SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **5**

Justice

----------X

RICHARD MCGILL,

Plaintiff,

- v -

WHITNEY MUSEUM OF AMERICAN ART, TURNER CONSTRUCTION COMPANY,

Defendant.

----------X

INDEX NO. 158766/2015

MOTION DATE 09/05/2024

MOTION SEQ. NO. 016

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 016) 405, 431, 432, 439, 440

were read on this motion to MISCELLANEOUS.

With the instant motion *in limine*, Plaintiff, Richard McGill ("Plaintiff") seeks an order determining that a scissor lift is an "aerial basket" within the meaning of New York Industrial Code Section 23-9.6. Defendants, Whitney Museum of American Art and Turner Construction Company ("Defendants"), oppose this motion and cross-move for an order precluding any and all testimony or evidence related to Section 23-9.6, contending that the scissor lift in question should be classified as a "scaffold" rather than an "aerial basket."

BACKGROUND AND ARGUMENTS

This case arises from a workplace accident in which Plaintiff was injured while operating a scissor lift at a construction site managed by Turner Construction Company at the Whitney Museum of American Art. Plaintiff contends that Defendants violated New York Industrial Code Section 23-9.6, which pertains to aerial baskets. Specifically, Plaintiff argues that the scissor lift should be considered an aerial basket, making Section 23-9.6 applicable and thereby imposing a higher standard of safety that was allegedly violated.

Plaintiff relies primarily on the Appellate Division, Fourth Department's decision in *Karcz v. Klewin Building Company, Inc.*, 85 AD3d 1649 (4th Dept 2011), where a scissor lift was found to be an aerial basket within the meaning of Section 23-9.6. Plaintiff argues that this decision is binding on this court, citing the doctrine of stare decisis, which requires trial courts to follow precedents set by the Appellate Division of another department until the Court of Appeals or the Appellate Division, First Department, issues a contrary ruling.

Defendants argue in opposition that the scissor lift does not meet the definition of an aerial basket under the Industrial Code. They assert that the scissor lift should be classified as a scaffold,

referencing OSHA and industry standards, as well as prior case law, to support their position. They request that any testimony or evidence related to Section 23-9.6 be precluded as irrelevant to the facts of this case.

More specifically, Defendants counter that the decision in *Karcz* is not dispositive for several reasons. First, they argue that the *Karcz* decision rested on the specific use of the scissor lift in that case, which involved lifting materials rather than merely elevating a worker, thereby distinguishing it from the present matter. They further cite *Primavera v. Benderson Family 1968 Trust*, 294 AD2d 923 (4th Dept 2002) and *Brown v. Ciminelli-Cowper, Inc.*, 2 AD3d 1308 (4th Dept 2003), where the Appellate Division, Fourth Department, found that a scissor lift functioned as a scaffold, not an aerial basket. They also highlight an OSHA interpretation that defines scissor lifts as scaffolds under federal regulations.

DISCUSSION

The pivotal issue before this court is whether the scissor lift operated by Plaintiff should be classified as an "aerial basket" or a "scaffold" under the New York Industrial Code. The classification will determine the applicability of Section 23-9.6 and, consequently, the standard of care owed by Defendants.

1. Precedent and Stare Decisis

The principle of stare decisis, as set forth in *Mountain View Coach Lines, Inc. v. Storms*, 102 AD2d 663 (2d Dept 1984), obliges this court to apply the law as established by the Appellate Division within its department and to follow decisions from other departments in the absence of contrary authority. In this instance, the *Karcz* decision from the Appellate Division, Fourth Department, provides persuasive authority, but it is not binding, especially considering the factual distinctions drawn by Defendants.

2. Applicability of Section 23-9.6

Section 23-9.6 of the New York Industrial Code governs the operation of aerial baskets, which are defined as "vehicle-mounted, power-operated devices with an articulating or telescoping work platform designed for use at elevated working positions" (12 NYCRR 23-1.4[b][2]). Plaintiff contends that the scissor lift falls within this definition. However, the lift in question lacks the articulating or telescoping platform characteristic of an aerial basket.

Defendants persuasively argue that the scissor lift functioned as a scaffold in this context. The cases of *Primavera* and *Brown* further support this interpretation, wherein scissor lifts used to gain elevation, rather than to hoist materials, were treated as scaffolds under the Industrial Code. Notably, the plaintiff in *Karcz* was injured by a truss that "had been placed on top of the rails of the scissor lift and was being hoisted/raised into position to be installed" (*Karcz v Klewin Bldg. Co., Inc.*, No. 12358205, 2010 WL 9433879 [Sup Ct, NY County 2010]). Additionally, OSHA's definition of scissor lifts as scaffolds reinforces this interpretation. As such, this court finds that the scissor lift does not meet the statutory definition of an aerial basket.

Plaintiff's reply seeks to rebut Defendants' position by arguing that *Karcz* is consistent with prior Appellate Division, Fourth Department, rulings and that it supports the classification of scissor lifts as aerial baskets. Plaintiff's reading of *Karcz*, however, is misplaced. As indicated, in *Karcz* the Appellate Division, Fourth Department, classified a scissor lift as an aerial basket, but the facts of that case are materially different from those before this court. In *Karcz*, the scissor lift was used to hoist large trusses, a fact that led the court to classify the lift as an aerial basket under Section 23-6.1(a). Here Plaintiff was not using the scissor lift to hoist materials but rather to elevate himself to perform work. This distinction is critical, as it aligns this case more closely with *Primavera* and *Brown*, where scissor lifts were deemed to function like scaffolds.

Plaintiff's argument that *Karcz* is consistent with *Primavera* and *Brown* is unconvincing. The *Karcz* decision does not undermine *Primavera* and *Brown*, but instead addresses a different use of a scissor lift. Therefore, *Karcz* does not support Plaintiff's contention that scissor lifts should always be classified as aerial baskets. Plaintiff alternatively argues that if the court finds the scissor lift to be a scaffold or ladder, other sections of the Industrial Code should apply. Specifically, plaintiff cites Sections 23-5.3(f), 23-5.18(c), and 23-1.21(b)(4)(i), which address access to and egress from scaffolds and ladders. However, none of these sections change the classification of the scissor lift in question. The primary issue is whether Section 23-9.6 applies, and having determined that the scissor lift is more appropriately classified as a scaffold, these other provisions do not alter the outcome of this motion.

3. Industry Standards and Regulatory Interpretation

Defendants' reliance on industry standards, specifically OSHA's classification of scissor lifts as scaffolds, provides further weight to their argument. OSHA's August 1, 2000 letter adopts the ANSI definition of aerial lifts, which does not include scissor lifts. Instead, OSHA explicitly categorizes scissor lifts under the general requirements for scaffolds (29 CFR 1926.451). This interpretation is consistent with the purpose of the scissor lift in the present case, which was used to elevate Plaintiff to a working height rather than to perform the type of work typically associated with aerial baskets.

For the foregoing reasons, the court finds that the scissor lift operated by Plaintiff was not an aerial basket within the meaning of New York Industrial Code Section 23-9.6.

Accordingly, it is hereby

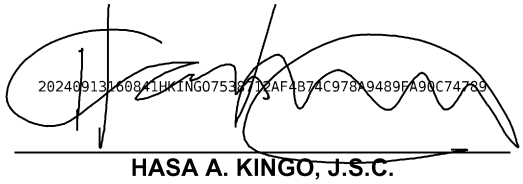
ORDERD that Plaintiff's motion *in limine* is denied; and it is further

ORDERED that Defendants' cross-motion is granted, and any testimony or evidence related to Industrial Code Section 23-9.6 is precluded from reference at trial; and it is further

ORDERED that the scissor lift in question is classified as a scaffold under applicable law and standards, and the parties are directed to proceed accordingly; and it is further

ORDERED that in light of the court rendering determinations on all pending *in limine* applications, counsel are directed to report to 60 Centre Street, New York, NY on Monday September 16, 2024 at 9:30 AM for jury selection in this matter.

This constitutes the decision and order of the court.



9/13/2024
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE