

Brown v Derse, Inc.

2024 NY Slip Op 30948(U)

March 21, 2024

Supreme Court, New York County

Docket Number: Index No. 150176/2020

Judge: Paul A. Goetz

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

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WILLIAM BROOKS BROWN,

Plaintiff,

- v -

DERSE, INC., THE FREEMAN COMPANY, LLC, FREEMAN
AUDIO VISUAL, LLC, FREEMAN DIGITAL VENTURES,
LLC, FREEMAN EXPOSITIONS, LLC, SAMSUNG
ELECTRONICS AMERICA INC., THE NEW YORK
CONVENTION CENTER OPERATING CORP., S/H/A THE
JACOB K. JAVITS CONVENTION CENTER OF NEW
YORK, THE NATIONAL RETAIL FEDERATION, INC.

Defendants.

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INDEX NO. 150176/2020
MOTION DATE 10/31/2023
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139

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

In this Labor Law personal injury action arising out of a storage cabinet (job box) that fell on plaintiff while he was preparing electronics for a tradeshow booth, plaintiff moves for summary judgment on the issues of liability and proximate cause on his negligence and Labor Law §§ 200 and 241(6) claims as against defendants Derse Inc. (Derse) and The Freeman Company LLC, Freeman Audio Visual LLC, Freeman Digital Ventures LLC, and Freeman Expositions LLC (collectively, Freeman). Derse and Freeman oppose plaintiff’s motion, and Freeman cross-moves for summary judgment dismissing plaintiff’s complaint and all crossclaims asserted against it.

BACKGROUND

The Jacob K. Javits Convention Center of New York (the Javits Center) hosts a variety of conventions and tradeshows run by its show management group, the National Retail Federation (NRF). NRF's primary service provider is Freeman, a union-staffed tradeshow production company that builds booths for vendors that opt for their services and owns a warehouse where exhibitors often store materials for later delivery to the Javits Center. However, vendors are also free to select their own contractor to build their booths. The exhibitor-appointed contractor (EAC) may still make use of the Freeman warehouse but remains responsible for installation (NYSCEF Doc No 115, 43:8-44:7).

Samsung rented booth space for an upcoming tradeshow at the Javits Center. Rather than rely only on Freeman's services, Samsung hired Derse, another tradeshow company, to prepare its exhibit.¹ Derse purchased a 400-lb, 60" x 24" x 60" Jobsite Storage Cabinet (the job box) for workers to use while preparing the Samsung booth, which it stored at Freeman's warehouse for some time leading up to the tradeshow (NYSCEF Doc No 117). According to an incident report dated January 11, 2017, Derse reported that the job box "was delivered to the booth with dents and wheels bent to the side" (NYSCEF Doc No 116; see also NYSCEF Doc No 117 [Derse representative stating that the "brand new job box specifically purchased for our client Samsung has been severely damaged and unusable," that "[t]he damage occurred while in possession at

¹ The exact scope of Derse's work, and the extent to which it relieved Freeman from any of its responsibilities, if at all, is unclear from the record (see NYSCEF Doc No 73, p. 21 [description of services to be provided to Samsung is redacted]). At times, Derse is characterized as a company that actually builds the booths themselves (NYSCEF Doc No 114, 24:6-13 ["For the most part Derse provides all the mounting hardware . . . because [the] business of Derse is building trade show exhibits"]), and at other times, its work is described as mere presentation (*id.*, 32:10-25 ["there's things that . . . the Derse team can do on their own like making things pretty. . . get the little fine details sorted out, you know, little literature baskets or literature racks or whatever"]). Additionally, it appears that at least some work on the Samsung booth was completed by union employees who worked under Freeman (*id.*, 27:25-28:16).

the Freeman advanced warehouse and/or during transit delivery to the exhibit space,” and that it “is not functional at all now to bring to show site”]).

Derse hired National Micro Rentals, an audio/visual provider, as a sub-contractor to set up tech equipment for the Samsung booth. Plaintiff, a technical director for National Micro Rentals, was responsible for overseeing union workers in the mounting of hardware, setting up network connections, and related set up of electronics such as TVs and computers (NYSCEF Doc No 114, 27:16-24).²

On January 12, 2017—the day after the incident report was filed—plaintiff arrived at the Javits Center and found the Samsung booth (*id.*, 25:6-26:2). His activities were directed by Randy Lee, a Derse employee (*id.*, 22:3-15), and mounting hardware was supplied by Derse (*id.*, 24:5-13). Numerous times throughout the day, plaintiff opened and closed the doors of the job box to retrieve and return materials needed to perform his duties, never noticing that it was damaged (*id.*, 30:2-31:20). Immediately before his accident, plaintiff approached the job box to retrieve hardware needed to mount a screen onto a wall (*id.*, 33:11-13). As plaintiff was crouched down on the floor right beside the job box, as he had done all day, it tipped over and fell onto his neck, back and shoulders, causing injury (*id.*, 33:13-20; see also NYSCEF Doc No 118).

Plaintiff now moves for summary judgment on the issues of liability and proximate cause on his negligence and Labor Law §§ 200 and 241(6) claims as against Derse and Freeman on the basis that they breached their duty of reasonable care by allowing the job box, which they knew was damaged, to be utilized; that they supervised, directed, and controlled plaintiff’s work; and that his accident was caused by their violation of Industrial Code 23-1.5(c)(3). Derse opposes on the grounds that plaintiff is not protected by the Labor Laws because he is not a covered worker,

² As plaintiff explains, “there’s not a lot of physical work in the Javits that I’m allowed to do because [I’m non-union]” (NYSCEF Doc No 114, 27:18-24).

nor was he engaging in a covered activity; that Derse cannot be held liable under the Labor Laws, since it was neither an owner nor a contractor and had no authority to enforce safety standards; and that the cited Industrial Code section is inapplicable to this matter. Freeman opposes the Labor Law claims on the same grounds and adds, with respect to the negligence claim, that Derse's use of the job box after it was delivered was a superseding act that broke the chain of Freeman's liability. Freeman also cross-moves for summary judgment dismissing plaintiff's complaint and all crossclaims against it.

DISCUSSION

“It is well settled that ‘the 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’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such 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]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-54 [1st Dept 2010]).

“The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339

[2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Applicability of New York Labor Laws

At the outset, Derse and Freeman argue that this is a negligence case, not a Labor Law case (NYSCEF Doc Nos 125, 128). Specifically, they assert that plaintiff is not a covered worker because his job was to supervise tech set up, rather than perform construction work, and that he was not performing a covered activity under the Labor Laws, since he is non-union and therefore was not permitted to perform physical labor in the Javits Center. Derse and Freeman also argue that they cannot be held liable under the Labor Laws because they were not owners or contractors, nor did they direct or control plaintiff's work or have the authority to enforce safety standards. Plaintiff argues that "under the doctrine of 'Law of the Case' Judge Goetz has already ruled that the Labor Law applies" based on a decision and order of the court dated November 18, 2022 (NYSCEF Doc No 99).

Plaintiff is correct to the extent that his injury is protected under the Labor Laws. As the decision and order dated November 18, 2022 determined, plaintiff's work involved "hanging brackets, mounting equipment and running network wires," which "appears to consist of alteration of a structure, which is protected by [Labor Law § 241]" (NYSCEF Doc No 99). As for Labor Law § 200, that "section [] is not limited to construction work and does not exclude employees engaged in normal [] processes" (*Jock v Fine*, 80 NY2d 965, 967 [1992]). Rather, it covers "all persons employed therein or lawfully frequenting" the worksite (Labor Law § 200). Like Samsung, Derse and Freeman thus "failed to show that plaintiff's work is not covered under

the Labor Law[s]” (NYSCEF Doc No 99). The decision and order dated November 18, 2022 did not, however, determine Derse and Freeman’s potential liability under the Labor Laws.

Derse and Freeman’s liability under the Labor Laws depends on their status as contractors, and their status as contractors cannot be determined as a matter of law because the record presents conflicting and incomplete descriptions of the scope of their duties. As noted *infra*, the agreement between Samsung and Derse lacks specificity and is redacted in key places (NYSCEF Doc No 73). Additionally, though some evidence indicates that Samsung hired Derse to construct the booth, indicating that Derse may be considered the general contractor for at least that portion of the worksite, there is also evidence that it was Freeman’s union workers who performed most of the physical work involved, indicating that Freeman maintained control over the construction activities onsite. Plaintiff failed to present a clear picture of how Derse and/or Freeman qualify as contractors such that they may be held liable under the Labor Laws. Accordingly, the parts of plaintiff’s motion seeking summary judgment on the issue of Derse and Freeman’s liability under Labor Law §§ 200 and 241(6) will be denied.

Freeman’s cross-motion similarly failed to establish that it was *not* a general contractor that could be held liable for any dangerous conditions at the worksite such as the allegedly defective job box, or a sub-contractor that could nevertheless be held liable because it created the dangerous condition. Accordingly, the part of its cross-motion seeking summary judgment dismissing the complaint will be denied with respect to plaintiff’s Labor Law §§ 200 and 241(6) claims against Freeman.

Negligence Claims

Plaintiff has established his entitlement to judgment as a matter of law on his negligence claim as against Derse. Derse owed plaintiff a duty of reasonable care which it breached by

inviting plaintiff to use its job box, which it knew to be defective, and this breach was the proximate cause of plaintiff's injuries. Derse "denies" that the job box was in a defective condition at the time of plaintiff's accident (NYSCEF Doc No 125) but this is belied by the evidence. The incident report dated January 11, 2017 clearly shows that Derse, as the EAC, complained that the job box "was delivered to the booth with dents and wheels bent to the side" (NYSCEF Doc No 116). The damaged condition was also recorded by email, in which a Derse representative stated: "On 1/11/2017 - during the unloading of advanced freight . . . Randy Lee noticed that his brand new job box specifically purchased for our client Samsung had been severely damaged and unusable," and that "[t]he job box is not functional at all" (NYSCEF Doc No 117). As this evidence indicates, Derse was on notice of the defective condition of the box, and yet allowed it to be used on the tradeshow floor. Derse also failed to refute plaintiff's testimony that the job box fell onto him without warning due to its condition. Accordingly, the part of plaintiff's motion seeking summary judgment on the issues of liability and proximate cause on his negligence claim as against Derse will be granted.

Plaintiff has not, however, demonstrated Freeman's negligence as a matter of law. Though Derse employees assumed that "[t]he damage occurred while in possession at the Freeman advanced warehouse and/or during transit deliver to the exhibit space" (NYSCEF Doc No 117), it is also possible that the job box was damaged even before it arrived at Freeman's warehouse (NYSCEF Doc No 114, 91:12-22). Neither plaintiff nor Freeman has presented evidence showing how or where the damage occurred; they merely speculate.³ Accordingly, the

³ Freeman argues that even if the job box was damaged while in its care, Derse's decision to allow it to be utilized constitutes a superseding act which interrupted the chain of causation from Freeman's act to plaintiff's injury. "An intervening act may break the causal nexus when it is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct" (*De'L. A. v City of New York*, 158 AD3d 30, 36 [1st Dept 2017] [internal quotation and citations omitted]). That Derse used the job box for the specific purpose for which it was purchased, stored, and delivered is an entirely foreseeable and normal course of events. Thus, Derse's act does not relieve Freeman from responsibility.

part of plaintiff's motion seeking summary judgment on the issues of liability and proximate cause on his negligence claim as against Freeman will be denied, and the part of Freeman's cross-motion seeking summary judgment dismissing the complaint will be denied with respect to plaintiff's negligence claim as against Freeman.

Crossclaims Against Freeman

Given the remaining issues of fact regarding Freeman's liability under both plaintiff's Labor Law and negligence causes of action, the part of its cross-motion seeking summary judgment dismissing all crossclaims against it will be denied.

CONCLUSION

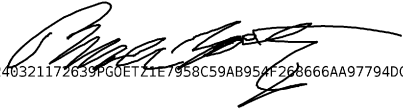
Accordingly, it is

ORDERED that the part of plaintiff's motion seeking summary judgment on the issue of liability under Labor Law §§ 200 and 241(6) as against Derse and Freeman is denied; and it is further

ORDERED that the part of plaintiff's motion seeking summary judgment on the issues of liability and proximate cause on his negligence claim as against Derse is granted; and it is further

ORDERED that the part of plaintiff's motion seeking summary judgment on the issues of liability and proximate cause on his negligence claim as against Freeman is denied; and it is further

ORDERED that Freeman’s cross-motion is denied in its entirety.


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3/21/2024
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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CHECK IF APPROPRIATE:

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