SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

THEODORE DEXTER, Plaintiff, - against – PARROTT ENTERPRISES, INC., Defendant.	DECISION & ORDER Index Number: 2017-51459 Motion Sequence No.: 4

FORMAN, J., Acting Supreme Court Justice

The Court read and considered the following documents in determining the Defendant's motion for summary judgment:

NYSCEF Docket Numbers: 81 - 107

This personal injury action arises out of a June 29, 2015 accident which occurred during the construction of an affordable housing complex ("the Project") located in Brookfield, Connecticut. Plaintiff alleges that he was injured while setting up certain equipment leased to the Defendant by his employer, Pine Bush Equipment Co., Inc. ("Pine Bush") for use on the Project.

Plaintiff commenced this action on June 20, 2017, asserting causes of action for negligence and violations of New York's Labor Law. Plaintiff sued Laurel Hill Residences, LLC, the owner of the Project site; Dakota Partners, Inc. ("Dakota"), the general contractor for the Project; and Defendant Parrott Enterprises, Inc. ("Parrott"), a sub-contractor on the Project. By Decision and Order dated June 25, 2018, this Court dismissed the complaint as against Defendant Laurel Hill Residences, LLC [*see* NYSCEF Docket No. 59], without prejudice to any action the Plaintiff may file against that defendant in Connecticut. On October 4, 2018, Plaintiff and Dakota executed a stipulation whereby Plaintiff's claims against Dakota were discontinued [*see* NYSCEF Docket No. 64].

Dakota and Parrott entered into a contract in which Parrott was sub-contracted to do, inter alia, certain excavation, paving, and rock hammering work [*see* Dep. Tr. of Mark Ferguson, NYSCEF Docket No. 90, p 17]. According to Mark Ferguson ("Ferguson"), Parrott's President, Parrott and Pine Bush entered into a lease agreement whereby Pine Bush would lease a hydraulic excavator and jack hammer to Parrott for use on the Project [*id.* at p 47; *see also* Pine Bush lease, NYSCEF Docket No. 101]. The Lease "is a contract of rental only" [NYSCEF Docket No. 101, ¶10].

Plaintiff testified at his deposition that Pine Bush rented and sold construction equipment [*see* Pltf. Dep. Tr., NYSCEF Docket No. 89]. Plaintiff was employed by Pine Bush as a driver and customer relations representative [*id.* at pp 9-12]. He also delivered the equipment to the job site and, upon delivery, would demonstrate how the equipment worked [*id*. at p 13].

On the day of the accident, Plaintiff and a co-worker delivered two pieces of equipment to the Project site, an excavator and a jack hammer, for the purpose of breaking rocks [*see* Ferguson Dep. Tr., NYSCEF Docket No. 90, pp 48, 51]. Plaintiff admitted that his sole job at the Project was to deliver and set up the equipment. He was not hired to perform any work at the Project [*see* Pltf. Dep. Tr., NYSCEF Docket No. 89, p 26]. Plaintiff was directed to set up the equipment and put the machine around back [*id*. at p 59]. Plaintiff delivered the equipment on Pine Bush's trailers. Plaintiff met with Ferguson who inspected the equipment for any damage and who signed the rental agreement. Ferguson and all other Parrott employees then left the job site prior to Plaintiff setting up the rental equipment. The only other interaction Ferguson had with Pine Bush was to instruct them to pick up the equipment after the job was finished [*see* Ferguson Dep. Tr., NYSCEF Docket No. 90, pp 52-53].

In order to set up the equipment, Plaintiff had to connect the hammer to the excavator. This involved lining up two pieces of equipment, which he did with the aid of his co-worker. Then, Plaintiff had to remove the "drip caps" from the excavator in order to connect the hydraulic hoses [*see* Pltf. Dep. Tr., NYSCEF Docket No. 89, pp 33-40]. Plaintiff removed the first cap without incident, but as he

attempted to remove the second cap, he slipped and fell backward from the machinery [*id.* at pp 40-45]. Plaintiff had "no idea" why he slipped [*id.* at p 45]. After Plaintiff's fall, his co-worker finished setting up the equipment, tested the hammer, and drove the equipment to where they had been directed [*id*. at pp 58-61].

After joinder of issue and completion of discovery, Parrott now moves for summary judgment dismissing the complaint. Plaintiff concedes that the causes of action brought pursuant to New York's Labor Law must be dismissed as the accident occurred on a construction site in Connecticut. Thus, the only remaining issue is whether Parrott is entitled to summary judgment dismissing the common-law negligence claim.

Parrott argues that it owed no duty to Plaintiff because there was no contract between Parrott and Plaintiff's employer, Pine Bush. In addition, Parrott maintains that it did not supervise and/or control Plaintiff's work. Plaintiff argues that there was a contract between Parrott and Pine Bush and that Plaintiff raised a question of fact as to whether Parrott was obligated under its contract with Dakota to undertake certain safety precautions and procedures.

Parrott has established its prima facie entitlement to judgment as a matter of law on the cause of action alleging common-law negligence by establishing that it did not create or have actual or constructive notice of the alleged condition which caused Plaintiff's injury, and that it did not have the authority to supervise or control the means and methods of Plaintiff's work [*Banscher v. Actus Lend Lease, LLC*, 132 AD3d 707 (2d Dept. 2015)]. In short, Parrott has established as a matter of law that it owed no duty to Plaintiff [*Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002)]. Parrott's submissions establish that it did not own the rental equipment, or the trucks used to deliver the equipment. Parrrott had nothing to do with either the delivery or setting up of the equipment, namely attaching the jackhammer to the excavator.

Plaintiff has failed to raise a triable issue of fact in opposition. Plaintiff's opposition is based on the faulty premise that Pine Bush was a sub-contractor of Parrott. The evidence does not bear this out. There was no contract between Parrott and Pine Bush related to work to be performed at the construction site. Rather, Pine Bush was merely leasing equipment to Parrott to be used at the Project site. Moreover, Plaintiff has failed to produce one shred of evidence that Parrott supervised and/or controlled Plaintiff's work at the job site. Accordingly, whether applying New York or Connecticut law, Plaintiff's claim must fail [*see WEJS v. Heinbockel*, 142 AD3d 990 (2d Dept. 2016), *lv app denied*, 28 NY3d 911 (2016); *Tomyuk v. Junefield Ass'n*, 57 AD3d 518 (2d Dept. 2008); *Murdock v. Croughwell*, 268 Conn 559 (2004)].

Based upon the foregoing, it is hereby

ORDERED, that Parrott's motion for summary judgment is granted and Plaintiff's complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: April 23, 2020
Poughkeepsie, New York

Peter M. Forman

Hon. Peter M. Forman, A.J.S.C.

To: All Counsel of Record via NYSCEF