

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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FLORENTINO ALATORRE RAMOS and
JUANA ALATORRE,

Index No.: 18373/06
Motion Date: 5/21/08
Motion Cal. No: 26
Motion Seq. No: 2

Plaintiffs,

-against-

SYLVIA ANN POWELL,

Defendant.

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SYLVIA ANN POWELL,

Third-Party Plaintiff,

-against-

SHERNOS INC. d/b/a SPIRO'S COFFEE SHOP,

Third-Party Defendant.

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The following papers numbered 1 to 17 read on this motion for an order, pursuant to CPLR § 3212, granting summary judgment to third-party defendant SHERNOS INC. d/b/a SPIRO'S COFFEE SHOP, dismissing the third-party complaint.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Memorandum of Law-Exhibits.....	1 - 5
Plaintiff's Affirmation in Opposition-Exhibits.....	6 - 11
Defendant/Third-Party Plaintiffs' Affirmation in Opposition.....	12 - 13
Reply Affirmation to Plaintiff's Opposition.....	14 - 15
Reply Affirmation to Defendant's Opposition.....	16 - 17

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiffs Florentino Alatorre Ramos (“plaintiff”) and Juana Alatorre commenced this action against defendant/third-party plaintiff Sylvia Ann Powell (“defendant”) to recover damages for injuries plaintiff allegedly sustained on August 5, 2006, when the motor vehicle operated by defendant struck plaintiff, a delivery person employed by third-party defendant Shernos Inc. d/b/a Spiro’s Coffee Shop (“Spiros”), as he was turning left while riding his bicycle from Pershing Crescent onto Manton Street in Briarwood, New York. Defendant commenced a third-party action against Spiros for contribution and indemnification based upon its alleged negligence in failing to provide proper bicycle equipment.

Pertinent Facts

Plaintiff Ramos is a deliveryman and dishwasher for Spiros, a restaurant located at 138-49 Queens Boulevard, Briarwood, New York, and at the time of the accident, worked the hours of 8:00 a.m. to 4:00 p.m. on Monday through Friday, and from 6:00 a.m. to 5:00 p.m. on Saturday. Spiros provided plaintiff Ramos with a three speed bicycle to make deliveries that was stored at the restaurant. At the time of the accident, plaintiff Ramos had completed the last of fifteen deliveries and was returning to the restaurant when his bicycle was struck by defendant’s motor vehicle as he attempted to make a left turn from Pershing Street onto Manton Street in Briarwood, New York. Plaintiff commenced the instant action on August 21, 2006. Defendant commenced the third-party action against Spiros on December 18, 2007, approximately sixteen months after the service of the original complaint, five months after plaintiff Ramos’ deposition, and two weeks after the filing of the Note of Issue.

In her third-party amended complaint, defendant alleges that Spiros was negligent in failing to train plaintiff in the proper use and operation of his bicycle when making deliveries for Spiros; in failing to supervise plaintiff’s deliveries; in failing to instruct or provide plaintiff with information on bicycle traffic rules and regulations; in creating a work environment that encouraged and/or necessitated plaintiff’s circumvention of the traffic laws in order to make timely deliveries; in offering incentives that motivated plaintiff to make deliveries as fast and expeditiously as possible; and in failing to provide property safety equipment. Spiros now moves for summary judgment dismissing the third-party complaint on the ground that Spiros was under no duty to provide plaintiff Ramos with proper bicycle equipment or to supervise him in the ordinary activity of bicycle riding inherent in his job. Spiros further seeks dismissal on the ground that plaintiff Ramos did not sustain a grave injury pursuant to Workers’ Compensation Law §11. In opposition, defendant/third-party plaintiff addresses only the issues of the duty to provide a helmet and “grave injury;” thus, all other theories of liability are presumed to be abandoned.

Discussion

It is beyond cavil that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dep. 1993). As such, the function of the court on the instant motion is issue finding and not issue

determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, *supra*. Once the moving party makes a prima facie showing of entitlement to summary judgment in their favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasan v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2nd Dept. 2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001).

The initial question in a negligence action is whether a duty of care is owed to the injured party. See, Church ex rel. Smith v. Callanan Industries, Inc., 99 N.Y.2d 104 (2002); Espinal v. Melville Snow Contrs., Inc., 98 N.Y.2d 136 (2002); Eaves Brooks Costume Co., Inc. v. Y.B.H. Realty Corp., 76 N.Y.2d 220 (1990); Sheila C. v. Povich, 11 A.D.3d 120 (1st Dept. 2004). To prove a prima facie case of negligence, there must be a demonstration of the existence of a duty, a breach of that duty, and such breach was a proximate cause of the injury. See, Fernandez v. Elemam, 25 A.D.3d 752 (2nd Dept. 2006); Edwards v. Mercy Home for Children & Adults, 303 A.D.2d 543, 544 (2nd Dept. 2003). “In the absence of a duty, there is no breach and no liability (citations omitted).” Coral v. State, 29 A.D.3d 851 (2nd Dept. 2006). “Although juries determine whether and to what extent a particular duty was breached,”[Daubert v. Flyte Time Regency Limousine, 1 A.D.3d 395, 396 (2nd Dept. 2003)], the existence and scope of that duty are legal questions for the courts to determine. See, 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280 (2002); Solan v. Great Neck Union Free School Dist., 43 A.D.3d 1035 (2nd Dept. 2007).

Here, defendant contends that Spiros owed a duty to provide a helmet to plaintiff and properly train him as he was engaged in making bicycle deliveries during the course of his employment. Spiro has made a prima facie showing of its entitlement to summary judgment dismissing the third-party complaint on the ground that it was under no duty to provide plaintiff Ramos with proper bicycle equipment or to supervise him in the ordinary activity of bicycle riding inherent in his job. In opposition, defendant has failed to raise triable issues to defeat the motion. New York City Code § 10-157, entitled “Bicycles used for commercial purposes,” states in pertinent part, the following:

e.(1) The owner of any business engaged in providing a service as authorized in this section shall provide, at its own expense, protective headgear suitable for each bicycle operator. Such headgear shall:

(i) meet the standards set forth by the consumer product safety commission in title 16, part 1203 of the code of federal regulations;

(ii) be readily available at each employment site for use by each bicycle operator; and

(iii) be replaced if such headgear is no longer in good condition. Headgear is no longer in good condition if it is missing any of its component parts or is otherwise damaged so as to impair its functionality.

(2) Each bicycle operator shall wear protective headgear that meets the requirements of paragraph 1 of this subdivision while making deliveries or otherwise operating a bicycle on behalf of such business. The term "wear such protective headgear" means having the headgear fastened securely upon the head with the headgear straps.

Notwithstanding defendant's reliance upon the aforementioned section to impose a duty upon Spiro based upon its failure to provide a helmet to plaintiff during the course of his employment, the mandate on business owners to provide delivery persons with, inter alia, helmets pursuant to New York City Code § 10-157, became effective on July 26, 2007, almost one year after the August 5, 2006 accident. Thus, this section cannot serve as a basis for Spiro's liability, as it had no duty to provide such protective headgear at the time of the incident.

Moreover, Spiro did not have a duty to supervise or train plaintiff in the ordinary activity of bicycle riding inherent in his job. "[A] party can seek contribution from a plaintiff's employer if the plaintiff's injuries stem in part or in whole from a lack of training or other independent actions on the part of an employer (citations omitted)." Stroschine v. Prudential-Bache Securities, Inc., 207 A.D.2d 828 (2nd Dept. 1994). However, when an activity is "'so ordinary and within the ken of the average person, [] there is no duty to provide instruction, warnings and/or assistance in how to perform it' (citations omitted)." Mangiafreno v. Wikstrom Machines, Inc., 243 A.D.2d 690 (2nd Dept. 1997); see, Lattanzi v. International Business Machines Corp., 237 A.D.2d 259 (2nd Dept. 1997); [The third-party defendant had no duty to provide the plaintiff Anna Lattanzi with instructions, warnings, or assistance on the performance of tasks which are ordinary and within the ken of the average person]; Camarda v. Summit Homes, 233 A.D.2d 285 (2nd Dept. 1996)[Since Camarda was engaged in the common and ordinary activity of carrying a ladder at the time he was injured, his employer, the appellant, cannot be held liable for failure to train, instruct, supervise, or direct him in the performance of that activity]; Stroschine v. Prudential-Bache Securities, Inc., 207 A.D.2d 828 (2nd Dept. 1994)[The undisputed facts show that plaintiff was injured while attempting to plug an extension cord into an electrical outlet located under a desk. This is a task so ordinary and within the ken of the average person that there is no duty to provide instruction, warnings and/or assistance in how to perform it]. "[U]nder the circumstances of this case, neither training of the plaintiff nor assistance by trained personnel was required." Stroschine v. Prudential-Bache Securities, Inc., 207 A.D.2d 828 (2nd Dept. 1994). Consequently, Spiro is entitled to summary judgment on the issue of duty.

Spiros further seeks dismissal on the ground that plaintiff Ramos did not sustain a grave injury. Section 11 of the Workers' Compensation Law provides that an employer's liability prescribed by the Workers' Compensation Law shall be exclusive and in place of any other liability whatsoever. See, *Stabile v. Viener*, 291 A.D.2d 395 (2nd Dept. 2002); *Soto v. Alert No. 1 Alarm Systems, Inc.*, 272 A.D.2d 466 (2nd Dept. 2000); *Goodarzi v. City of New York*, 217 A.D.2d 683 (2nd Dept. 1995). The section further provides that an employer may be liable in a third-party action for contribution or indemnification only where the third-party plaintiff proves through competent medical evidence that the employee sustained a grave injury. See, *Flores v. Lower East Side Service Center, Inc.*, 4 N.Y.3d 363 (2005); *Meis v. ELO Org.*, 97 N.Y.2d 714 (2002); see, also, *Spiegler v. Gerken Bldg. Corp.*, 35 A.D.3d 715, 715 (2nd Dept. 2006); *Angwin v. SRF Partnership, L.P.*, 285 A.D.2d 568 (2nd Dept. 2001). "The term 'grave injury' as contained in Workers' Compensation Law § 11 has been described as 'a statutorily-defined threshold for catastrophic injuries, and it includes only those injuries listed in the statute and determined to be permanent' (citations omitted). Furthermore, the statutory list of grave injuries is intended to be exhaustive, not illustrative." *Dunn v. Smithtown Bancorp*, 286 A.D.2d 701, 702 (2nd Dept. 2001); *McCoy v. Queens Hydraulic Co., Inc.*, 286 A.D.2d 425 (2nd Dept. 2001). Section 11 expressly provides:

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Moreover, it is well settled that "statutory language should be 'sensibly' read 'without resort to forced or unnatural interpretations' (citation omitted). Further, in interpreting the statutory language, the 'guiding principle is, of course, to implement the intent of the Legislature-in this case to narrow tort exposure for employers while also protecting the interest of injured workers-by considering both the language used and objects to be accomplished' (citation omitted)." *Castillo v. 711 Group, Inc.*, 41 A.D.3d 77, 79 (2nd Dept. 2007). With respect to the scope of the enumerated grave injury of 'an acquired injury to the brain caused by an external physical force resulting in permanent total disability,' the Court of Appeals, in *Rubeis v. Aqua Club Inc.*, 3 N.Y.3d 408 (2004), found that a brain injury resulting in 'permanent total disability' under Workers' Compensation Law § 11 is established when the evidence demonstrates that the injured worker is no longer employable in any capacity. The Court, in making its determination, stated the following [3 N.Y.3d at 417]:

First, we consider the choices within the context of section 11 itself. The Legislature in section 11 has itself defined a grave injury to include "loss of multiple fingers," "loss of multiple toes," "loss of nose," "loss of ear," "permanent and severe facial disfigurement" and "loss of an index finger." None of those enumerated grave injuries has the effect of preventing an employee from performing daily life activities. Limitation of permanent total disability to a vegetative state thus is too harsh a test, out of step with the balance of the section.

Next, we consider the two alternatives within the larger context of the Workers' Compensation Law, where the customary definition of "disability" relates to employment. The Workers' Compensation Law deals with employment benefits, and the term "disability" generally refers to inability to work. Workers' Compensation Law § 201 (9) (A) and Department of Labor Rules and Regulations (12 NYCRR) § 363.1, for example, relate disability to inability to perform duties of employment. And section 37 (1), which refers to occupational diseases, states, "[d]isability' means the state of being disabled from earning full wages at the work at which the employee was last employed." The Workers' Compensation Law is about workers and their work.

Finally, we make clear that the test we adopt for permanent total disability under section 11 is one of unemployability in any capacity. "In any capacity" is in keeping with legislative intent and sets a more objectively ascertainable test than equivalent, or competitive, employment.

Under the Workers' Compensation Law, "[the] proponent of a motion for summary judgment dismissing a third-party complaint because the plaintiff did not sustain a grave injury, is required to make a prima facie showing of entitlement to judgment as a matter of law." Fitzpatrick v. Chase Manhattan Bank, 285 A.D.2d 487, 488 (2nd Dept. 2001); see, Meis v. ELO Organization, LLC, 97 N.Y.2d 714 (2002); Castro v. United Container Mach. Group, 96 N.Y.2d 398 (2001); DePaola v. Albany Medical College, 40 A.D.3d 678 (2nd Dept. 2007). The burden then shifts to plaintiff to demonstrate the existence of a genuine issue of fact on the "grave injury" issue. See, Benedetto v. Carrera Realty Corp., 32 A.D.3d 874 (2nd Dept. 2006); Palacio v. Textron, Inc., 295 A.D.2d 415 (2nd Dept. 2002); Fitzpatrick v. Chase Manhattan Bank, 285 A.D.2d 487 (2nd Dept. 2001); Miroe v. Miroe, 270 A.D.2d 400 (2nd Dept. 2000).

Here, the record before this Court demonstrates that there are triable issues of fact with respect to whether plaintiff, whose injuries as specified in his bill of particulars are, inter alia, a traumatic brain injury, fractured skull and subdural hematoma, sustained a grave injury within the

meaning of the Workers' Compensation law. See, generally, Ramos v. DEGI Deutsche Gesellschaft Fuer Immobilienfonds MBH, 37 A.D.3d 802 (2nd Dept. 2007); Marshall v. Arias, 12 A.D.3d 423 (2nd Dept. 2004); Aguirre v. Castle American Const., LLC, 307 A.D.2d 901 (2nd Dept. 2003). Indeed, the affirmation of Dr. Malcolm Reid, the Chairman of the Department of Physical Medicine and Rehabilitation at St. Luke's Roosevelt Hospital, who examined plaintiff in September 2006 and opined that plaintiff's brain injuries include "chronic encephalomalacia with associated gliosis in the bilateral frontal lobes," which renders him "not likely to be employable," sufficiently raises triable issues, contrary to Spiro's contentions. Thus, summary disposition of this ground is precluded.

Accordingly, the motion for summary judgment by third-party defendant Shernos Inc. d/b/a Spiro's Coffee Shop dismissing the third-party complaint on the grounds that it was under no duty to provide plaintiff Ramos with proper bicycle equipment or to supervise him, and plaintiff Ramos did not sustain a grave injury pursuant to Workers' Compensation Law § 11, is granted to the extent that the claim that Spiro was under a duty to provide plaintiff Ramos with proper bicycle equipment and supervise him, hereby is dismissed. The balance of the motion for dismissal under the Workers' Compensation Law § 11, as well as the relief sought in the alternative under CPLR §§ 603 and 1010, are denied.

Dated: August 8, 2008

J.S.C.