

**State v Fresh Direct, LLC**

2023 NY Slip Op 34768(U)

January 26, 2023

Supreme Court, Queens County

Docket Number: Index No. 708518/2017

Judge: Pam Jackman Brown

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This opinion is uncorrected and not selected for official publication.

**NEW YORK STATE SUPREME COURT  
QUEENS COUNTY – IAS PART 19**

**AMENDED  
SHORT FORM ORDER**

**Present: HON. PAM JACKMAN BROWN  
Justice**



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**CAROLYN STATE, as Administrator of the  
Estate of JOHN STATE, ,**

**Plaintiff,**

**Index No.: 708518/2017  
Mot Seq #:002 & 004**

**-against-**

**FRESH DIRECT, LLC, FRESH PROPERTY  
BRONX LLC, SCHIMENTI CONSTRUCTION  
COMPANY, LLC, and OUR RENTAL CORP,**

**Defendants.**

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**FRESH DIRECT, LLC, FRESH  
PROPERTY BRONX, LLC, and  
SCHIMENTI CONSTRUCTION  
COMPANY, LLC,**

**Third- Party Plaintiffs,**

**-against-**

**RUTTURA & SONS  
CONSTRUCTION CO., INC.,**

**Third- Party Defendant.**

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Recitation, as required by CPLR § 2219(a), of the following papers read on this motion sequence 002, by Defendants for an Order pursuant to CPLR §3212 granting

OUR RENTAL CORP. summary judgment dismissing the plaintiffs’ complaint in its entirety as well as all cross-claims asserted by the codefendants Fresh Direct LLC, Fresh Property Bronx LLC and Schimenti Construction Company for indemnification, contribution and breach of contract for failure to procure insurance and for such other, further relief as this Court deems just and proper.

**E-Filed papers numbered**

**Notice of Motion - Affidavits - Exhibits (Sequence #002).....100-113**

**Notice of Motion - Affidavits- Exhibits (Sequence #004).....162-203**

**Affidavit in Opposition, Affidavits and Exhibits (Sequence #002).....125-161**

**Affidavit in Opposition and Response to Statement of**

**Material Facts, Affidavits, Exhibits.....205-206**

**Reply Affidavit (Sequence #002).....207**

**Reply Affidavit and Affidavit of Service (Sequence #004).....208-209**

The motions are decided in accordance with this Decision and Order.

Plaintiff commenced the labor law action by filing a Summons and Complaint on June 20, 2017. Plaintiff alleges that while working on a project at the Fresh Direct Project on July 18, 2016 at 2 St. Anne’s Avenue in Bronx, New York, he was struck in the head and face by concrete rocks, cement mixture and foam cleaning balls. Plaintiff alleges these items flew from a concrete pump truck that was being cleaned by Ruttura & Sons Construction Co. Inc’s employee, Karim Huneidi. As a result, Plaintiff states he sustained serious injuries to his face and suffered a traumatic brain injury.

Defendant, Our Rental Corp (hereinafter referred to as “Defendant Our Rental”) now moves for summary judgment. Defendant Our Rental argues they are not associated with the project being completed on the premises. Defendant Our Rental states they did not enter into contract with Schimenti Construction, Fresh Direct LLC or Fresh Property Bronx LLC.

When moving for summary judgment, the movant bears the initial burden of establishing, *prima facie*, entitlement to judgment as a matter of law, offering sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320[1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851[1985]; *Zuckerman v. City of New York*, 49 NY2d 557[1981]). Once a *prima facie* showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (CPLR §3212; *Giuffrida v. Citibank Corp.*,100 NY2d 72[2003]; *see also*

*Zuckerman v. City of New York*, 49 NY2d at 557).

In support of the summary judgment motion, Defendant Our Rental submits to the Court, the summons and complaints, answers, verified bill of particulars, a rental agreement, affidavit of Dominic Thomas Ruttura and the transcript of Plaintiff, Samantha Rutturra, and Robert McDougal. The transcript of Plaintiff was signed and notarized. The transcript of Samantha Rutturra and Robert McDougal were not signed and notarized and bears not relevance for the Court's consideration. After review of the rental agreement, it is titled, "Work Order", signed but not acknowledged as to who signed it and what authority they had to sign the agreement. Additionally, the agreement lacks a date as to when it was signed. The documentation is not sufficient to prove that a valid contract existed as argued by Defendant.

After a full review of the admissible documents submitted in support of the motion, Defendant has failed to meet their burden as to demonstrating the absence of any material issues of fact. Accordingly, the motion, sequence #002, for summary judgment is denied.

The Court now turns to the motion sequence #004, filed by Plaintiffs. In support of the motion, Plaintiffs submit documentation in support of their position the entity Our Rental Pumps LLC and Our Rental Truck are alter egos of each other. Plaintiffs conducted the deposition of the owner of Our Rental Pumps LLC, giving notice of the pending litigation. This gave notice of the pending litigation. Therefore, no prejudice exists. Defendants argue because Plaintiff has passed since the deposition, Our Rental Pumps LLC would be prejudiced. However, counsel filed the opposition to the motion on behalf of Rutturra,, Our Rental Truck and Our Rental Pumps representing all three entities. Accordingly, the Court rejects this argument. After full review of the documentation submitted and review of the opposition submitted by Our Rental Truck, the motion sequence #004 is granted to the extent the caption is modified to include Our Rental Pumps LLC in the action.

Accordingly,

**IT IS HEREBY ORDERED** motion sequence #002 seeking summary judgment and dismissing the action is denied in its entirety.

**IT IS HEREBY FURTHER ORDERED** motion sequence #004 is granted to the extent, OUR RENTAL PUMPS LLC is added to the action, and the caption is amended to reflect such as follows:

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**CAROLYN STATE as Administrator of the Estate of  
JOHN STATE, deceased, and CAROLYN STATE,  
Individually,**

**Plaintiffs,**

**-against-**

**FRESH DIRECT, LLC, FRESH  
PROPERTY BRONX LLC,  
SCHIMENTI CONSTRUCTION  
COMPANY, LLC, OUR RENTAL  
PUMPS LLC and OUR RENTAL PUMPS,**

**Defendants.**

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**FRESH DIRECT, LLC, FRESH  
PROPERTY BRONX, LLC,  
and SCHIMENTI CONSTRUCTION  
COMPANY, LLC,**

**Third- Party Plaintiffs,**

**-against-**

**RUTTURA & SONS  
CONSTRUCTION CO., INC.,**

**Third- Party Defendant.**

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**IT IS HEREBY FURTHER ORDERED** Plaintiff is granted leave to amend the Complaint as to allege negligence causes of action against Our Rental Pumps LLC and leave to Supplemental Summons and Amended Complaint.

**IT IS HEREBY FURTHER ORDERED** that a copy of this Order with Notice of Entry with the amended Summons and Complaint must be served on Counsels for the Defendants that have appeared and service pursuant to CPLR 308 on all not appearing/added Defendants within 10 days of Entry.

**IT IS HEREBY FURTHER ORDERED** all other relief not explicitly granted is

denied.

The above constitutes the Decision and Order of the Court determining motion sequence #002 and #004.

Dated: January 26, 2023

Jamaica, NY



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HON. PAM JACKMAN BROWN, JSC

