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| <b>Wright v Sears</b>                                                                                                                                                                                                          |
| 2022 NY Slip Op 35173(U)                                                                                                                                                                                                       |
| October 20, 2022                                                                                                                                                                                                               |
| Supreme Court, Bronx County                                                                                                                                                                                                    |
| Docket Number: Index No. 26237/2018E                                                                                                                                                                                           |
| Judge: Bianka Perez                                                                                                                                                                                                            |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 14**

-----X  
DETROIT T. WRIGHT,

Plaintiff,

**Index №. 26237/2018E**

**-against-**

**Hon. BIANKA PEREZ,**

**Justice Supreme Court**

DANIEL P. SEARS, HALE TRAILER BRAKE &  
WHEEL INC., A ONE LEASING LLC, TSC 2016  
LLC MACQUESTIN CONSTRUCTION  
MANAGEMENT LLC, and 2030 CRESTON  
AVENUE LLC.,

Defendants.

-----X  
MACQUESTIN CONSTRUCTION MANAGEMENT  
LLC,

Third-Party Plaintiff,

**-against-**

TSC 2016 LLC,

Third-Party Defendant.

-----X  
The following papers were read on these Motions and Cross-Motions (NYSCEF **Seqs. No.s 1-5**), for **SUMMARY JUDGMENT**, submitted **August 9, 2022**.

|                                                  |                                                                                                                                            |
|--------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Notice of Motion</b> –Affirmation & Exhibits  | NYSCEF Doc #(s): (Seq 1: 84-101) (Seq 2: 90-101) (Seq 3: 123-133) (Seq 4: 137-154) ( Seq 5: 155-177)                                       |
| Answering Affirmation & Exhibits on Motions      | NYSCEF Doc #(s): (Seq 1: 104-117) (Seq 2: 120-122, 240-243, 247) (Seq 3: 224-231) (Seq 4: 186-198, 290, 294-295) (Seq 5: 199-211, 232-239) |
| Reply on Motions                                 | NYSCEF Doc #(s): (Seq 1: 178) (Seq 3: 293, 298) (Seq 4: 299-302) (Seq 5: 308)                                                              |
| Notice of Cross-Motion-Affirmation & Exhibits    | Doc #(s): (Seq 2: 248-274) (Seq 3: 212-223)                                                                                                |
| Answering Affirmation & Exhibits on Cross-Motion | NYSCEF Doc #(s): (Seq 2: 296-297) (Seq 2 opp filed as Seq 5: 275-289) (Seq 3: 291-292)                                                     |
| Reply on Cross-Motions                           | NYSCEF Doc #(s): (Seq 2: 296-297) (Seq 2 filed as Seq 5: 303)                                                                              |
| Letter                                           | NYSCEF Doc #(s): (Seq 4: 307) (Seq 5: 306)                                                                                                 |

### Procedural History

This is a personal injury action in which plaintiff, DETROIT T. WRIGHT, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on September 11, 2017, at the intersection of Creston Avenue and East Burnside Avenue, Bronx, New York.

At the time of the accident plaintiff was proceeding through the intersection of Creston Avenue and Burnside Avenue heading right towards the Grand Concourse when a truck owned by defendant TRAILER BRAKE & WHEEL INC. (hereinafter Hale) and operated by defendant DANIEL P. SEARS (hereinafter Sears) who was employed by defendant A ONE LEASING LLC (hereinafter A-One) backed into plaintiff's vehicle. Sears was delivering a concrete slab to a construction site near the intersection. There were flagmen directing traffic with STOP signs on the driver's side of the truck to stop vehicles attempting to go under the overpass on Burnside Avenue and there was another flagman holding a SLOW or STOP sign to bear right at the intersection for vehicles intending to go to the Grand Concourse. According to plaintiff there was a flagman with a SLOW sign allowing cars to bear right. Plaintiff passed the green light at the intersection and then went to the right when the truck backed into his vehicle causing the collision. The flagman were employed by defendant TSC 2016 LLC (hereinafter TSC) who was contracted to provide flagging services by defendant MacQuesten Construction Management LLC s/h/a MacQuestin Construction Management LLC (hereinafter MacQuesten) the General Contractor for the construction project. The owner of the building under construction is 2030 Creston Avenue LLC (hereinafter 2030 Creston) who contracted with defendant MacQuesten.

Plaintiff commenced an action for personal injuries against the defendants by filing a summons and complaint on May 30, 2018. Issue was joined by service of defendants' answers with various cross-claims on July 9, 2018 defendant Hale, on July 27, 2018 defendant MacQuesten, on August 3, 2018 defendant 2030 Creston and September 10, 2018 defendant Sears and A-One. The attorneys for defendants Sears and A-One filed a consent to change attorney to represent defendant Hale in this action together with defendants Sears and A-One on February 12, 2019.

Defendant/Third-party plaintiff filed a third-party action against third-party defendant TSC on November 18, 2019. An amended summons and complaint was filed and served adding TSC as a first party defendant on November 27, 2019. Defendant TSC filed its answer on December 9, 2019. Defendants filed their answers to all cross-claims. All discovery was agreed by all parties to be completed and the Note of Issue was filed on November 24, 2021.

Defendants move and cross-move for summary judgment on liability and contractual indemnity claims. Plaintiff cross-moves on liability against defendants Sears, Hale and A-One.

## Motions Seq 1 & 2

Defendants' move for an Order Vacating the Note of Issue, compelling plaintiff to provide discovery and extend the time to file dispositive motions which have been rendered moot as all discovery issues have been resolved and the parties stipulated to extend the time to file motions.

Accordingly, the motions to vacate the Note of Issue are denied as moot.

## Cross-Motion Seq 2

Defendant/third-party defendant TSC cross-moves for summary judgment pursuant to CPLR § 3212 on the issue of liability dismissing the plaintiff's amended complaint, dismissing the third-party complaint, dismissing all cross-claims against them and granting summary Judgment on it's contractual indemnity claim against defendant MacQuesten.

In support of the cross-motion, Defendant, TSC submits the parties' deposition testimony, non-party Cerene Mayes deposition transcript, the pleadings, contract between TSC, tender letter, and TSC billing records. Defendant TSC was hired by the General Contractor defendant MacQuesten to provide flagging services for the construction project. Defendant TSC alleges they are not responsible per the contract MacQuesten is to indemnify TSC. In addition, TSC argues they are not liable as they owed no duty to plaintiff.

Plaintiff and defendant MacQuesten oppose arguing the motion is untimely pursuant to Part 14 rules. In addition, they argue the defendant TSC was negligent through it's employees in failing to properly direct traffic at the subject intersection. Defendant MacQuesten opposes the portion of the cross-motion for contractual indemnification arguing material issues of fact exist as to TSC's fault and state the contractual claims cannot be decided as a matter of law before a jury decides the questions of fact on the issue of liability.

Here, defendant/third-party TSC filed their cross-motion over 60 days from the filing of the Note of Issue which is unrelated to the initial motion to vacate the Note of Issue. Thus, defendant's cross-motion should be denied as untimely in violation of the Court Part 14 Rules and CPLR §3212(a). In considering the merits of the motion, TSC's submission fails to establish their *prima facie* burden as there are several versions of the events leading to the collision thereby creating questions of fact.

Defendant's failure to make a *prima facie* showing requires denial of the motion regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Viewing the evidence in the light most favorable to the non-moving parties and applying the principles that issues of negligence and proximate cause are fact-intensive questions best suited for the jury, the Court cannot say that all issues of fact have been eliminated. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such

issues, or where the issue is arguable; issue-finding, rather than issue-determination, is the key to the procedure, (see *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Accordingly, defendant, TSC's cross-motion is denied.

### **Motion and Cross-Motion Seq 3**

Defendants, Sears, Hale and A-One move for Summary Judgment on the issue of liability pursuant to CPLR 3212 dismissing the plaintiff's amended complaint and all cross-claims and/or counter-claims asserted against them.

In support of the motion, Defendants submit the parties' deposition testimony, non-party Cerene Mayes deposition transcript, the pleadings and an affidavit from Jason D'Amico employed by defendant Hale which fails to comply with CPLR §2309(c). Defendant Sears and its employer defendant A-One allege they were not responsible for the collision as they were only required to follow the flagman who instructed the driver of the vehicle when to back up. Defendant Hale moves to dismiss as they allege they are in the commercial business of renting/leasing vehicles and are not liable pursuant to the Graves Amendment.

Plaintiff opposes and cross-moves for summary judgment against defendants, Sears, Hale and A-One on the issue of liability alleging the defendants were negligent in unsafely backing up their truck into his vehicle in violation of VTL §1211. In addition, plaintiff alleges defendant Sears cannot rely on VTL §1102 as Sears relied on an employee of MacQuesten to back up the truck not the TSC flagperson who was directing street traffic. In opposition to defendant Hale's motion under the Graves amendment plaintiff points out movant's failure to meet his burden on the motion as movant failed to annex the leasing contract and the affidavit annexed to the moving papers fails to comply with CPLR §2309(c).

In opposition to defendants Sears, Hale and A-One's motion, defendant MacQuesten also argues the movants failure to establish as a matter of law there are not liable as movant failed to annex the lease and failed to establish the relationship between defendant Sears, A-One and Hale in the affidavit of Jason D'Amico.

In opposition to plaintiff's cross-motion defendants, Sears, Hale and A-One argue that the flag person instructed plaintiff to STOP not SLOW down but plaintiff blew past him and disobeyed the instructions of the flag person in violation of VTL § 1102. It is further alleged in opposition that plaintiff ignored the flagperson pulled out of the line of stopped cars and tried to go around rear of trailer causing the collision.

Here, it is clear that there are several versions of the events leading to the collision. Thus, defendants, Sears, Hale and A-One's submissions fail to prove freedom from negligence as a matter of law, and therefore, is insufficient to meet their *prima facie* burden. Defendants' failure to make a *prima facie* showing requires denial of the motion regardless of the sufficiency of the opposing

papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Viewing the evidence in the light most favorable to the non-moving parties and applying the principles that issues of negligence and proximate cause are fact-intensive questions best suited for the jury, the Court cannot say that all issues of fact have been eliminated. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is arguable; issue-finding, rather than issue-determination, is the key to the procedure, (see *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

On plaintiff's cross-motion, plaintiff failed to establish a *prima facie* case against the defendants, Sears, Hale and A-One as there exists questions of fact on the issue of liability. Thus, there exists questions of fact as to plaintiff's alleged violation of VTL § 1102 in failing to yield or stop.

Accordingly, defendants, Sears, Hale and A-One's motion and plaintiff's cross-motion are denied.

#### **Motion Seq 4**

Defendant/third-party plaintiff MacQuesten moves for Summary Judgment pursuant to CPLR § 3212 on the issue of liability and dismissing the amended complaint and all cross-claims; dismissing Co-defendants and Third-Party Defendants' claims, cross-claims and/or counter-claims, as a matter of law; granting Defendant/Third-Party Plaintiff MACQUESTEN's Motion for Summary Judgment on all cross-claims, including those for common-law indemnification, contribution and/or indemnification, contractual indemnification, failure to obtain insurance coverage, against Codefendants, as a matter of law; and granting Defendant/Third-Party Plaintiff MACQUESTEN's Motion for Summary Judgment on all third-party claims, including those for common-law indemnification, contribution and/or indemnification, contractual indemnification, failure to obtain insurance coverage, against Third-Party Defendants TSC 2016, LLC. The portion of the Motion for Summary Judgment against defendant 2030 Creston is withdrawn (NYSCEF Doc # 307).

MacQuesten was the General Contractor for the project. Defendant MacQuesten alleges it bears no liability herein as defendant Sears was not an employee of defendant MacQuesten and the vehicle he was operating was not owned by them. Defendant MacQuesten further alleges that although they managed the job site, they did not supervise, direct or control the third-party defendant TSC. The portion of the Motion for Summary Judgment against defendant 2030 Creston is withdrawn.

In support of the motion, Defendant, MacQuesten submits the parties' deposition testimony, non-party Cerene Mays deposition transcript, the police report and the pleadings. In opposition, plaintiff argues that defendant MacQuesten had his own flagperson, spotters and employees on site who instructed all workers including defendant Sears on the flow of traffic and specifically the

movement of the truck at the time of the collision. Defendants, Sears, Hale and A-One's argue in opposition, that defendant MacQuesten's employees were instructing defendant Sears at the time of the accident and therefore are liable. Defendant 2030 Creston also argues in opposition that defendant MacQuesten was responsible for all aspect of the jobsite safety, for the hiring of all the flaggers and for coordinating all deliveries and therefore are liable.

Defendant's submission fails to prove freedom from negligence as a matter of law, and therefore, is insufficient to meet their *prima facie* burden. Here, there's questions of fact as to who directed and controlled the work at the site. Thus, defendant's failure to make a *prima facie* showing requires denial of the motion regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Viewing the evidence in the light most favorable to the non-moving parties and applying the principles that issues of negligence and proximate cause are fact-intensive questions best suited for the jury, the Court cannot say that all issues of fact have been eliminated. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is arguable; issue-finding, rather than issue-determination, is the key to the procedure, (see *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Accordingly, defendant, MacQuesten's motion is denied.

### **Motion Seq 5**

Defendant 2030 Creston moves for summary judgment pursuant to CPLR § 3212 on the issue of liability dismissing the plaintiff's amended complaint and all cross-claims against them. The portion of the Motion for Summary Judgment against defendant Macquesten on it's contractual indemnity claim is withdrawn (NYSCEF Doc # 306).

Defendant 2030 Creston is the owner of the building under construction where the truck driven by defendant Sears was making it's delivery of a concrete slab. 2030 Creston contracted with defendant MacQuesten to act as the General Contractor for the project. 2030 Creston moves to dismiss as they were not actively involved in the construction project in any way and defendant MacQuesten was responsible for essentially everything that was required in connection with the construction of the building. In addition, the accident occurred in the street not on the property owned by defendant 2030 Creston. In support of the motion, Defendant submits the parties' deposition testimony, non-party Cerene Mays deposition transcript, and the pleadings.

In opposition, plaintiff and defendant MacQuesten argue that defendant 2030 Creston is liable as they derived a special use of the roadway during the construction of the building and therefore owed a duty to plaintiff and others on the roadway to provide safe conditions on the roadway.



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 (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *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; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]). Here, defendant 2030 Creston established that the collision occurred outside the construction site on the roadway and that none of the exceptions apply. In addition, the testimony submitted in support establishes the moving defendant 2030 Creston did not have any employees at the site and did not control the work. Thus, defendant’s submissions are sufficient to establish as a matter of law their lack of involvement in the collision. In opposition, plaintiff and defendant MacQuesten failed to raise an issue of fact herein.

Accordingly, defendant 2030 Creston’s motion is granted. The portion of the motion seeking contractual indemnification from defendant MacQuesten is permitted to be withdrawn.

Accordingly, it is hereby

ORDERED, that the motions to Vacate the Note of Issue (Seq 1 & 2) are denied as moot, and it is further

ORDERED, that the cross-motion by defendant TSC (Seq 2 ) is denied in its entirety, and it is further

ORDERED, that the motion by defendants Sears, Hale and A-One (Seq 3) is denied is denied in its entirety, and it is further

ORDERED, that the cross-motion by plaintiff (Seq 3) is denied in its entirety, and it is further

ORDERED, that the motion by defendant MacQuesten (Seq 4) is denied in its entirety and the portion of the motion against 2030 Creston is permitted to be withdrawn, and it is further

ORDERED, that the motion by defendant 2030 Creston is granted and the portion of the motion against MacQuesten is permitted to be withdrawn, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant 2030 CRESTON AVENUE LLC. and against plaintiff and co-defendants dismissing the amended complaint and all cross-claims against them.



This constitutes the Decision and Order of this Court.

**Dated: October 20, 2022**



**HON. BIANKA PEREZ, J.S.C.**

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1. CHECK ONE..... ✓ CASE STILL ACTIVE

2. MOTION IS

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3.