

Burgess v Ryder Truck Rental, Inc.
2025 NY Slip Op 35554(U)
February 10, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 605626/2019
Judge: George Nolan
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SHORT FORM ORDER

INDEX No. 605626/2019CAL. No. 202400419MVSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY**PRESENT:**Hon. GEORGE M. NOLAN
Justice of the Supreme CourtMOTION DATE 8/12/24ADJ. DATE 9/12/24

Mot. Seq. # 005 MD

Mot. Seq. # 006 MD

-----X
MARK A. BURGESS,

Plaintiff,

- against -

RYDER TRUCK RENTAL, INC. and
MIDTOWN BEVERAGES, INC., REP D-2026,
LLC, KEURIG GREEN MOUNTAIN, INC.,
DR. PEPPER/SEVEN UP, INC., and KEURIG
DR. PEPPER, INC.,Defendants.
-----XSIBEN & SIBEN, LLP
Attorney for Plaintiff
90 East Main Street
Bay Shore, New York 11706GOLDBERG SEGALLA LLP
Attorney for Defendants Ryder Truck Rental,
Inc. and Midtown Beverages, Inc.
200 Garden City Plaza, Suite 520
Garden City, New York 11530THE LAW OFFICES OF RICHARD J.
DAVOLIO, P.C.
Attorney for Defendants Rep D-2026, LLC,
Keurig Green Mountain, Inc., Dr. Pepper/Seven
Up, Inc. and Keurig Dr. Pepper, Inc.
153 Main Street, Suite 10
Sayville, New York 11782

Upon the following papers read on these e-filed motions for summary judgment: Notice of Motion and supporting papers by defendants Ryder Truck Rental, Inc., and Midtown Beverages, Inc., dated July 12, 2024; Notice of Motion and supporting papers by defendants REP D-2026, LLC, Keurig Green Mountain, Inc., Dr Pepper/Seven Up, Inc., and Keurig Dr Pepper, Inc., dated July 12, 2024; Answering Affidavits and supporting papers by plaintiff, dated August 29, 2024; Answering Affidavits and supporting papers by plaintiff, dated September 4, 2024; Replying Affidavits and supporting papers by defendants Ryder Truck Rental, Inc., and Midtown Beverages, Inc., dated September 11, 2024; Replying Affidavits and supporting papers by defendants REP D-2026, LLC, Keurig Green Mountain, Inc., Dr Pepper/Seven Up, Inc., and Keurig Dr Pepper, Inc., dated September 11, 2024; it is

ORDERED that the motion by defendant Midtown Beverages, Inc., for summary judgment dismissing the complaint against it is denied; and it is further

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ORDERED that the motion by defendants REP D-2026, LLC, Keurig Green Mountain, Inc., Dr Pepper/Seven Up, Inc., and Keurig Dr Pepper, Inc., for summary judgment dismissing the complaint against them is denied.

This action was commenced by plaintiff Mark Burgess to recover damages for injuries he allegedly sustained on June 28, 2018, when, while operating a pallet jack to load a truck with beverages at a warehouse located at 2004 Orville Drive North in Ronkonkoma, New York, such machine dropped suddenly when the dock plate underneath it collapsed. It is alleged that defendant Ryder Truck Rental, Inc. (Ryder) owned the subject truck, and that defendant Midtown Beverages, Inc. (Midtown) employed the man who parked the truck and set the dock plate. It is further alleged that one or more of defendants REP D-2026, Keurig Green Mountain, Inc., Dr Pepper/Seven Up, Inc., and Keurig Dr Pepper, Inc. (collectively, the Keurig defendants), owned or leased the premises where the incident occurred. By a stipulation dated September 19, 2023, plaintiff discontinued the action as against defendant Ryder Truck Rental, Inc., only, with prejudice.

Midtown now moves for summary judgment in its favor, arguing that it has no liability to plaintiff “because Midtown simply did not create, or have anything to do with, the dock plate or Plaintiff’s accident.” In support of its motion, Midtown submits, among other things, transcripts of the parties’ deposition testimony.

The Keurig defendants also move for summary judgment in their favor, arguing that “the plaintiff was a temporary employee hired through an agency to work on the loading dock of the warehouse leased by The American Bottling Company,” that there is no lease with any of the named Keurig defendants, and, “[a]s per the affidavit of Ray Russo on behalf of The American Bottling Company, they executed a lease which made them responsible for the loading docks.” They further argue that “plaintiff has no proof or evidence that the [Keurig defendants] were in any way connected to the location in question.” Lastly, citing *Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 869 NYS2d 356 (2008), the Keurig defendants argue that Midtown was an independent contractor, which absolves the Keurig defendants of any liability for Midtown’s negligent acts. In support of their motion, the Keurig defendants submit, among other things, transcripts of the parties’ deposition testimony, an affidavit with the name of the affiant redacted, a copy of a lease agreement, and a copy of an “Area Route Agreement.”

Plaintiff testified that on the incident date he had been employed by nonparty Randstad, which he described as a “a temp agency,” for approximately two-and-a-half months. More specifically, he stated that he took a four to five hour virtual training course given by Randstad relating to “forklifts and pallet jacks and operating those types of machinery in the warehouse,” and then was placed with the Snapple company located on Orville Drive in Ronkonkoma. Plaintiff indicated that at the Snapple warehouse he “was basically on [his] own,” and was not part of any team or crew, but that there were “like 15 other guys working in the same warehouse,” all doing similar loading and unloading of trucks. Upon questioning, plaintiff explained that there were generally eight trucks that the warehouse employees on his shift were tasked with loading and unloading each day—six being Snapple trucks, and two “Ryder trucks” with the Ryder logo “written all over them.” He testified that “the yard dog, which works for Snapple . . . is basically the guy that goes out and gets the empty truck and pull[s] it in, and the other workers load that truck.”

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Plaintiff indicated that, most of the time, the person that pulls the truck up to the loading bay, usually the "yard dog," will place a dock plate "for [him or her] to get on and off the truck." He described the dock plate as "[a] big metal plate that comes out of the cement by electronic buttons" and, at its top, "there is another part that flips out and then you release it and it comes down and lays down . . . about a foot, a foot-and-a-half into the truck." Plaintiff stated that he always used the pallet jack designated as number three while loading and unloading trucks, and that he had already unloaded three trucks that day, after which he took a lunch break. After finishing lunch, he stated that he unplugged the pallet jack— which had been charging its battery during the break— and did another 45 minutes of truck unloading.

Plaintiff indicated that his supervisor told him "Midtown Trucking in bay one is ready to be loaded," so he confirmed that all 12 of the pallets to be loaded were present, then began loading, using the pallet jack. Plaintiff testified that the truck had been parked, and the dock plate placed, by the driver "from Midtown," who might have been named "Mike or Miguel or something like that," who was accompanied by a helper. Plaintiff explained that the dock plate "looked secured to [him]," and that Midtown's employees crossed the dock plate approximately five times while fully unloading the truck. He indicated that the unloading of the subject truck by Midtown employees was accomplished without incident, and that approximately two-and-a-half hours passed before he was told to begin loading it. Plaintiff testified that he was able to successfully load the first three pallets of beverages onto the truck, and that he had no problem traversing the dock plate on any of those occasions. Plaintiff stated that for his fourth trip into the truck he was loading "a full skid of Fiji water" and had moved the pallet jack containing the water onto the dock plate. Plaintiff testified that while the pallet jack was entirely on the dock plate, he moved the pallet jack forward toward the interior of the truck. As he did so, "that's when the dock plate gave way and . . . the wheel dropped down and it jackknifed." More specifically, he explained that the dock plate, which had extended "[s]ix to eight inches" into the truck, "became dislodged from the truck completely," and "dropped about a foot or two down." Plaintiff indicated that the pallet jack's front two wheels dropped, and then, "when it basically jackknifed, it twisted [him] off the machine towards the left," causing him to fall. Upon further questioning, plaintiff stated that the subject truck had been properly backed into the loading bay by the Midtown employee, that there had never been an issue with the dock plate or the truck before, that he is unaware of the truck or dock plate shifting while the Midtown employees unloaded the truck, and that he is unaware of any malfunction "on the truck or the lift gate concerning this accident." He also stated that he placed chocks in front of the truck's rear wheels, that the truck was parked squarely against the black rubber bumpers of the dock, and that the dock plate did not shift or otherwise move during his loading of the first three pallets onto the truck.

Michael Ladenheim testified that at the time of the subject incident he was employed as a warehouse manager by the "Dr. Pepper Snapple Group," which is currently known as the "Keurig Dr. Pepper Snapple Group." He indicated that he began working for the company in June of 2017, and that his duties included "[b]asically taking care of all of the facilities and all operations within the warehouse facility, receiving, distribution, warehouse functions, [and] picking operation" in a 50,000 square foot facility.

Kenneth Sussman testified that he is the sole owner of Midtown, a soft drink distributor formed in 2013. He stated that he was the only employee of Midtown, and that it used one or more box trucks to deliver goods to its 150 to 200 customers. Mr. Sussman indicated that on the subject date two box trucks were being used, and that both trucks were owned by Ryder. He explained that Midtown rented one of them

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on a long-term basis, while the other was a single-day rental, procured when needed. As to additional workers, Mr. Sussman indicated that if he “needed a fill-in” person to drive a truck, he could hire a man named Carlos Camacho for the day, and that if he needed a “helper,” he could hire a man named Henry Lucano. Both men were former employees of the delivery route’s prior owner.

Sussman testified that on the incident date Midtown had a “pretty large order” to be delivered to a Costco store. He explained that one truck would not have been sufficient to complete Midtown’s usual deliveries while also servicing Costco, which prompted Midtown to rent a second Ryder box truck for the day. Mr. Sussman stated that he and Mr. Lucano, whom Midtown had hired to assist with the unusually large Costco delivery that day, arrived to the subject premises at approximately 6:00 a.m. He indicated that they confirmed the rented box truck was loaded with the correct items, made the Costco delivery, and then returned to the warehouse. Mr. Sussman testified that upon return to the warehouse he provided “Snapple” with the paperwork generated by the Costco delivery, relieved Mr. Lucano, and returned the rented truck to Ryder by 10:30 a.m. He stated that he returned to the subject warehouse to retrieve his personal vehicle by noon, then went home.

Questioned regarding Midtown’s second box truck, Mr. Sussman stated that it was being operated by Mr. Camacho on the incident date. Asked what procedure is followed when Midtown returns an empty truck to the subject premises, and if such procedure permitted Midtown’s driver to back the truck up to the loading dock himself, he replied, “No, they would never allow us to do that. It’s a union job, so those jockeys, that’s their job. We don’t touch anything.” Rather, Mr. Sussman testified that Midtown’s driver would generally leave the truck in the warehouse’s parking lot, with its keys inside, which allowed the Keurig defendants’ “yard dog” or “yard jockey” to reposition the truck as needed. He indicated that such procedure was necessary because there were “over 30 trucks there at the time and only two loading docks.” Pressed to confirm that Midtown’s personnel never back one of its trucks into the subject loading dock, Mr. Sussman stated, “It would never even come up, no. They are doing that at night and we are already out of there when they would start loading.”

Carlos Camacho testified that while he never considered himself employed by Midtown, he would be paid by Mr. Sussman to conduct deliveries on occasion. He stated that he would be paid in cash, and that the work entailed his picking up a loaded truck, making deliveries, then returning the truck to the subject warehouse. Camacho indicated that he was sometimes accompanied by a helper, Henry Lucano. Asked to describe the procedure he would follow upon arrival to the subject warehouse, he testified that he would arrive “[n]o later than 5:00 [a.m.],” then locate his designated box truck in the warehouse’s front parking lot. From there, he would enter the truck, drive it to the warehouse’s loading dock, and back the truck into the dock bay designated by a warehouse supervisor. Mr. Camacho stated that the supervisor would then “chock the wheels,” open the rear of the truck, and inspect its contents for accuracy. He noted that the supervisor at the warehouse would sometimes use a “mechanical lift gate” or a dock plate to enter the truck, but that he was “not allowed to be in that area because [he does not] work for Snapple.” Asked if he has “ever operated the building dock plate,” Mr. Camacho replied, “No, not at all . . . I don’t use that plate or dock mechanism at the warehouse ever . . . I don’t know how it operates.” Questioned regarding the procedure he generally followed when returning to the warehouse after making all deliveries, he explained that he would arrive back as early as 12:30 p.m., “or as late as maybe 2:00 [p.m.] or 3:00 [p.m.],” exit the

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truck, and walk inside to locate a supervisor. Mr. Camacho testified that the supervisor would then advise him as to which loading dock bay he should park in, and he would return to the truck. He would then drive the truck to the designated bay, back it in, and then a warehouse employee would “make sure that the wheels were chocked . . . then they would operate the lift gate and put the lift gate on the truck.” Mr. Camacho stated that, next, warehouse employees would remove any returned items that were in the truck, take “the lift gate off the truck,” “tell [him] that it’s okay to take the chocks” and then inform him that “[he] can go.” He indicated that after being informed that he could leave, he would drive the truck to the front of the warehouse and park it in the lot “because there’s a jockey that brings the truck in and out so they can be loaded at nighttime.”

Raymond Russo testified that he has been employed by American Bottling Company (ABC) for thirty years. He indicated that at the time of plaintiff’s incident he was ABC’s branch manager at the subject premises, assisted by warehouse manager Michael Ladenheim. Mr. Russo stated, in relevant part, that “a number of people” could be responsible for unloading a truck at the subject premises, including “a union worker,” “a supervisor,” or “a driver.” Asked to describe the “customary practice” for backing trucks into the bay for loading, he explained that “there’s no process that [he] can think of,” and “they just back into whatever bay is open.” With regard to trucks returning to the subject premises after completing deliveries for the day, Mr. Russo stated that “it would be the driver [or] whoever is driving . . . that truck would back it up.” As to who would “activate the dock plate,” he testified that it would either be “the jockey” or “the loader himself,” and if it was the responsibility of a loader before using equipment like a pallet jack to ensure that the dock plate was properly activated. Mr. Russo indicated that even if a loading dock supervisor moved a truck instead of the yard jockey, and even if an employee of Midtown parked its truck and set the dock plate, it would still be incumbent upon the loader of the truck to ensure the dock plate was properly set.

A party moving for summary judgment “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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [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, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

Liability for a dangerous or defective condition on property is generally “predicated upon ownership, occupancy, control, or special use of the property” (*Tilford v Greenburgh Hous. Auth.*, 170 AD3d 1233, 1235, 97 NYS3d 278 [2d Dept 2019] [internal quotations and citations omitted]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]). Generally, “the issue of whether a dangerous or defective condition exists depends on the facts of

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each case and is a question of fact for the jury” (*Karpel v National Grid Generation, LLC*, 174 AD3d 695, 695, 106 NYS3d 99 [2d Dept 2019]). “In moving for summary judgment, a defendant has the burden of establishing, prima facie, that it did not create the alleged dangerous condition or have actual or constructive notice of it” (*Buffalino v XSport Fitness*, 202 AD3d 902, 903, 163 NYS3d 208 [2d Dept 2022]). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant’s employees to discover and remedy it” (*J.G. v L.I. Adventureland*, 215 AD3d 737, 737, 186 NYS3d 673 [2d Dept 2023], quoting *Gordon v American Museum of Natural History*, 67 NY2d 836, 837, 501 NYS2d 646 [1986]).

Here, Midtown has not established a prima facie case of entitlement to summary judgment in its favor (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923). Midtown’s own evidence, namely the deposition transcripts, fails to eliminate triable issues of fact. Assuming, arguendo, that the defective or dangerous condition that caused plaintiff’s alleged injuries was some combination of an incorrectly parked truck, an unsafely placed dock plate, or a malfunctioning dock plate, there is a clear dispute regarding the individual(s) who performed such acts. Plaintiff contends that employees of Midtown, whom he recognized as such, were present on the incident date, and that the driver of Midtown’s truck negligently parked it and placed the dock plate. Despite the testimony of witnesses denying that Midtown’s personnel ever placed a dock plate, the court must view the evidence in the light most favorable to plaintiff. Thus, the court finds the conflicting testimony of the witnesses is insufficient to absolve Midtown of liability as a matter of law (see generally *Stafford v Allied Bldg. Prods. Corp.*, 164 AD3d 1398, 82 NYS3d 539 [2d Dept 2018]). In light of Midtown’s failure to meet its initial burden, the court need not consider plaintiff’s papers in opposition (see generally *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). Accordingly, the motion by defendant Midtown Beverages, Inc., for summary judgment dismissing the complaint against it is denied.

