

Mendelsohn v Falcon Messenger Serv., Inc.
2024 NY Slip Op 35652(U)
October 1, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 609972/2020
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX No. 609972/2020CAL. No. 202301833MVSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY**PRESENT:**Hon. JOSEPH A. SANTORELLI
Justice of the Supreme CourtMOTION DATE 4/26/24ADJ. DATE 5/2/24

Mot. Seq. # 002 MotD

-----X
JONATHAN MENDELSON,

Plaintiff,

- against -

FALCON MESSENGER SERVICE, INC., C-
TRANS, INC., JOHN DOE, OCEAN
TRANSPORT LEASING, INC, OCEAN
TRANSPORT, INC., and OCEAN
TRANSPORT INC.,Defendants.
-----XSALENGER, SACK, KIMMEL &
BAVARO, LLP

Attorney for Plaintiff

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Doe, Ocean Transport Leasing Inc., and
Ocean Transport Inc.180 Maiden Lane, Suite 901
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Upon the following papers read on this motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by plaintiff, filed March 27, 2024; Answering Affidavits and supporting papers by defendants C-Trans, Inc. and John Doe, filed April 19, 2024; Replying Affidavits and supporting papers by plaintiff, filed May 1, 2024; it is

ORDERED that the motion by plaintiff Jonathan Mendelsohn for, among other things, summary judgment in his favor on the issue of defendants' liability is granted in part and denied in part.

Plaintiff Jonathan Mendelsohn commenced this action against, among others, defendants C-Trans, Inc., John Doe, Ocean Transport Leasing Inc., and Ocean Transport Inc. (collectively, the remaining defendants) to recover damages for personal injuries allegedly arising out of an accident that occurred on June 12, 2019, at the loading dock of the premises located at 90 Trade Zone Court, in Suffolk County, New York. The accident allegedly occurred when plaintiff was inside of a trailer owned by Ocean Transport Leasing Inc. and Ocean Transport Inc. (collectively, Ocean Transport), which was attached to a tractor owned by C-Trans, Inc (hereinafter C-Trans). The tractor-trailer allegedly was operated by Doe, who was an employee of C-Trans at the time of the accident. Plaintiff alleges that defendants were, in part, negligent in operating, lifting, and/or lowering the trailer, in failing to secure

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merchandise within the trailer, and in creating and permitting a trap. C-Trans and John Doe interpose various affirmative defenses, including a first affirmative defense alleging, inter alia, assumption of risk and contributory negligence, a fifth affirmative defense alleging, among other things, contributory negligence, culpable conduct, and assumption of risk, and a ninth affirmative defense alleging assumption of risk, as do Ocean Transport. By stipulation dated May 11, 2023, the action was discontinued as against defendant Falcon Messenger Service, Inc. (*see* CPLR 3217).

Plaintiff now moves for summary judgment in his favor on the issue of defendants' liability, dismissal of defendants' first, fifth, and ninth affirmative defenses, and an immediate trial on the issue of damages. Plaintiff's arguments include that nonparty Edgar Martinez, who was an employee of C-Trans, created a dangerous condition which proximately caused the alleged injuries, that the accident occurred within the scope of Martinez's employment, and that plaintiff was free from fault. In opposition, C-Trans and Doe contend, in part, that triable issues of fact exist as to plaintiff's fault in the happening of the accident. C-Trans and Doe submit their attorney's affirmation and plaintiff's deposition transcript.

As a general rule, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Walsh v Steel O-III, LLC*, 230 AD3d 536, 216 NYS3d 246 [2d Dept 2024]). An exception to the general rule, however, applies "where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launch[es] a force or instrument of harm" or "creates or exacerbates a dangerous condition" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136 at 140, 142, 746 NYS2d at 123, 124 [internal quotation marks omitted], quoting *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168, 159 NE896, 898 [1928]; *Cohen v City of New York*, 209 AD3d 830, 176 NYS3d 303 [2d Dept 2022]). While a plaintiff no longer must demonstrate freedom from comparative fault to establish a prima facie case of entitlement to summary judgment on the issue of a defendant's liability, the issue of a plaintiff's comparative negligence may be determined in the context of a summary judgment motion where, as here, the plaintiff moves for summary judgment dismissing a defendant's affirmative defense alleging comparative negligence and culpable conduct on the part of the plaintiff (*see Grecco v Altice USA, Inc.*, 230 AD3d 655, 216 NYS3d 694 [2d Dept 2024]; *De La Luz Alfaro v Access-A-Ride*, 229 AD3d 503, 214 NYS3d 766 [2d Dept 2024]). Generally, the issue of proximate cause is for the trier of fact to determine (*see Bristol v Biser*, ___ AD3d ___, 2024 NY Slip Op 04370 [2d Dept 2024]; *Olivo v Rent A Unit NY, Inc.*, 229 AD3d 712, 215 NYS3d 495 [2d Dept 2024]). "However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the facts" (*Glover v Teresa Limo, Inc.*, 229 AD3d 604, 604, 215 NYS3d 430 [2d Dept 2024], quoting *Hayes v County of Suffolk*, 222 AD3d 950, 952, 202 NYS3d 427, 429 [2d Dept 2023] [internal quotation marks omitted]; *Silva v Rabbani*, 227 AD3d 1026, 1027, 212 NYS3d 655, 657 [2d Dept 2024]).

Under the doctrine of respondeat superior, an employer may be vicariously liable for torts committed by an employee within the scope of employment (*Rivera v State of New York*, 34 NY3d 383, 389, 389, 119 NYS3d 749, 753 [2019]; *Diluglio v Liberty Mut. Group, Inc.*, 230 AD3d 643, 647, 2024 NY Slip Op 04245, *3 [2d Dept 2024]). "An employee's action falls within the scope of employment when it is performed while the employee is engaged generally in the business of the employer, or if the act may be reasonably said to be necessary or incidental to such employment" (*Cobena v Antonioli*, 217

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AD3d 746, 747, 191 NYS3d 442, 444 [2d Dept 2023] [internal quotation marks omitted], quoting *Camisa v Rosen*, 150 AD3d 809, 810, 54 NYS3d 111, 113 [2d Dept 2017]; *Fernandez v Fernandez*, 216 AD3d 743, 745, 189 NYS3d 538, 541 [2d Dept 2023]).

Plaintiff established a prima facie case of entitlement to summary judgment in his favor on the issue of C-Trans' liability (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Here, plaintiff demonstrated, prima facie, that Martinez caused and created the dangerous condition that injured plaintiff (see *Villanueva v O'Mara Org.*, 204 AD3d 557, 164 NYS3d 821 [1st Dept 2022]; see also *Woods v Harris-Camden Term. Equip. Inc.*, 223 AD3d 505, 201 NYS3d 403 [1st Dept 2024]; cf. *Scime v Hale Northeastern Inc.*, 218 AD3d 1338, 193 NYS3d 553 [4d Dept 2023]). According to the deposition transcripts submitted by plaintiff, he was inside of the trailer portion of a tractor-trailer unloading a delivery of car rims from C-Trans, when the operator of the tractor-trailer, Martinez, without checking whether anyone was inside of the trailer, unhitched it from the tractor. At his deposition, plaintiff described that the trailer was lifted up in the air, that the boxes containing car rims began shaking, and that approximately 1 to 15 boxes of car rims fell onto him. Plaintiff also demonstrated, prima facie, that the accident occurred within the scope of Martinez's employment for C-Trans, and that C-Trans was vicariously liable for Martinez's conduct (see *Durkee v Sanchez-Rodriguez*, 229 AD3d 1315, 215 NYS3d 676 [4th Dept 2024]; *Couillard v Shaw Envtl. & Infrastructure Eng'g of N.Y., P.C.*, 125 AD3d 509, 4 NYS3d 176 [1st Dept 2015]; cf. *Brandford v Singh*, 136 AD3d 726, 25 NYS3d 268 [2d Dept 2016]).

Plaintiff further established his prima facie entitlement to dismissal of the remaining defendants' first, fifth, and ninth affirmative defenses insofar as they allege comparative negligence, culpable conduct, and assumption of risk. Plaintiff's submissions were sufficient to establish, prima facie, that he was not at fault in the happening of the accident (see *Castillo v Unique Roofing of N.Y.*, 218 AD3d 432, 193 NYS3d 101 [2d Dept 2023]; see also *Becci v Worldwide Flight Servs.*, 88 AD3d 932, 931 NYS2d 535 [2d Dept 2011]; cf. *Scime v Hale Northeastern Inc.*, 218 AD3d 1338, 193 NYS3d 553; *Acevedo v CKF Produce Corp.*, 216 AD3d 885, 188 NYS3d 670 [2d Dept 2023]). Moreover, plaintiff demonstrated, prima facie, that the assumption of risk doctrine is inapplicable here (see *Muniz v SPO Rest., LLC*, 227 AD3d 1002, 212 NYS3d 163 [2d Dept 2024]; *Depass v Mercer Square, LLC*, 219 AD3d 801, 195 NYS3d 117 [2d Dept 2023]). The assumption of risk doctrine "is generally limited to risks arising from voluntary participation in athletic and recreational activities" (*Muniz v SPO Rest., LLC*, 227 AD3d at 1004, 212 NYS3d at 166, quoting *Depass v Mercer Square, LLC*, 219 AD3d at 803, 195 NYS3d at 120).

In opposition, C-Trans and Doe failed to raise a triable issue of fact (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923). The speculative assertion of C-Trans and Doe that plaintiff could have avoided the accident by speaking to the driver before entering the trailer was insufficient to raise an issue of fact as to plaintiff's comparative fault (see *Gumas v Niagara Frontier Tr. Metro Sys.*, 189 AD3d 2095, 138 NYS3d 768 [4th Dept 2020]; *Colandrea v Choku*, 94 AD3d 1034, 943 NYS2d 166 [2d Dept 2012]; *Gill v Braasch*, 100 AD3d 1415, 953 NYS2d 783 [4th Dept 2012]). Furthermore, the opposition papers address or specifically oppose that branch of plaintiff's motion for summary judgment dismissing defendants' affirmative defenses of assumption of risk.

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However, plaintiff failed to establish his prima facie entitlement to summary judgment on the issue of liability as to either Ocean Transport or Doe (*see Anson v Incorporated Vil. of Freeport*, 193 AD3d 799, 148 NYS3d 158 [2d Dept 2021]; *Scarpelli v Naderi*, 207 AD3d 769, 173 NYS3d 264 [2d Dept 2022]; *Romanelli v Jones*, 179 AD3d 851, 117 NYS3d 90 [2d Dept 2020]; *Grucci v Grucci*, 174 AD3d 790, 102 NYS3d 885 [2d Dept 2019]). Notwithstanding the breadth of relief requested in the notice of motion, plaintiff does not specifically address those defendants' liability, other than to generally request an award of summary judgment on the issue of defendants' liability. The court shall not award summary judgment on a ground not raised by plaintiff (*see Scarpelli v Naderi*, 207 AD3d 769, 173 NYS3d 264; *Romanelli v Jones*, 179 AD3d 851, 117 NYS3d 90; *Grucci v Grucci*, 174 AD3d 790, 102 NYS3d 885). The court also notes that plaintiff never moved to substitute Martinez in place of Doe.

For similar reasons, plaintiff also did not establish his prima facie entitlement to dismissal of the remaining defendants' first and fifth affirmative defenses insofar as those affirmative defenses are based on grounds other than culpable conduct, contributory negligence, and assumption of risk (*see generally Scarpelli v Naderi*, 207 AD3d 769, 173 NYS3d 264; *Romanelli v Jones*, 179 AD3d 851, 117 NYS3d 90; *Grucci v Grucci*, 174 AD3d 790, 102 NYS3d 88). With regard to affirmative defenses, plaintiff's arguments are directed only to the issues of culpable conduct and contributory negligence on his part and assumption of risk.

Further, in light of the previously mentioned stipulation of discontinuance, plaintiff's motion to the extent that it is construed as seeking affirmative relief against Falcon Messenger Service is denied as moot. Finally, plaintiff's application to set the matter down for an immediate trial on the issue of damages is denied.

Accordingly, plaintiff's motion is granted in part and denied in part.

Dated: October 1, 2024



Hon. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION