

Shelby v Shalmer Trucking Corp.

2024 NY Slip Op 30073(U)

January 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 507625/2020

Judge: Debra Silber

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.

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of January, 2024.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

TERRENCE SHELBY,

Plaintiff,

DECISION / ORDER

- against-

Index No.: 507625/2020
Mot. Seq. No. 6, 7, 8, 9

SHALMER TRUCKING CORP.,
AUTOMOTIVE FACILITY SERVICES, INC.
AND SHAWN CONSTRUCTION INC.,

Defendants.

-----X

The following e-filed papers were read herein:

NYSCEF Doc. Nos.

Notices of Motion, Affirmation and Exhibits	<u>95-114; 115-130; 134-147; 151-164</u>
Opposing Affirmations and Exhibits	<u>169; 168; 167; 166</u>
Replies	<u>175-177; 178-180; 174; 181-182</u>

This is a personal injury action which arises from an accident which took place on the sidewalk in front of 100 Dobbin Street, Brooklyn, NY, on December 1, 2019. This location has a sports event space and a gymnasium. Plaintiff claims he parked his car at the curb and exited the vehicle. He stepped onto a large plywood board that was on the sidewalk which had not been placed atop a sidewalk flag but had been placed over an area of soil which was lower than the level of the sidewalk, and the plywood buckled under his

foot. Plaintiff alleges that he sustained a fractured right ankle. Plaintiff claims the board was about 6 feet by 5 feet and was covering a “hole” in the sidewalk. He commenced this action against the property owner at the time, Shalmer Trucking Corp. (hereafter “Shalmer”), as well as two other defendants, Automotive Facility Service, Inc. (hereafter “Automotive”) and Shawn Construction Inc. (hereafter “Shawn”).

In motion sequence 6, defendant Automotive moves for an order, pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross-claims asserted against it. In motion sequence 7, defendant Shawn moves for an order, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it. In motion sequence 8, defendant Shalmer moves for an order, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it. In motion sequence 9, plaintiff moves for partial summary judgment on the issue of liability solely as against defendant Shalmer, and an order striking all defendants’ affirmative defenses of comparative fault.

Factual Background and Procedural History

Plaintiff commenced the action by filing the summons and verified complaint on May 26, 2020 against Shalmer and Automotive, two of the three defendants. Defendants answered the complaint and discovery ensued. Defendant Automotive asserted a cross-claim against Shalmer, and Shalmer asserted a cross-claim against Automotive. Plaintiff then moved for leave to amend the complaint to add Shawn as an additional defendant. The motion was granted without opposition. In motion sequence 2, plaintiff sought a default judgment order as against defendant Shawn, which was granted. Shortly

afterwards, the court so-ordered a stipulation vacating that order, and defendant Shawn answered the amended complaint and asserted cross-claims against Shalmer and Automotive. Motions 3, 4 and 5 were related to discovery. The Note of Issue was filed on July 17, 2023. These motions were all timely filed.

Plaintiff's amended complaint alleges that the incident occurred on the sidewalk in front of the premises located at 100 Dobbin Street, Brooklyn. He claims he was caused to trip and fall "as a result of the dangerous, defective, hazardous, broken, depressed, holey, uneven, unsafe and/or traplike condition of the public sidewalk" [bill of particulars ¶3].

The Motions

In support of plaintiff's motion for summary judgment, plaintiff submits an affirmation of counsel, the pleadings, the deposition transcripts and the photos authenticated, and an invoice issued by defendant Shawn to defendant Shalmer dated November 12, 2019 for "removed . . . existing sidewalk concrete [and] provided and installed new concrete."

Plaintiff's counsel avers [Doc 153] that defendant Shalmer, "as owner of the premises with a nondelegable duty to maintain its sidewalk, is liable to Plaintiff for causing a dangerous condition. Moreover, Defendant Shalmer Trucking Corp., had constructive notice of the aforesaid defective and dangerous condition." He further argues that Shawn was hired to do "concrete work to the sidewalk" and that the work took a couple of days from September to November of 2019. Counsel points out that Shalmer's EBT witness, Mr. Elliot Ambalo, "admitted that the location depicted in the photographs was part of the premises located at 100 Dobbin in Brooklyn, owned by defendant Shalmer

Trucking Corp. He further admitted that the photos depict the "plywood" in front of the subject property" [Doc 153 ¶24]. The EBT witness for defendant Shawn, Chaudhry Ali, testified that his company had replaced the sidewalk. There was no written contract. He testified that "After the work was completed, Ali returned to the subject premises to check if anything was damaged before sending the invoice. When he returned, he removed the tape barricade and cones that were erected around the work" [Doc 162 at 34, 46, 64, 66, 68, 82, 83, and 102].

To be clear, plaintiff's counsel is solely seeking summary judgment against defendant Shalmer, as "When an owner has a nondelegable duty, it cannot point fingers at its contractors. The fact that defendant Shalmer Trucking Corp., hired defendant Shawn Construction to do work on the sidewalk in front of the premises Defendant Shalmer Trucking Corp., owns does not release him from his responsibility to maintain the premises in a safe condition." Counsel cites NYC Administrative Code 7-210 and *He v Troon Mgt., Inc.*, 34 NY3d 167 [2019]. He further argues that Shalmer created the dangerous condition, as plaintiff was in the area regularly, and plaintiff testified that the plywood had only been there for about a week. In the alternative, he argues that Shalmer had actual and/or constructive notice of the dangerous condition. The court notes that plaintiff's counsel's affirmation makes no mention whatsoever of defendant Automotive.

The first motion (#6) was brought by defendant Automotive. Essentially, this defendant claims it was a contractor at the premises, but "only performed work inside the premises. Furthermore, Automotive Facility did not damage the sidewalk or make a special use of the sidewalk in any manner upon entering or exiting the premises where it

performed work. Therefore, there is no evidence that Automotive Facility caused or created a defective condition or was in any way negligent” [Doc 96 ¶3]. The motion is supported with an affirmation of counsel, the pleadings, the EBT transcripts of all four parties, with photos, and an estimate dated 10/4/19 [Doc 112] from Automotive to the tenant at the premises for renovation work, specifically, installing sheetrock and painting it. As this was the first motion filed, counsel’s affirmation in support does not include any opposition to any of the other motions.

Only plaintiff opposes this motion, and claims that Automotive fails to make a prima facie case for summary judgment, and that it was Automotive that used the plywood and left it on the sidewalk [Doc 169]. It is noted that this affirmation in opposition was written and filed after plaintiff’s motion, #9, which completely fails to mention Automotive.

Shawn’s motion, #7, includes an attorney’s affirmation, the pleadings, the EBT transcripts, a memorandum of law and the invoice for the sidewalk work which was previously described. Counsel’s affirmation in support fails to make any legal arguments, and merely summarizes the procedural history of this matter. It also fails to oppose Automotive’s motion. In the memo of law, counsel claims that Shawn was “specifically prohibited by the Department of Buildings to cover or otherwise manipulate the tree hole at the subject premises during the sidewalk replacement. There are no allegations that the sidewalk itself, or Shawn’s work with respect to the sidewalk replacement, caused Plaintiff’s accident. Plaintiff tripped over plywood that was used to cover an exposed tree hole left untouched by Shawn’s work pursuant to Department of Buildings requirements.

Second, Shawn breached no duty. Indeed, Shawn’s work at the subject premises was completed at least 19 days before the accident happened.” [Doc 129 Page 2]. Counsel further states that “In fact, Shawn never uses plywood while removing and replacing a sidewalk for any reason. (Exhibit “J” at p. 109) No party to this action has been able to identify who placed the plywood over the exposed tree hole that Plaintiff tripped on.” In her reply affirmation, counsel notes that “Shawn’s motion was not opposed by any of the defendants. Only the Plaintiff filed a vague affirmation in opposition, wherein it is argued that Shawn used and left plywood on the sidewalk when they finished their work. However, Plaintiff cites no evidence to support this speculative and unfounded theory. Nor does Plaintiff offer any legal precedent to defeat the case law cited in Shawn’s motion papers.”

The only opposition, again, is from the plaintiff. His attorney avers that Shawn fails to make a prima facie case for summary judgment, and that it was Shawn that used the plywood and left it on the sidewalk when they finished their work [Doc 168 ¶4].

The next motion, #8, is brought by Shalmer, the property owner. The motion is supported by an affirmation of counsel and otherwise the same documents are submitted in support as were submitted in support of the prior motions, with the addition of an affidavit from Mr. Elliot Ambalo, Shalmer’s EBT witness [Doc 147]. He says he is submitting the affidavit “to supplement my deposition testimony.” Mr. Ambalo then states that “In addition to the fact that Shalmer did not install and place the plywood over the tree well in front of the property where plaintiff claims to have fallen, Shalmer did not create the alleged dangerous condition of the plywood, as alleged, never repaired or altered it in any

way or made any use of the tree well, with or without the alleged plywood covering. Moreover, Shalmer did not cause anyone else to do so on Shalmer's behalf.”

Counsel for Shalmer argues that the complaint should be dismissed against Shalmer, the property owner, because Shalmer does not know who placed the plywood over the tree well, or who placed the cones around it, which are in the photos [Docs 108 and 109]. He claims that the tree well was not filled in with concrete because this was prohibited by the NYC Department of Buildings, “so the City could later plant trees” [Doc 135 ¶17]. The movant cites to no statute, rule, regulation or document for this claim. The legal argument proffered is that “City-owned tree wells are not considered part of the sidewalk for purposes of application of the “Sidewalk Law” which imposes a duty on property owners to maintain the abutting sidewalks in a reasonably safe condition. It is also clear under the law that material installed in and upon tree wells is also considered part of the tree well” [*id.* ¶25]. He concludes “Shalmer has established prima facie entitlement to summary judgment since it did not install the plywood; did not create the alleged dangerous condition; did not make any repairs or alterations to the tree well or plywood; and never made any use of the tree well with or without the plywood” [*id.* ¶28].

The only opposition, again, is from the plaintiff. His attorney avers that Shalmer fails to make a prima facie case for summary judgment, and “as owner of the premises with a nondelegable duty to maintain its sidewalk, is liable to Plaintiff for causing a dangerous condition. Moreover, Defendant Shalmer had constructive notice of the aforesaid defective and dangerous condition. While performing these duties and responsibilities, by and through its agents, contractors, servants and/or employees,

defendant Shalmer should have discovered the defective and dangerous condition and remedied it, and/or provided sufficient warning.” [Doc 167 ¶4].

Standards for Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of

fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115

[2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

More specifically, "a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (see *Burke v Umbaca*, 163 AD3d 618, 618 [2d Dept 2018]; *Ash v City of New York*, 109 AD3d 854, 855 [2d Dept 2013]).

Discussion

NYC Administrative Code § 7-210 imposes a non-delegable duty upon property owners to maintain and repair the sidewalk abutting their property, and specifically imposes liability upon property owners for injuries resulting from a violation of the statute. In order to set forth a prima facie case of negligence, plaintiff's evidence must establish (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury. The court finds that all of the foregoing elements are met here. Defendant Shalmer's claim that the tree well was not the owner's responsibility is unsupported by any law or facts, because there is no evidence whatsoever that the area where the plaintiff had his accident was in fact a tree well. There was clearly no tree. A property owner who would like a tree to be planted in front of its property cannot simply cut a rectangle in the concrete sidewalk, call it a tree well, and blame the City if someone falls in it. The Court takes judicial notice of the Google Map photos of the site, which started in 2007 and end in 2022. There is no "tree well" or tree in

any of the photos before the plaintiff's accident at the location, and the sidewalk is completely paved. This includes the photo from July 2019, the one closest to the date of the plaintiff's accident. In the 2022 photo, there is a car parked on the sidewalk, covering most of the "tree well." The only thing the Court can conclude is that the property owner hired Shawn to replace the sidewalk with a new sidewalk, and specifically asked Shawn not to repave the area where the plywood was, so a tree could be planted. This does not turn the sidewalk into a "tree well" that the City is responsible for.

Mr. Ambalo, Shalmer's property manager, was asked at his EBT "At any point in time prior to December 1, 2019, do you know whether or not there had been a tree or vegetation in that particular area where there's dirt depicted in the photo?" and he replied "no" [Doc 124 Page 33]. He was asked twice again, or maybe the attorney pointed to another spot, and he said "no" [*id.* Pages 37 and 41]. Mr. Ambalo concluded "you're asking me something I never paid attention to . . . I can't remember. It's just a minute detail" [*id.*]. He said the same tenant leased both 100 and 106 Dobbin Street, The Post BK Gym. He said the sidewalk was redone at some point, but he could not remember when. When the tenant was having the work done at the property, they parked their cars on the sidewalk in front of the property [*id.* Page 45].

Mr. Ali, who was deposed for Shawn on January 31, 2023, [Doc 113], testified that if the "tree pit" was there before, "it's against the law. You can't pour concrete on it" [*id.* Page 102]. But he testified "I don't remember what was there before" [*id.* Page 104]. There was no written contract for the work, no written estimate, no photos, drawing or anything else. He testified that "usually" a permit was obtained for the work. He said this job, "if I

remember correctly it is one day work” [*id.* Page 24]. He had gone to the site, met with the principal, Mr. Ambalo’s grandfather, measured the job and orally gave him a price. He could not remember if the work his company did was on just a part of the site or on the entire sidewalk adjacent to the property owned by Shalmer. The 100 Dobbin Street lot, Block 2617 Lot 42, extends along 150 feet of Dobbin Street.¹ Shalmer also owned 106 Dobbin Street, the adjacent property, which is Lot 50, and extends 50 feet along the street (to the left of 100 as you face the building), for a total of 200 feet of sidewalk. The attorneys tried to have Mr. Ali delineate how much of the sidewalk he had worked on for the \$12,000 invoice, but a clear answer was not provided.

To reiterate, all three defendants were deposed, and all three stated that their company had not placed the plywood in the location where the plaintiff had his accident. Automotive was a contractor working inside the building. Its witness said they were working with sheetrock, not plywood [Doc 111 Page 26]. They did not use cones either [*id.* Page 31]. He did not know who put the plywood or the cones down [*id.* Page 35].

Shawn replaced some part of the sidewalk, and had finished about two weeks before the accident, and claims they do not use any plywood in their work [Doc 113 Pages 55, 59, 60, 78, 109]. Shalmer’s witness did not know who put the plywood or the cones in the area, or when [Doc 124 Pages 63, 65]. Mr. Ambalo said it was not Shalmer [Doc 124 Page 67].

Again, NYC Administrative Code §7-210 requires property owners to maintain the sidewalk in a reasonably safe condition. It is a non-delegable duty. Plaintiff is not required

¹ See Tax Map at [Property Information Portal \(nyc.gov\)](https://www.nyc.gov/property-information-portal)

to establish that he was free of negligence to be entitled to summary judgment. *Rodriguez v City of New York*, 31 NY3d 312 (2108). The Court finds that plaintiff has made a prima facie case for summary judgment on the issue of liability as against Shalmer. Shalmer, the property owner, had a duty to plaintiff to provide him with a safe place to walk; the property owner breached this duty; and such breach was a substantial cause of the resulting injury. However, the plaintiff does not establish that he was completely free of fault. Thus, a trial is still required to determine what percentage of fault, if any, is attributable to the plaintiff.

The Court of Appeals has issued a definitive decision on the subject of NYC Administrative Code 7-210 and held that “the text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning” (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 169 [2019]). While the regulation does not impose strict liability, and traditional tort principles of negligence and causation apply, the property owner cannot point the finger at others, whether tenants, contractors, or workers [*id.*].

Therefore, the reciprocal branch of Shalmer’s motion, for summary judgment dismissing the complaint, is denied. The court notes that the standard for evaluating this motion on defendant’s part is different than that for the plaintiff’s motion. This accident occurred as the result of a transient condition, the plywood, and not a permanent condition, such as a raised or misleveled sidewalk flag. A defendant moving for summary judgment in a slip-and-fall case has the burden of demonstrating, prima facie, that it did not create the alleged dangerous condition or have actual or constructive notice of its existence in

sufficient time to remedy it. To meet its burden on the issue of lack of constructive notice, a defendant is required to offer [some] evidence as to when the accident site was last cleaned or inspected prior to the accident (*Serebrenik v Chelsea Apts., LLC*, 207 AD3d 677, 678 [2d Dept 2022]). Defendant Shalmer has failed to do so here. The only deposition witness for Shalmer was Mr. Elliot Ambalo. At his EBT, Mr. Ambalo said both buildings were leased to one commercial tenant, that he was the property manager, and had been the property manager for four or five years. He said his grandfather was the only shareholder of the corporation, but he was a part owner of the trust, and “there’s a trust in the property” [Doc 124 Page 16]. Mr. Ambalo testified that in 2019, the year of the plaintiff’s accident, he visited the property “a couple of times a week” [*id.* Page 23]. He was not asked at his EBT, and his affidavit is silent, on the issue of when he had last been there before the plaintiff’s accident, or who, if anyone, was responsible for cleaning, inspecting or maintaining the sidewalk.

The other two defendants, Automotive and Shawn, did not owe a duty to the plaintiff. While a contractor may be liable to a pedestrian walking on the sidewalk for an affirmative act of negligence which results in the creation of a dangerous or hazardous condition, and while the property owner’s acceptance of the work does not “immunize” the contractor when there is evidence that the contractor created the defect, there is no such evidence here (see *Pizzolorusso v Metro Mechanical*, 205 AD3d 748 [2d Dept 2022]). Therefore, Automotive and Shawn are entitled to have the complaint dismissed as against each of them.

With regard to the cross-claims asserted against Automotive, the court finds that Automotive is entitled to have Shawn's cross-claims dismissed. Shawn asserts claims [Doc 44] for common law indemnification, contribution, contractual indemnification and breach of the contract to provide insurance. There was no contract between Automotive and Shawn, thus the claims for contractual indemnification and breach of contract do not lie, and the dismissal of the complaint as against Shawn requires dismissal of Shawn's claims against Automotive for contribution and common law indemnification. With regard to Shalmer's cross-claims against Automotive [Doc 11], for common law indemnification and contribution, the branch of Automotive's motion to dismiss these claims is denied, and they are hereby converted to third-party claims.

With regard to the branch of Shawn's motion to dismiss all cross-claims asserted against Shawn, the court finds that neither Automotive nor Shalmer asserted any cross-claims against Shawn. Shalmer answered the complaint before Shawn was added as a defendant by order dated 4/9/21 [Doc 11] and did not file an amended answer subsequently, so Shalmer does not assert any cross-claims against Shawn. Shawn filed its answer on 11/30/21, and neither of the other two defendants amended their answers subsequently.

With regard to the cross-claims asserted against Shalmer by Automotive and Shawn, the dismissal of the plaintiff's complaint as against Shawn and Automotive requires dismissal of their cross-claims against Shalmer.

Conclusions of Law

Accordingly, it is

ORDERED that Plaintiff’s motion (#9) for summary judgment on the issue of liability solely as against defendant Shalmer is granted, however the branch of the motion which seeks an order striking all affirmative defense of comparative fault is denied. Plaintiff’s comparative fault, if any, must still be determined by the trier of fact; and it is further

ORDERED that defendant Automotive’s motion (#6) for summary judgment dismissing the plaintiff’s complaint is granted, and the branch of its motion to dismiss the cross claims asserted against it is granted with regard to Shawn, and denied with regard to Shalmer, and the cross claims asserted against it by Shalmer are hereby converted to third-party claims; and it is further

ORDERED that defendant Shawn’s motion (#7), for summary judgment dismissing the complaint and all cross-claims is granted; and it is further

ORDERED that defendant Shalmer’s motion for summary judgment (#8) dismissing the complaint is denied, and the branch of the motion seeking an order dismissing all cross claims asserted against it is granted; and it is further

ORDERED that the caption is hereby amended to read as follows:

-----X

TERRENCE SHELBY,

Plaintiff,

- against-

Index No.: 507625/2020

SHALMER TRUCKING CORP.,

Defendant.

-----X

-----X

SHALMER TRUCKING CORP.,

Third-Party Plaintiff,

-against -

AUTOMOTIVE FACILITY SERVICES, INC.,

Third-Party Defendant.

-----X

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.