Turning to the Keurig defendants’ motion, defendant REP D-2026, LLC, as owner, submitted a copy of an agreement dated June 16, 2014, purporting to lease 48.6% of the subject premises to nonparty ABC. Yet, the rider appended to such lease agreement, which is dated 10 days before the main agreement was executed, was signed by a representative of nonparty “Dr. Pepper Snapple Group, Inc.” The Keurig defendants do not explain the connection they have, if any, to “Dr. Pepper Snapple Group, Inc.” Nevertheless, assuming, arguendo, that the lease rider was operational at the time of plaintiff’s incident, Paragraph 51, subsection (c), of such agreement specifically provides that “Tenant *may* use the loading area appurtenant to the Demised Premises for loading and unloading [emphasis added].” Such rider also contains provisions obligating REP D-2026, LLC to maintain the structural and exterior portions of the subject building, but states that ABC “shall, at its own cost and expense, keep the Demised Premises in good condition, repair and appearance at all times throughout the term of this lease including, without limitation . . . the maintenance, repair and replacement of the area of the parking lot designated for Tenant’s trucks on the Parking Plan.” In addition, Paragraph 63, subsection (l), obligates ABC to

indemnify, hold harmless and defend Landlord, its affiliates, managing agents, construction company, subsidiaries, directors, officers, employees and agents from and against any and all liabilities, claims, demands, damages, costs, expenses (including attorney fees) suits, judgments whether actual or

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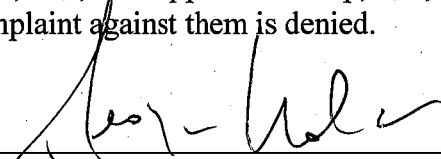
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alleged, including such for bodily injury or wrongful death to any person (including tenant employees and invitees) and property damage to any property, arising out of or in connection with the operations or business of the Tenant at the demised premises or real property; the acts or omissions of the Tenant, its sub-tenants, its employees, invitees, contractors or agents; or any breach of this lease or improper conduct.

Assuming, again, that the lease agreement and rider were in effect, REP D-2026, LLC established, prima facie, that it leased only a portion of the subject premises to ABC, that ABC was permitted to use the subject loading dock, and that ABC has an obligation to indemnify REP D-2026, LLC. Such facts, if true, are insufficient to prove, as a matter of law, that no Keurig defendant had an ownership, leasehold, or controlling interest in the subject premises at the time of plaintiff's alleged incident. Nor does the lease agreement, or rider, contain language granting any Keurig defendant exclusive use of the subject loading dock. Instead, the submitted lease rider includes terms implying that other tenants will be working in close proximity to the leaseholder, such as Paragraph 51, subsection (a), which cautions ABC against "interfer[ing] with other tenants in the Building." Beyond the obvious uncertainty regarding how the accident occurred, there is insufficient evidence to determine which entity, if any, breached a duty owed to plaintiff. Therefore, the court is unable, at this juncture, to determine if any of the defendants, including REP D-2026 LLC, are free of liability.

Assuming, without finding, that REP D-2026 LLC has a valid contract obligating ABC to indemnify it against plaintiff's claims, REP D-2026 LLC has not proven, prima facie, that ABC was still a leaseholder at the time of plaintiff's incident, that ABC owed plaintiff a duty, that ABC was the *sole* entity with access to the loading dock at the time of the incident, or that ABC was negligent. Accordingly, the motion by defendants REP D-2026, LLC, Keurig Green Mountain, Inc., Dr Pepper/Seven Up, Inc., and Keurig Dr Pepper, Inc., for summary judgment dismissing the complaint against them is denied.

Dated: February 10, 2025


HON. GEORGE NOLAN, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION