At an IAS Term, Part 92 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of Sept, 2024.

PRESENT:

HON. KATHERINE LEVINE,
Justice.

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DANNY KISSOON,

Plaintiff,

Index No.: 510671/2018

-against-

RED HOOK CONSTRUCTION GROUP, LLC., RED HOOK CONSTRUCTION GROUP-I, LLC., RED HOOK CONSTRUCTION GROUP-II, LLC., SOLOMON WOOD COMPANY, LLC AND SAWKILL LUMBER LLC,

(Mot. Seq. 4)

Defendants.

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| The following e-filed papers read herein: | NYSCEF Doc Nos. |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) | 84-93 |
| Opposing Affidavits (Affirmations) | 97-98 |
| Reply Affidavits (Affirmations) | 106-107 |

Upon the foregoing papers, Defendant Red Hook Construction Group-II ("Red Hook") moves (in motion sequence [mot. seq.] four) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint and all cross-claims against it. In the alternative, Red Hook moves for an order striking plaintiff's complaint for spoliation of evidence or for an adverse inference based on destruction of evidence.

## Background and Procedural History

Plaintiff commenced this action, sounding in common law negligence, for personal injuries allegedly sustained on May 10, 2017 after falling off a flatbed truck that contained an unsecured load of lumber.

***Plaintiff's Pretrial Testimony***

Plaintiff owns DSK Trucking ("DSK"), a company that transports materials on large flatbed trucks. Plaintiff is also one of DSK's primary drivers. On the day of his accident, plaintiff drove one of DSK's truck to pick up a load of lumber at a lumber yard located at 46 Halleck Street in Brooklyn (the "Yard"). DSK was hired by Sawkill Lumber LLC ("Sawkill")[1] to pick up reclaimed lumber removed from demolished buildings. Plaintiff previously made three or four such trips to the Yard. On these occasions, after plaintiff parked his flatbed, a Red Hook employee used a forklift to place the reclaimed lumber onto the flatbed's floor in several loads. Each load was comprised of stacks of individual pieces of lumber that were 10 inches wide, three inches thick and 20 inches long, and the loads measured approximately five feet high and 20 feet long.

Prior to the forklift placing the lumber on the flatbed, plaintiff would set down three pieces of wood called "dunnage" on the footbed. Dunnage is used to support the lumber loads and provides the forklift room to place the lumber on the flatbed's floor. Plaintiff described the dunnage as "4 x 4 by 8 feet length" and testified that the three pieces were laid side-by-side – one at the top of the flatbed, one in the middle, and one at the rear. After

[1] The claims against former-defendant Sawkill have been dismissed by order dated December 16, 2022.

the lumber is loaded onto the flatbed, plaintiff was responsible for strapping or securing the lumber to the flatbed. Plaintiff generally used numerous straps to secure the lumber because flatbeds do not have sides and the straps prevent materials from falling off the truck. The straps are located on one side of the flatbed, and plaintiff would stand on the ground on one side, throw the straps up over the top of the lumber load, walk around to the other side and hook the straps in, then come back around and tighten the straps. Occasionally, an additional load would be placed on top creating a second level of loaded lumber. On these occasions, several pieces of dunnage would be placed on top of the first lumber level to support the second level.

On the day of plaintiff's accident, he arrived at the Yard, parked his flatbed truck, and proceeded to place six pieces of dunnage, which plaintiff owned and stored on the bottom of the flatbed, onto the flatbed's deck. Based on his experience, plaintiff knew how to place dunnage on the flatbed so the load would not cave and performed this task without anyone's assistance. Thereafter, a Yard worker used a forklift to load four loads of lumber on top of the dunnage. The lumber was comprised of reclaimed floor beams from old buildings that had old nails sticking out which prevented these reclaimed beams from lying together seamlessly side-by-side. Plaintiff did not speak to the forklift operator or anyone else prior to the forklift operator placing the lumber on the flatbed. On this occasion, as well as prior occasions, other than "giv[ing] it a glance," plaintiff did not check to make sure that the lumber was being loaded properly, as he claimed it was not necessary for him to do so. The lumber in each of the four loads was not tied together, but loose.

After the floor of the flatbed was full, the forklift operator left to get an additional load of lumber and plaintiff placed two additional pieces of dunnage on top of the load to support the second level. Plaintiff testified that he was aware the lumber that was already loaded on the flatbed was uneven, not flush with each other, that the individual pieces of lumber had nails sticking from them, and the pieces did not seamlessly stack. Plaintiff had previously encountered this situation, having dealt with reclaimed lumber on many occasions in the course of his duties. Plaintiff also testified that on prior jobs at the Yard, Red Hook had their own employees place the dunnage, however, on the day of his accident, the forklift operator was the only employee Red Hook had present, leaving plaintiff himself to place the dunnage.

Prior to placing the second level of dunnage, plaintiff realized that he would need to secure the lumber with seven straps – two straps across the bottom load of lumber near the rear of the flatbed, two nearest to the cabin of the vehicle, and three after the second load of lumber was added. Plaintiff first secured the front two straps over the two lumber loads nearest to the cabin. Plaintiff did not secure the two lumber loads in the rear of the flatbed with straps as he was waiting to see what the forklift operator would bring next - - even though plaintiff believed that there would only be one more load which would most likely be placed in the middle.

Plaintiff then climbed up from the back of the trailer onto the unsecured rear lumber loads to manually place the two pieces of dunnage by walking across the loose lumber pieces. Plaintiff testified that no one instructed him to do this and that it was his decision as to the order in which to secure the straps and place the second level of dunnage. Plaintiff

also conceded that a load that is strapped in both the front and rear is more sturdy and less likely to shake or move than a load that is strapped only in the front.

As plaintiff placed the first piece of dunnage, he took a few steps and felt the lumber shift. Plaintiff testified that at this point, there was nothing stopping him from climbing down and strapping in the rear load, but he did not think anything negative would occur. Despite his awareness that it was an uneven load and that there were nails jutting from it, plaintiff looked straight ahead and was watching neither his feet or the lumber. Plaintiff also testified that he had the option of using a ladder to place the dunnage on top of the lumber but chose not to bring a ladder with him. As the lumber shifted under his feet, plaintiff fell, testifying that, "[t]he lumber decide to move it decide to fall, so when it fall I leap. As it falling I go with it but I leap out [sic]" (Plaintiff's tr. 100:21-23).

After the incident, the subject dunnage was taken from him to a different site and eventually destroyed. Plaintiff testified that dunnage wears down over time and needs to be replaced, having had the subject dunnage since 2016. Plaintiff further testified the dunnage itself and the placement of the dunnage is very important to the process of loading and securing and that defective dunnage can break and cause the loads that it supports to move. Despite such testimony, plaintiff never inspected the dunnage prior to using it on the date of the accident, and, more importantly, that he *never* inspects dunnage at all.

***Red Hook's and Saw Kill's Pretrial Testimony***

Christopher Garofalo ("Garofalo"), a former Red Hook employee, testified that it was the flatbed truck driver's responsibility to place dunnage onto the flatbed, and opined that it was the driver's responsibility to make sure the loads are properly and securely

stacked onto the truck. Sawkill's owner, Alan Solomon ("Solomon") also testified that it was the truck driver's responsibility to make sure that the load that they are picking up is secure and stable. However, Solomon was not present for the accident and has no firsthand knowledge of the incident.

## Parties' Contentions

***Red Hook's Motion***

Red Hook contends that it is entitled to summary judgment because it was not negligent and did not owe plaintiff a duty because he was responsible for securing is own truck. In that regard, Red Hook argues that the flatbed truck loaded with lumber was not a dangerous condition. Red Hook contends that plaintiff was fully aware that the wood planks were loose and contained nails yet chose to walk on top of the loose wood rather than first securing the load or using a ladder to do so. Red Hook also argues that alternatively, it is entitled to summary judgment because plaintiff's own conduct was the sole proximate cause of his injuries and was not foreseeable. Also in the alternative, Red Hook contends that if the court finds that a dangerous or defective condition existed, that condition was open and obvious and plaintiff is not entitled to recovery.

If the court denies summary judgment, Red Hook argues that plaintiff's complaint should be stricken because plaintiff destroyed key evidence, i.e., the dunnage used to support the lumber load.

***Plaintiff's Opposition***

In opposition, plaintiff contends that Red Hook failed to meet its initial burden on summary judgment, and also contends that factual issues preclude granting summary

judgment in Red Hook's favor. Plaintiff argues that Red Hook owed plaintiff a duty when it created a dangerous condition that caused plaintiff's accident. To that end, plaintiff contends that a Red Hook employee placed uneven, unsecured reclaimed wood with nails sticking out, making it impossible to tightly pack the wood and produced gaping holes between the wood. Plaintiff contends that because of the way that the Red Hook employee laid down the wood and due to wood's nature, plaintiff had no choice but to traverse the top of the unsecured wood to secure it to ensure that it was safe to transport.

Plaintiff also argues that he was not the proximate cause of his injuries and that his injuries were not foreseeable. Plaintiff further contends that Red Hook owed him a duty to warn him as the condition was not open and obvious and inherently dangerous.

Finally, plaintiff contends that there is no basis for spoliation sanctions because plaintiff did not destroy the subject dunnage but rather that it was taken from him when he went to different job sites. Plaintiff argues that he was out of work for six months and could not have done anything with the dunnage during that time.

***Red Hook's Reply***

In reply, Red Hook contends that plaintiff failed to raise any question of fact or law precluding summary judgment and notes that plaintiff failed to cite any case law in support of his arguments.

**Discussion**

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (CPLR 3212

[b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

"A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition" (*Wilson v Rye Family Realty, LLC*, 218 AD3d 836, 837 [2d Dept 2023]; *see also Livingston v Better Medical Health, P.C.*, 149 AD3d 1061, 1062 [2d Dept 2017]). "To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" (*Leary v Leisure Glen Home Owners Assn., Inc.*, 82 AD3d 1169, 1169-1170 [2d Dept 2011]).

"A property owner has no duty to protect or warn against conditions that are open and obvious and not inherently dangerous" (*Evans v Fields*, 217 AD3d 656, 656 [2d Dept

2023]; *Brady v 2247 Utica Ave. Realty Corp.*, 210 AD3d 621, 622 [2d Dept 2022]). "Whether a dangerous or defective condition exists on the property so as to give rise to liability depends on the particular circumstances of each case and is generally a question of fact for the jury" (*Evans*, 217 AD3d at 656-657; *Brady*, 210 AD3d at 622-623 [internal quotation marks omitted]; *see also Holmes*, 184 AD3d at 811). However, there is no duty to warn against a condition that is readily apparent "by those employing the reasonable use of their senses" (*Maravelli v Home Depot U.S.A.*, 266 AD2d 437 [2d Dept 1999]).

Here, Red Hook met its burden of demonstrating that it did not owe a duty to protect plaintiff. In that regard, plaintiff testified that he had significant experience loading lumber onto the flatbed and securing it, and that he had done so at the Yard on several prior occasions. Plaintiff also testified that he had experience dealing with lumber that had nails in it and loads that were not stacked flush with each other on the flatbed. Plaintiff further detailed the procedure for laying dunnage, loading lumber, and then securing it with straps. In addition, plaintiff testified that he and not Red Hook was responsible for securing he load. Plaintiff conceded that he did not follow his usual procedure of securing the lumber on this occasion but rather chose to walk on top of the loose lumber, which wobbled, causing plaintiff to fall. Under these particular circumstances, the lumber pile stacked on the flatbed was not a dangerous condition and Red Hook had no duty to warn plaintiff of the condition of the lumber that is readily apparent by plaintiff employing the use of his senses.

Indeed, the Third Department reversed a denial of summary judgment to a defendant in a strikingly similar case. In *Smith v Curtis Lbr. Co* (183 AD2d 1018 [3d Dept 1992]),

the plaintiff was injured in defendant's lumber yard when he slipped and fell while attempting to remove wood planks from a six-foot high pile by standing on an adjoining pile of planks. The Third Department held that defendant failed to plead facts from which the existence of a duty to the plaintiff may be inferred (*id.*). The court also held that the plaintiff could not recover under a theory of a dangerous condition, because the lumber yard owner was "not required to protect [the] plaintiff from his own folly" (*id.* at 1019). The court further held that: (1) "plaintiff was fully aware of the stacked wood pile on which, for some inexplicable reason, he elected to stand to accommodate himself in taking down wooden planks," (2) "[t]he danger in standing on loose wood was apparent," and (3) "[t]here is no duty to warn against a condition which is readily observable" (*id.*).

As in *Smith*, here, plaintiff chose to stand on the unsecured pile of wood with nails protruding from it, knowing that the portion that he stood on was unsecured, and testified that he secured the lumber piles on prior occasions from the ground before having a second load of wood piled onto it. As in *Smith,* the danger in standing on the loose wood was apparent, and Red Hook had no duty to warn plaintiff against it or to protect plaintiff from his own folly.

In opposition, plaintiff has failed to raise a factual issue precluding summary judgment. The parties agree on the pertinent facts that form the basis of plaintiff's claim. Plaintiff does not cite any case law refuting Red Hook's arguments regarding any dangerous condition or duty owed to him.

The court has considered the parties' remaining contentions and finds them to be without merit.

## Conclusion

It is therefore,

**ORDERED** that the portion Red Hook's motion for summary judgment (mot. seq. four) dismissing the claims and cross-claims against it is **GRANTED** and any claims and cross-claims against Red Hook are dismissed.

In light of the court's dismissal of the claims against Red Hook, the determination of that portion of Red Hook's motion seeking spoliation sanctions is unnecessary.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. KATHERINE A. LEVINE
JUSTICE SUPREME COURT

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