SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY

PRESENT: HON. ALISON Y. TUITT **PART** IA 5

Justice

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CARMEN RIVERA,

Plaintiff,

- v -

BREEN BROS. TOWING, INC., PCI INDUSTRIES CORP., RICHARD CAMPISI

Defendant.

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INDEX NO. 31890/2019E

MOTION DATE

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004 were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff, Carmen Rivera moves pursuant to CPLR 3212 seeking summary judgment on the issue of liability against defendants, Breen Bros. Towing, INC., PCI Industries Corp., and Richard Campisi, granting immediate trial on damages, and for such other relief as this court deems just, necessary and proper. Defendant cross-moves CPLR 3212 seeking summary judgment, dismissal of the plaintiff's complaint in its entirety, and in opposition to Plaintiff's summary judgment motion. Defendants Breen Bros Towing, INC. ("Breen") and Richard G. Campisi ("Campisi," or collectively with Breen, "Breen Defendants"). Both defendants' motions are **DENIED,** Plaintiff's motion is **GRANTED**, in part, in accordance with this decision herein.

Plaintiff commenced this action seeking to recover damages from an alleged slip and fall. The complaint alleges collective negligence per se, in violating New York State and City Traffic Laws and Rules in a crosswalk when tow truck operator Mr. Campisi, allegedly parked and exited the tow truck owned by his employer, Breen, while the long, extended device attached to its rear, laid on the ground. Plaintiff, who was working as a School Crossing Guard for the New York City Police Department at the time of the accident, stepped backwards and came into

contact with the device and fell, resulting in her sustaining serious, permanent injuries. Plaintiff maintains that the defendants did not give notice, warning, or have permission, to obstruct the active crosswalk utilized by plaintiff.

In support of its motion, plaintiff argues that defendant PCI is responsible for the negligent conduct of those services PCI engaged to perform work in furtherance of PCI's contract with the City. PCI leased tow trucks and operators from Breen to perform vehicle relocating services. The contract required that PCI not perform work during daylight weekday hours when performing work on school blocks. Plaintiff alleged that defendants Breen violated State and City Traffic Rules and Laws, Mr. Campisi violated tow truck operating protocols and Breen's protocols. Furthermore, Plaintiff argues that Breen acknowledged that they do not train its operators with respect to traffic rules.

Plaintiff further alleges that PCI is liable for the negligence of Breen and Mr. Campisi because it failed to prevent the foreseeable conduct of the party with whom it contracted. Plaintiff argues that PCI is liable for its own independent acts of negligence in employing a tow truck provider who was not competent, faithful or skilled; in negligently supervising Mr. Campisi and providing inadequate instructions and parking areas; in failing to avoid an avoidable accident; and in performing work on a block where a school is located during school hours. Lastly, plaintiff argues that PCI does not dispute that the contract required it to manage pedestrian and vehicular traffic or that these duties were explicitly imputed to PCI by the Department of Transportation.

Defendants PCI submits a cross motion for summary judgment wherein they aver that PCI neither owed nor breached a duty owed to plaintiff. PCI argues that contractors are not liable to third parties for any injuries resulting from a breach of their contractual obligations, unless the

contractor created the condition that caused plaintiff's accident. PCI relies on an Espinal analysis to demonstrate that they owed no duty to third parties. Espinal v Melville Snow Contractors, Inc., 98 NY2d 136 [2002].

Defendants Breen Bros. Towing and Richard Campisi ("Breen Defendants") submit opposition to both plaintiff's and defendant's motions for summary judgment. With respect to the plaintiff's motion, Breen Defendants argue that the tow truck and its wheel lift were extremely obvious, such that any person making basic use of their senses could not have missed them. Breen Defendants also argues that Plaintiff has not shown that VTL sections 1202(a)(1)(d) and (a)(2)(b) and Department of Transportation Traffic Rule 4-08(e)(5) were intended to protect against the particular type of hazard, accident, or injury at issue here.

With respect to PCI's Cross Motion for Summary Judgment, Breen Defendants argue that PCI, under its contract with the City, assumed responsibility for ensuring the safety of pedestrians in its work area and to taking all reasonable precautions to protect the public from injuries resulting from its or its subcontractors' operations in furtherance of the work. Further, Breen Defendants argue that PCI had authority or control over Breen's drivers. Breen Defendants acknowledge that PCI's environmental health and safety manager, Eric Henderson, offered contradictory testimony, thereby raising an issue of fact as to whether PCI had authority or control over Breen's drivers.

ANALYSIS

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853

[1985]). Upon such a showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1985]).

There are three issues here affecting summary judgment whether defendants' violation of VTL sections 1202(a)(1)(d) and (a)(2)(b) and Department of Transportation Traffic Rule 4-08(e)(5) makes them liable per se and whether PCI owed a duty to plaintiff and whether they breached that duty. With respect to the first issue of whether Breen Defendant's violation of VTL sections 1202(a)(1)(d) and (a)(2)(b) and Department of Transportation Traffic Rule 4-08(e)(5) makes them liable per se, there is no dispute about whether or not defendants violated VTL only whether or not that violation makes them negligent per se.

Defendants argue that the doctrine of negligence per se applies only "[w]hen a statute designed to protect a particular class of persons against a particular type of harm is invoked by a member of the protected class." (Dance v Southampton, 95 AD2d 442, 445 [2d Dept 1983]). With respect to Vehicle and Traffic Law §§1202 (1)(d) and 2(b);- defendants are correct these laws were enacted to ensure that fire trucks have adequate access to hydrants during emergencies, not to protect against pedestrian safety. However, the same cannot be said with respect to Department of Transportation Traffic Rule 4-08(e)(5), as that law was enacted to ensure that pedestrians can safely cross. The rule is in place to ensure pedestrian safety by preventing obstructions in crosswalks. The court finds that the plaintiff has satisfied their prima facie burden against Breen Defendants for partial summary judgment. Therefore, plaintiff's motion for summary judgment against Breen Defendants is GRANTED, in part.

Consistent with the Court of Appeals of New York, the court finds to be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault. *Rodriguez v. City of New York*, 31 N.Y.3d 312, 101 N.E.3d 366 (2018).

"When a defendant's liability is established as a matter of law before trial, the jury must still determine whether the plaintiff was negligent and whether such negligence was a substantial factor in causing plaintiff's injuries. If so, the comparative fault of each party is then apportioned by the jury. Therefore, the jury is still tasked with considering the plaintiff's and defendant's culpability together." *Id.*

Next, we turn to the issues surrounding PCI's alleged liability, whether PCI owed a duty to plaintiff and whether that duty was breached. Here, plaintiff, in their summary judgment motion, and Breen Defendants in their opposition papers have provided evidence sufficient to establish their prima facie entitlement to summary judgment. However, the evidence relied on by the plaintiff and Breen Defendants in their motions was controverted by PCI, in their Cross-Motion. PCI successfully raise triable issues of fact and credibility of witnesses. Issues of fact and credibility of witnesses should be left to the jury to decide. *Vega v. Restani Const. Corp.*, 18 NY3d 499 (2012).

"Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). Therefore, plaintiff's motion with respect to PCI and PCI's Cross Motion for Summary Judgment are **DENIED**, as there remain triable issues of fact.

Accordingly, it is hereby

ORDERED, that Plaintiff's Motion for Summary Judgment against Breen Defendants is GRANTED, to the extent outlined above and it is further,

ORDERED, that Plaintiff's Motion for Summary Judgment against PCI is DENIED, and

ORDERED, that PCI's Cross Motion for Summary Judgment is DENIED, and it is further,

ORDERED that Plaintiff shall serve a copy of this Order with Notice of Entry upon all parties within thirty days of the upload of this Order in NYSCEF.

This constitutes the Decision and Order of this Court.

Dated: 8/19/2025

Hon. Alison Y. Tuitt, J.S.C.