

Nikocevik v Auer's Moving & Roofing Co., Inc.

2021 NY Slip Op 31439(U)

April 2, 2021

Supreme Court, New York County

Docket Number: 162429/2014

Judge: Richard G. Latin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD G. LATIN PART IAS MOTION 46

Justice

-----X

ORHAN NIKOCEVIK, SABINA NIKOCEVIK,

Plaintiff,

- v -

AUER'S MOVING & ROOFING CO., INC., AUER'S MOVING & RIGGING CO., INC., WHITE GLOVE TRANSPORTATION SERVICES, INC.

Defendant.

-----X

INDEX NO. 162429/2014
MOTION DATE 02/11/2021
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 73, 74, 75, 76, 78, 79, 81, 82

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is ordered that defendant White Glove Transportations Services, Inc.'s ("White Glove") motion pursuant to CPLR 3212 for summary judgment, dismissing the complaint is determined as follows:

Plaintiff Orhan Nikocevnik, a building engineer at the Trump Park Avenue building, commenced the instant action to recover for injuries allegedly sustained when he was struck by a falling metal scaffolding pole while checking for burned-out light bulbs in staircase B of the building on September 6, 2013. On the same day, defendants White Glove and defendant Auer's Moving and Roofing Co., Inc. i/s/h/a Auer's Moving & Rigging Co. Inc. ("Auer's") were engaged in moving out the possessions of the 20th floor penthouse resident at the subject premises. Defendant White Glove now moves for summary judgment on the basis that it did not owe or breach any duty to plaintiffs and did not proximately cause plaintiffs' injuries since it is not the entity that uses the scaffolding poles.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its *prima facie* burden will the burden shift to the opponent “to lay bare his or her proof and demonstrate the existence of triable issues of fact” (*Alvarez*, 68 NY2d at 324; *see al Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In support of the motion, defendant White Glove submits, inter alia, the deposition transcripts of plaintiff, Jose Rivera, rigging foreman for Auer’s, and Maunel Bodre, employee of White Glove.

Plaintiff Orhan stated that on the day of the accident he was walking down Stairway B from the 31st floor checking the lights on each floor and landing. He testified that when he got to the 20th floor, he opened the door to get to the service landing and immediately heard someone scream “watch out” as he was struck by a hard hit. Plaintiff realized after the fact that he was struck by a 6 or 7 foot scaffolding pole. He alleged that after he was hit two guys went to him to see if he was alright. He testified that one of the individual’s was Manny from White Glove and the other was “Marlow” from Auer’s. He also stated that everyone at work knows him as Rocco.

Rivera stated that his role within Auer’s is that of a rigging foreman and explained the rigging aspect of the operation. He stated generally that when a piece of furniture would not fit in the elevator, Auer’s would come in and hoist it with either a crane or set up a scaffold to lift the furniture from outside the building to a window or balcony. He verified that the scaffolding was made from medal pipes.

He believed in September of 2013 that the company was involved in a three-day project at 502 Park Avenue that consisted of moving stuff, furniture, and artwork from about the 20th floor. He also believed that they were working with White Glove on the project as a team. Rivera thought White Glove was handling the moving of items inside the apartment. He recalled that Auer's was bringing other stuff downstairs through the hoist. Rivera averred that on the first day of the job Auer's set up the equipment that was going to be used to lift the items, on the second day they did the actual lifting, and on the third day they broke down the set up and carried it to the truck. He believed that the incident with plaintiff Orhan occurred on the last day, September 6th.

Rivera testified that on the third day they were instructed to come in and finish "breaking down." That consisted of the breakdown of the scaffolding, which was used to create space from the subject penthouse terrace to the winch machine used in hoisting, and the carrying of all the equipment out that was upstairs to downstairs. The scaffolding consisted of pieces of pipe that were six feet, seven feet, and eight feet long. He recounted that the pipes were brought down to the ground through a process where different guys were at different positions. By this he explained that there were a few guys on top, one guy by the elevator, and a couple of guys outside the truck. The two guys on top by the terrace would bring pipes to the person by the elevator. The guy by the elevator would then load the elevator, which would be brought down to the guys waiting to carry the pipes into the truck. He clarified, however, that they were not the only people using the elevator so someone would carry a pipe, pass it to another guy, and that guy would place it someplace near the elevator if it was being used by others. He added that when that happened that items would be staged in the corner, leaning against the wall, until the elevator comes up and opens.

Rivera recounted that he first learned about the incident with plaintiff Orhan sometime shortly after lunch on September 6th. He recalled that he was at the truck loading stuff when an employee named Marlo told him that a guy from the building walked out his door and was hit by a sliding pipe. He further averred that White Glove was still there that day doing their own work, but he was not 100% sure they were there at the time of the accident. To his knowledge, White Glove did not use any pipes, however, as he was downstairs, he was not sure what was going on upstairs.

Bodre testified that at on the day of the accident he was a helper for White Glove concerning the project at 502 Park Avenue in Manhattan and in charge of the job. He additionally stated that he is often referred to as Luis B and that his nephew Manny, who used to work for the company, might have been working that job also. He did not recall if this was a one-day move, if White Glove had been there earlier, or how many days the move took. He did not remember either what was being moved, what apartment was involved in the move, which floor it was on, what time they arrived, how many trucks there were, or how many men there were. He did remember, however, that White Glove was not using any type of metal posts or poles in connection with the move.


Bodre alleged that he did learn that an accident took place on September 6, 2013 while he was at the subject building. He claimed that he was waiting by the service elevator after his job was completed and that when the elevator got to the floor, Rocco was there. Rocco went into the apartment involved with the move and Bodre waited for him to come back to operate the service elevator. It was then when Rocco returned that he was informed that a pole hit Rocco. Bodre stated that he did not learn exactly how the accident happened and could not remember Rocco's exact words. Bodre further testified that he was not the Manny that gave a statement to anyone about the

accident and did not tell anyone that Auer’s placed the metal posts against the stairway. Additionally, he verified that he did not witness the accident or yell “watch out” to Rocco as it happened. Moreover, he did not know if Auer’s used metal poles.

As a general matter, a duty undertaken as a contractual obligation does not normally extend to third parties that are not in privity of contract (see *Eaves Brooks Costume Co. v YBH Realty Corp.*, 76 NY2d 220 [1990]). However, an exception to this general rule exists where a party that fails to exercise reasonable care in the performance of its contractual duties and launches a force or instrument of harm may be subject to tort liability to a third party (see *Espinal v Melville Snow Construction*, 98 NY2d 136 [2002]; *Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253 [2007]; *Church v Callanan Indus.*, 99 NY2d 104 [2002]). Here, through the evidence submitted, movant established that it did not own the pole in question and that White Glove did not carry any poles as part of the job that day. Nevertheless, movant failed to eliminate all triable issues of fact since it did not demonstrate that White Glove never touched, moved, or placed any of the poles that were leaning against the wall by the subject stairway and service elevator as its employees were moving items from the subject penthouse apartment to the service elevator. Thus, White Glove failed to meet its prima facie burden in establishing that it did not launch the instrument of harm that proximately caused plaintiffs’ injuries.

Accordingly, defendant White Glove’s motion for summary judgment is denied.

This constitutes the decision and order of the Court.

<u>4/2/2021</u> DATE	 RICHARD G. LATIN, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE