d Dept 2016]; *Elsayed v Al Farha Corp.*, 132 AD3d 942, 20 NYS3d 80 [2d Dept 2015]; *Friedman v 1753 Realty Co.*, 117 AD3d 781, 986 NYS2d 175 [2d Dept 2014]). Defendant failed to proffer evidence regarding when the area of the box truck at issue was last inspected prior to plaintiff's accident (*see Malloy v Montefiore Med. Ctr.*, 183 AD3d 811, 122 NYS3d 532 [2d Dept 2020]; *Nsengiyumva v Amalgamated Warbasse Houses, Inc.*, 180 AD3d 799, 115 NYS3d 912 [2d Dept 2020]; *Troina v Canyon Donuts Jericho Turnpike, Inc.*, 166 AD3d 706, 86 NYS3d 78 [2d Dept 2018]). Further, defendant failed to make a prima facie showing that the alleged defect that caused plaintiff to fall was not visible and apparent, and would not have been noticed upon a reasonable inspection of the accident area (*see Malloy v Montefiore Med. Ctr.*, *supra*; *Fortune v Western Beef, Inc.*, 178 AD3d 671, 115 NYS3d 93 [2d Dept 2019]).

Defendant also failed to establish, prima facie, that plaintiff was unable to identify the cause of his fall without engaging in speculation (*see Moiseyeva v New York City Housing Authority*, 175 AD3d 1527, 109 NYS3d 370 [2d Dept 2019]; *Flanagan v Town of Huntington*, 155 AD3d 1000, 64 NYS3d [2d Dept 2017]; *Pajovic v 94-06 34th Road Realty Co., LLC*, 152 AD3d 781, 59 NYS3d 138 [2d Dept 2017]). Even if plaintiff's fall was precipitated by a loss of balance, defendants failed to eliminate triable issues of fact regarding whether the allegedly defective steps located underneath the box truck were not a proximate cause of his injuries (*see Pajovic v 94-06 34th Road Realty Co., LLC*, *supra*; *DeCarlo v Vacchio*, 147 AD3d 724, 45 NYS3d 581 [2d Dept 2017]; *Boudreau-Grillo v Ramirez*, 74 AD3d 1265, 904 NYS2d 485 [2d Dept 2010]).

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Moreover, defendant failed to establish its prima facie entitlement to summary judgment on the ground that the alleged the alleged dangerous condition was open and obvious and not inherently dangerous (*see Santopetro v Devine Mercy R.C. Parish*, 155 AD3d 1080, 64 NYS3d [2d Dept 2017]; *Schwartz v Reisman*, 135 AD3d 739, 22 NYS3d 879 [2d Dept 2016]; *Surujnaraine v Valley Stream Cent. High School Dist.*, 88 AD3d 866, 931 NYS2d 119 [2d Dept 2011]). Defendant failed to submit sufficient evidence regarding whether the condition of the steps was not inherently dangerous (*see Crosby v Southport, LLC, supra*; *Lee v Acevedo*, 152 AD3d 577, 59 NYS3d 66 [2d Dept 2017]; *Rigatti v Geba*, 140 AD3d 723, 30 NYS3d 898 [2d Dept 2016]).

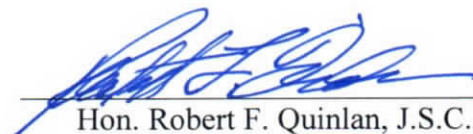
Contrary to defendant's contention, the storm in progress rules does not preclude it from being liable for plaintiff's alleged injuries as matter of law (*see generally Mejias v City of New York, supra*; *Velez v 955 Tenants Stockholders, Inc.*, 66 AD3d 1005, 887 NYS2d 646 [2d Dept 2009]). Although the parties do not dispute that there was precipitation at the time of plaintiff's accident, defendant failed to eliminate triable issues of fact as to whether the alleged dangerous condition of the steps caused or contributed to his injuries (*see Mejias v City of New York, supra*). Plaintiff does not allege that he fell on snow or ice, and that his fall was caused by defendant's failure to remove accumulating snow. Rather, he alleges, among other, that his accident occurred as a result of defective steps underneath the truck.

As to proximate cause, defendant did not satisfy its prima facie burden that plaintiff's conduct in stepping on the trailer hitch to ascend into the rear of the box truck was so unforeseeable as to constitute a superseding and intervening act which severed any nexus between defendant's alleged negligence and plaintiff's injuries (*see Hain v Jamison, supra*; *Munoz v Kiryat Stockholm, LLC*, 162 AD3d 889, 79 NYS3d 264 [2d Dept 2019]; *Biro v Keen*, 153 AD3d 1571, 61 NYS3d 750 [4th Dpt 2017]). As previously indicated, plaintiff testified that on the date of the accident, the steps of the box truck were bent underneath and were "inoperable." He explained that when the steps were bent underneath the subject box truck, on prior occasions and on the date of the accident, he used the trailer hitch to ascend into the rear of it. Under the circumstances, there are triable issues of fact as to whether plaintiff's accident was a natural and foreseeable consequence of defendant's alleged negligence (*see Rodriguez v. 250 Park Avenue, LLC*, 161 AD3d 906, 76 NYS3d 107 [2d Dept 2018]; *Piazza v Volpe*, 153 AD3d 563, 59 NYS3d 466 [2d Dept 2017]).

In light of defendant's failure to meet its prima facie burden, we need not consider the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316).

According, the motion by defendant is denied.

Dated: July 24, 2020


 Hon. Robert F. Quinlan, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION