

Deitrich v Binghamton Rd. Elec., LLC
2024 NY Slip Op 35725(U)
October 28, 2024
Supreme Court, Rensselaer County
Docket Number: Index No. EF2022-271730
Judge: Richard J. McNally, Jr.
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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 a IAS Term of the Rensselaer County
Supreme Court, held in and for the County
of Rensselaer, in the City of Troy, New
York, on the 28th day of October, 2024.

PRESENT: HON. RICHARD J. MCNALLY, JR.
JUSTICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

ANTHONY P. DEITRICH,

Plaintiff,

-against-

DECISION & ORDER
Index No. EF2022-271730

BINGHAMTON ROAD ELECTRIC, LLC, CLAIRE
J. RUTLER, BOTHARCONSTRUCTION, LLC,
KENNETH R. ROUSELL II, ST MARY & SONS
TRANSPORT LLC, AND AMISH COUNTRY SHEDS
OF VT, LLC,

Defendants.

APPEARANCES:

FROST & KAVANAUGH, P.C.
Attorneys for Plaintiff
287 North Greenbush Road
Troy, New York 12180

MCCABE, COLLINS, MCGEOUGH, FOWLER,
LEVINE & NOGAN, LLP
ROBERT J. PASSARELLI
Attorneys for Defendant
AMISH COUNTRY SHEDS OF VT, LLC
30 Jericho Executive Plaza, Suite 400C
Jericho, New York 11753

Keith Miller, Esq.
LAW OFFICES OF KEITH D. MILLER
1000, 7th North Street, Suite 120
Liverpool, New York 13088

Jeffrey D. Schulman, Esq.
PILLINGER MILLER TARALLO, LLP
126 N. Salina Street, Suite 215
Syracuse, New York 13202

MCNALLY, J.

Defendant Amish Country Sheds of VT, LLC (hereinafter “Amish Country Sheds”) moves for summary judgment on the issue of liability pursuant to CPLR 3212 in this motor vehicle tort action. Plaintiff opposes the motion. Amish Country Sheds seeks summary judgment on the basis that it had no liability to plaintiff as a matter of law as it owed no duty to plaintiff, and is not liable for the actions of independent contractor and defendant St. Mary & Sons Transport, LLC (hereinafter “St. Mary & Sons”). Plaintiff opposes the motion on the basis that Amish Country Sheds was engaged in an action in which danger arises out of the normal performance of that work, and reasonably should have anticipated it would be dangerous to others. For the reasons stated below, Amish Country Sheds’ motion is denied.

Amish Country Sheds is a broker between consumers and an Amish community in New York that constructs prefabricated sheds. Amish Country Sheds hired St. Mary & Sons to transport a shed to a customer’s home in Vermont. On October 14, 2021, St. Mary & Sons transported the shed, which was loaded on a specialty trailer and pulled by a pickup truck, on US Route 11 in Malone, New York, through the intersection of US Route 11 and Raymond Street. During this time, active construction was ongoing in this intersection by Defendant Binghamton Road Electric, LLC, and Bothar Construction, LLC. At approximately 8:17AM, the truck loaded with the shed was driven through the intersection by Defendant Kenneth R. Rousell II (hereinafter “Rousell”), driver for St. Mary & Sons. While driving through the intersection, Rousell maneuvered the truck in such a way as to encroach into a closed turning lane so that the load did not strike individuals on the sidewalk. In doing so, Rousell hit plaintiff, a construction worker who was in the closed turning lane, with the corner of the load. Plaintiff was severely injured.

It is well settled, that on a motion for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination and all evidence must be viewed in the light most favorable to the opponent to the motion (*see Barr v County of Albany*, 50 NY2d 247, 254 [1980]).

Generally, an employer who hires an independent contractor is not liable for the independent contractor's negligent acts (*Rosenberg v Equit. Life Assur. Soc. of U.S.*, 79 NY2d 663, 668 [1992]). There are exceptions to this general rule, and one exception involves situations where the employer has assigned work to an independent contractor in which the employer knows or has reason to know the work involves special dangers inherent in the work or dangers which should have been anticipated by the employer (*id.*). In such situations, the employer cannot insulate itself from liability by claiming it was not negligent; the employer is vicariously liable for the fault of the independent contractor because a legal duty is imposed on it which cannot be delegated (*id.*).

This Court finds the transportation of the load at issue to be an inherently dangerous activity which Amish Country Sheds knew or should have been aware of. When one undertakes work in a public highway which, unless carefully done, will create conditions dangerous to the public using the highway in a normal manner, he is under a duty to use requisite care, and that duty cannot be delegated (*Tytell v Battery Beer Distrib., Inc.*, 202 AD2d 226 [1st Dept 1994]).

Here, St. Mary & Sons was transporting a load that was 14 feet wide, which was classified as an oversized load and requires a special hauling permit under Vehicle and Traffic Law 385. This Court finds the intersection through which St. Mary & Sons transported the shed is defined as a business district pursuant to Vehicle and Traffic Law 105, which prohibits the transportation of such a load through such a district between 7:00AM and 9:00AM. Vehicle and Traffic Law 385 also required red or orange fluorescent flags no smaller than eighteen square inches and reflectors to be placed on the corners of the load with staffs.

Rousell testified that transporting the load at issue was an inherently dangerous activity if not done properly, that there were flags fixed to the corners of the load but they were attached with a clamp and were not fluorescent, and that the intersection through which he was driving was a business district (NYSCEF Docketed No. 127 at 33, 43-44, 48). The testimony of Richard Gamache, president of Amish Country Sheds, also established that St. Mary & Sons was hired because the load in question required an oversized load permit as it was over the threshold width in Vehicle and Traffic Law 385, and Amish Country Sheds always subs out loads that require such a permit (NYSCEF Docketed No. 129 at 16).

New York State has created the Vehicle and Traffic Laws discussed *supra* for the purpose of protecting the public from the dangers created by oversized loads on the roadway. Amish Country Sheds was aware, or should have been aware as they hire subcontractors for the purpose of transporting oversized loads, of the inherent dangers posed by oversized loads on the roadway. This excepts Amish Country Sheds from the general rule that they are not liable for the actions of subcontractors. Amish Country Sheds is vicariously liable for triable issues of fact surrounding the fault of the independent contractor St. Mary & Sons such as the adequacy of

flagging, the decision to transport the load through a business district during a restricted time period, and the maneuvering of the truck through a closed turning lane.

Accordingly, it is

ORDERED that defendant Amish Country Sheds' motion for summary judgment pursuant to CPLR 3212 is denied.

The Court has uploaded the original Decision and Order/Judgment to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the Office of the Rensselaer County Clerk.

Counsel for the plaintiff is not relieved from the applicable provisions of CPLR 2220 or the Uniform Rules of Supreme and County Courts § 202.5b [h] [2], insofar as it relates to service and notice of entry of the filed document upon all other parties to this special proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

Uniform Rules of Supreme and County Courts § 202.5b [b] [2] [I] directs that service upon nonparticipating parties must be made in hard copy.

SO ORDERED!
ENTER

Dated: October 28, 2024
Troy, New York



RICHARD J. MCNALLY, JR.
Supreme Court Justice

Papers Considered:

NYSCEF Docketed Nos. 1-136.