Torres v Pierless Fish Corp.

2024 NY Slip Op 31351(U)

April 12, 2024

Supreme Court, Kings County

Docket Number: Index No. 505428/2017

Judge: Ingrid Joseph

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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 12th day of April 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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CHARLES TORRES,

Plaintiff(s)

-against-

PIERLESS FISH CORP., JERRY WWHS CO., INC., CANON SOLUTIONS AMERICA, INC., F/K/A CANON BUSINESS SOLUTIONS, INC.,

Defendant(s)

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Index No: 505428/2017

ORDER

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Affirmation in Support/Affidavits Annexed Exhibits Annexed/Reply.....	105-125; 170
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....	149-153; 154-158
Notice of Motion/Affirmation in Support/Affidavits Annexed Exhibits Annexed/Reply.....	126-144; 166-169
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....	154; 161

In this action, Pierless Fish Corp. ("Pierless") moves (Motion Seq. 8) for summary judgment pursuant to CPLR 3212 dismissing Charles Torres' ("Plaintiff") complaint and all cross-claims against Pierless on the ground that there is no genuine issue of material fact concerning liability against Pierless as well as summary judgment on its cross-claims against Canon Solutions America, Inc., F/K/A Canon Business Solutions, ("CSA"). Plaintiff and CSA has opposed the motion. Additionally, CSA moves (Motion Seq. 9) for summary judgment pursuant to CPLR 3212 dismissing Plaintiff's complaint against CSA together with any and all cross-claims against it as well as granting common law indemnity against Pierless with expenses and attorney's fees.

This matter arises from a slip-and-fall down an interior stairway on August 10, 2015, in building B9 at 5600 1st Avenue Brooklyn, New York ("Subject Premises"). While in the scope of his employment with non-party FMD Distribution ("FMD") Plaintiff slipped and fell while he and and his coworker, non-party Henry Paulino ("Paulino") were operating a stair-climber machine to carry a Canon copy machine down a flight of stairs. Non-party, City of New York (the "City") was the owner of the Subject Premises on the date of the accident. Defendant Pierless was the tenant and entered into a 3-year agreement on July 20, 2012, to lease the subject copy machine from Defendant CSA. CSA hired FMD to remove the copy machine from the Subject Premises due to the lease term ending on July 10, 2015.

In support of its motion, Pierless argues that Plaintiff's negligence claim against it must be dismissed because Pierless never owed a duty to him. Pierless states that it did not own, possess, or control the area where Plaintiff was injured nor did it have an obligation to maintain it. Pierless claims

that pursuant to "Landlord's Obligations" under Article 11 Section 11.06 of its Lease Agreement, that the landlord "shall at its own cost and expense, perform, or caused to be performed, certain services ("Landlord Obligations") in connection with the maintenance and repair of the following: … the subsurface and structural elements of the Permit Area." Pierless also cites EBT testimony from its former President Robert Demasco ("Demasco"), who testified that the landlord was responsible for cleaning the staircase leading to the second floor of the premises, which was considered a common element of the building.[1] Furthermore, Pierless asserts that it did not own, maintain or control the subject copy machine. Pierless claims that in 2012 it entered into an "Acquisition Agreement: Lease or Purchase" ("Acquisition Agreement") with Defendant CSA, and that CSA retained FMD to remove the copy machine on the date of the accident because the lease term was over. Pierless contends that it did not direct, control, or supervise the Plaintiff's work while he was removing the copy machine. Pierless alleges that CSA owned the copy machine and was ultimately responsible for its removal, therefore its careless, defective, and inadequate ownership and transportation of the copy machine caused Plaintiff's accident. Pierless contends that as evidenced by its submitted photographs dated June of 2018 and video of the accident, that the stairs were not in a bad condition nor the cause of the accident. Pierless contends that because CSA was negligent and the cause of the accident, that Pierless is entitled to common law indemnification and that CSA's cross-claims against Pierless should be dismissed.

In opposition, Plaintiff argues that Pierless created the dangerous condition that caused Plaintiff's accident. Plaintiff states that Pierless regularly exercised control over the subject staircase and had an obligation under their Lease Agreement with the City to keep stairs in a clean condition. Plaintiff asserts that pursuant to the Lease Agreement, the landlord was responsible to maintain "common areas" but that stairs were not listed as a common area, and that the staircase instead fell under "Maintenance of the Premises, Permit Area, Etc." pursuant to Article 11 Section 11.01 of the contract which assigned responsibility for maintenance and repairs of the exterior, structural elements, and appurtenances to the tenant to the extent that such repairs are made necessary due to the tenant's negligence in maintaining the Premises. Moreover, Plaintiff claims that Section 11.03 requires the tenant to keep the front of the Subject Premises, the Permit Area, sidewalks, sidewalk hoists, railings, gutters, and curbs located in front of the Subject Premises, free of dirt, snow, debris, etc.

Plaintiff further argues that Pierless concedes that it created the dangerous condition of the staircase through the course of regularly using them over the years since its business opened. Plaintiff cites EBT testimony from Demasco, who testified that while it was the landlord's duty to maintain the

[1] (Demasco Dep. Pg. 28 lines 8-25; Pg 36 lines 2-25).

stairs, that he was not actually sure if they ever cleaned the stairs or sent employees to do so, and that he never requested for them to clean them.[2] Further, Plaintiff argues that Demasco testified that due to accumulation of saltwater (from the saltwater fish that the business sells) and debris, that he and other employees would often clean the subject staircase where Plaintiff fell.[3]

Plaintiff states that Pierless has failed to proffer evidence of cleaning and inspection records for the stairs nor has it alleged that that anyone other than it cleaned them, only that the landlord was responsible. Plaintiff cites his EBT testimony wherein he repeatedly states that the poor condition of the stairs caused his fall.[4] Plaintiff also cites Paulino's EBT wherein he testified that while he was unsure exactly how the accident happened, that the stairs were in bad shape, [5] he submits photographs taken by Pierless dated June of 2018 as well as from Plaintiff's site inspection dated April of 2021 to further demonstrate that the stairs were actually in an advanced stage of decay by the time the accident occurred.

In partial opposition to Pierless and in support of its motion, CSA argues that it was not negligent and bears no responsibility for Plaintiff's accident. CSA states that it did not owe a duty to Plaintiff, nor did it proximately cause his injuries. CSA asserts that the only contract between it and Pierless is the Acquisition Agreement which states that, Pierless agreed to acquire, and CSA agreed to sell certain equipment through a third-party independent leasing company named Canon Financial Solutions ("CFA"), and that Pierless entered into a separate agreement with CFA regarding the subject copy machine. CSA claims that CFS owned the copy machine. Furthermore, CSA states that it is not liable for any negligence attributable to FMD because pursuant to the parties' Transportation Agreement, FMD's employees are independent contractors and CSA asserts that it did not control, manage, or direct Plaintiff on the date of the accident, nor did it provide the equipment that was used, FMD did.[6]

With respect to Pierless' cross-claim, CSA states that because Pierless failed to address its cross-claims for negligence, contractual liability to defend, insure, and breach of contract, in its moving papers that those claims must be dismissed. Additionally, CSA argues that Pierless' motion for common law indemnification must be dismissed because it was Pierless' negligence that caused Plaintiff's accident and injuries. CSA states that it is not alleged that the copy machine itself caused Plaintiff's accident. CSA cites Plaintiff's EBT wherein he attributed the condition of the staircase as the cause of his accident. CSA also cites Demasco's EBT, stating that he and other employees routinely cleaned the stairs due to the accumulation of saltwater and debris, and that the stairs had begun to deteriorate. Therefore, CSA

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[2] (Demasco Dep. Pg. 36 lines 24-25; 37 lines 2-9).
[3] (Demasco Dep. Pg. 29 line 25; 30 lines 2- 6; 34 lines 21-25; 35 lines 2-5; 55 lines 8-25; 56 lines 2-18).
[4] (Plaintiff Dep. Pg. 63 lines 5-13; 77 lines 16-25; 78 lines 2-4; 179 lines 21-25; 182 lines 2-10; 183 lines 5-23).
[5] (Paulino Dep. Pg. 35 lines 10-21; 42 lines 23-25; 43 lines 2-10; 91 lines 9-24).
[6] (Tempera Dep. Pg. 16 lines 14-25; 17 lines 2-25; 18 lines 2-24).

contends that Pierless created the dangerous condition and failed to establish that CSA created or contributed to it.

In opposition to CSA's motion, Plaintiff argues that an employer can still be liable for independent contractors in instances where an employer "retains an interest in the manner of performance of how work is done." Plaintiff states that CSA retained an interest in the manner of performance regarding customer service relations and in safeguarding its equipment. Plaintiff asserts that CSA was negligent in protecting the Plaintiff and ensuring he was able to work in a safe environment. Moreover, Plaintiff contends that CSA's motion should be denied because there is a question of fact as to the nature and degree of control that CSA exercises over FMD or CFS.

In opposition to CSA's motion, Pierless argues that Section 3(a) of the Service Provider Terms and Conditions Agreement lists it as being the owner of the copy machine. Thus, Pierless claims that because CSA is the owner and was responsible for its removal, CSA's negligence caused Plaintiff's accident. Pierless asserts that allegations that the accident was caused by deterioration of the stairs is speculative because Plaintiff also testified that he was unsure what caused him to fall.[7]

It is well established that "the proponent of a summary judgment motion 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" (*Ayotte v. Gervasio,* 81 NY2d 1062, 1063 [1993], *citing Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212, [2d Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2d Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitemore,* 172 AD2d 600 [2d Dept. 1991]).

In a premises liability case, a defendant who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the condition that allegedly caused the accident nor had actual or constructive notice of its existence (*Castillo v Silvercrest*, 134 AD 3d 977 [2d Dept. 2015]); *Cosme v New York City Department of Education*, 221 AD3d 875 [2d Dept. 2023]; *Caban v Kem Realty, LLC*, 172 AD3d 1302 [2d Dept. 2019]; *Muhammad v St. Rose of Limas R.C. Church*, 163 AD3d

[7] (Plaintiff Dep. Pg. 77 lines 22-25; 80 lines 6-17).

693 [2d Dept. 2018]; *Kyte v Mid-Hudson Wendico, Inc.*, 131 AD3d 452 [2d Dept. 2015]). To establish constructive notice, a dangerous condition must be visible and apparent and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it (*Cosme* at 859; *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). To meet its initial burden on the issue of lack of constructive notice, a defendant is required to offer evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's accident (*Id.*; *Tuck v Surrey Carlton Housing Development Fund Corp.*, 208 AD3d 1383 [2d Dept. 2022]). Constructive notice will not be imputed where the defect is latent, i.e., where the defect is of such a nature that it would not be discoverable even upon a reasonable inspection" (*Lee v Bethel First Pentecostal Church of America, Inc.*, 304 AD2d 798 [2d Dept. 2003]; *Ferris v. County of Suffolk*, 174 AD2d 70 [2d Dept. 1992]). The failure to make a diligent inspection constitutes negligence only if such an inspection would have disclosed the defect (*Monroe v. City of New York*, 67 AD2d 89 [2d Dept. 1979]; see *Pittel v. Town of Hempstead*, 154 AD2d 581 [2d Dept. 1989]).

Here, the court finds that Pierless has not established that it did not create the defective condition, nor lacked knowledge of its existence. Contrary to Pierless' contention, while Plaintiff did testify that he was initially unsure as to what caused his accident, he stated that it felt as though the "steps gave in" and he was also able to identify and mark the location of his fall on the staircase.[8] Plaintiff repeatedly testified that the stairs were in a bad condition and that he and his coworker initially wanted to use the freight elevator but it was out-of-service.[9] Furthermore, he testified that the photographs submitted accurately showed the state of the steps on the date of the accident and that the video accurately portrayed how the accident happened.[10]

With respect to the Lease Agreement, Plaintiff has failed to establish that the City was responsible for maintenance and repair of the subject staircase. Article 1 defines "Permit Area" as the area described in Exhibit A which illustrates the layout of Unit B9 – Pierless' office (which the subject staircase is attached to), its First Floor Cooler, the Loading Permit Area and the Dock Permit Area. "Common Area" is defined as all portions of the Property excluding the buildings located thereon as shown and described on Exhibit B. The excluded areas include "Building A," which is the Parking Area and "Building B," which is the Subject Premises. Exhibit B-1 adds that, "Common Area" is an area not defined as Building A, B, or D. Since Plaintiff's accident was on an interior stairway, it would not fall

[8] (Plaintiff Dep. Pg. 77 lines 12-25; 80 lines 6-17; 171 lines 8-25; 172 lines 2-6; 177 lines 16-25; 178 lines 2-12; 181 lines 2-25; 184 lines 16-24).
[9] (Plaintiff Dep. Pg. 182 lines 16-21).
[10] (Plaintiff Dep. Pg. 171 lines 8-25; 172 lines 2-6; 177 lines 16-25).

within the defined common areas. Moreover, the Lease Agreement further specifies the parties' obligations as tenant and landlord:

2 Section 2.03(d) Clean-Up and Maintenance (of Permit Areas) states:

> Without limiting the generality of the requirements of Article 11, Tenant shall, on a daily basis, be responsible for: (i) clean-up and pick-up of loose cartons, crates, meat parts and all other trash rubbish, litter and debris (resulting from meat market operations) ... and (ii) after such clean-up and pick-up, daily sweeping up, as appropriate, of the Permit Area, and thereafter the removal of any standing debris, water, snow or ice, whether or not created by such clean-up and sweeping by 1:30 p.m. Tenant further covenants and agrees...that it shall, put the Permit Area in a safe, clean and sanitary condition consistent with the safe, clean and sanitary use of the Permit Area.

Section 11.01 Maintenance of the Premises, Permit Area Etc., states:

> Subject to the provisions of Section 11.06, Tenant shall take good care of the Premises and Permit Area, including, without limitation, the Improvements, the surfaces and appurtenances thereto, all grounds, vaults, sidewalk hoists, railings, gutters, curbs, and the waters sewer and gas connections, pipes and mains appurtenant thereto, and shall keep and maintain the Premises (including all of the foregoing) in good and safe order and condition, and shall make all repairs therein and thereon, interior and exterior, structural and nonstructural, ordinary and extraordinary, foreseen and unforeseen, necessary or desirable to keep the Premises in good and safe order and condition... however, Tenant shall only be responsible for exterior and/or structural repairs to the extent such repairs are made necessary due to Tenants negligence in maintaining the Premises...Tenant shall neither commit nor suffer, and shall use all reasonable precautions to prevent, waste, damage or injury to the Premises and Permit Area.
>
> As used in this Section, the term "repair" shall include all necessary (a). replacements, (b) removals, (c) alterations, and (d) additions. Notwithstanding the foregoing, Tenant shall repair, keep, and maintain in good condition, at its sole cost and expense, the concrete surface areas, and facie of, and bumpers in, the Permit Area, provided, however, that Tenant shall- not be responsible to repair and maintain the subsurface and structural elements of the Permit Area.

Section 11.03: Free of Dirt, Snow. Etc., states:

> Tenant shall at all times keep reasonably clean and free from dirt, snow, ice, rubbish, obstructions and encumbrances directly in front of the Premises, the Permit Area and the sidewalks, sidewalk hoists, railings, gutters, or curbs located in front of the Premises and the Permit Area or any of such areas or spaces adjacent to the Premises or the Permit Area for which Tenant or the fee owner of the Premises or Permit Area has or would have responsibility under applicable law, except to the extent covered by the Common Services.

Section 11.05. No Obligation of Landlord to Repair or to Supply Utilities, states:

> Except as expressly provided in Sections 11.06 and 11.07, Landlord shall not be required to supply any facilities, services or utilities whatsoever to the Premises or to the Permit Area, and Landlord shall not have any duty or obligation to make any repair, alteration, change, improvement, replacement, Restoration or repair to the Premises or Permit Area, and Tenant assumes the full and sole responsibility for the condition, operation, alteration, change improvement, replacement, restoration, repair, maintenance and management of the Premises and Permit Area.

Section 11.06. Landlord Obligations, states:

> Notwithstanding any provision to the contrary contained herein, Landlord shall, at its own cost and expense, perform, or caused to be performed, certain services ("Landlord Obligations") in connection with the maintenance and repair of the following: water and sewer lines from the mains at the street to the Premises, the roof, foundation and canopy of the .Building, the steel superstructure, structural walls and demising walls of the Premises, fire protection system (comprised of sprinkler and hydrant loop) and the subsurface and structural elements of the Permit Area, provided that if the cost of remediating such subsurface and structural elements is, in Landlord's reasonable determination, extraordinary...The performance of Landlord Obligations shall be subject to Unavoidable Delays. Landlord shall hold a contract for the maintenance of all refrigeration systems installed at the Property.

Section 11.07. Common Services, states:

> (a) Services by Landlord. Notwithstanding any provision to the contrary contained herein, Landlord...shall perform or cause to be performed certain services as set forth below (the "Common Services"). Common Services shall include, without limitation: water, sewer, and hot water services... cleaning of the Common Area, carting of debris in the Common Area, snow removal in the Common Area,. repairs and resurfacing of paved portions of the Common Area, lighting of the Common Area, operation of the gate enclosing the Property, security for the Common Area, Building facade repairs and painting, hot water system repair, maintenance and fuel usage, repairs and maintenance of fencing in the Common Area.

16(a) Landlord not liable for injury or damage, etc.

> Landlord shall not be liable for any injury or damage to Tenant or to any Person happening on, in or about the Premises, the Permit Area, or its appurtenances, nor for any injury or damage to the Premises, the Permit Area, or to any property belonging to Tenant or to any other Person that may be caused by fire, by breakage, or by the use, misuse or abuse of any portion of the Premises or the Permit Area (including but not limited to any of the common areas within the Building, hatches, openings, installations, stairways or hallways or other common facilities, the streets, sidewalk areas or water within or adjacent to the Premises) or that may

> arise from any other cause whatsoever, other than liabilities arising out of the negligence or intentional acts or omissions of Landlord or its employees, agents, representatives or contractors in performing Landlord Obligations or Common Services.

Assuming arguendo that the interior staircase was considered a Common Area, Demasco's testimony raises a question of fact as to whether Pierless' actual conduct in cleaning the stairs effectively modified the contract demonstrating that it assumed responsibility to maintain that particular part of the Subject Premises (see *Gelardo v ASMA Realty Corp.*, 137 AD2d 787 [2d Dept. 1998]; *Aiello v Burns Intl. Sec Servs. Corp.*, 110 AD3d 234 [1st Dept. 2013; *Estate of Kingston v Kingston Farms Partnership*, 130 AD3d 1464 [4th Dept. 2015]).

On the issue of notice, Pierless has failed to proffer admissible evidence as to when the accident site was last cleaned or inspected prior to Plaintiff's accident. Demasco testified that the corrosion on the stairs was new and that the stairs were not decaying on the date of the accident, however, the photographs submitted shows evidence that subject staircase was in a state of advanced decay on the date of the accident suggesting that the condition existed for a sufficient length of time before the accident to permit Pierless to discover and remedy it. Accordingly, movant has failed to establish its prima facie burden for entitlement to summary judgment as to liability, thus there is no need to consider opposing parties' opposition in rebuttal.

The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party (*Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507). In order to establish a claim for common-law indemnification, a party must prove not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident, or in the absence of any negligence, that the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury (*Mohan v Atlantic Ct., LLC*, 134 AD3d 1075, 1078-1079 [2nd Dept 2015]; *Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118-1119 [2nd Dept 2011]). Where a defendant's alleged liability is purely statutory and vicarious, conditional summary judgment in that defendant's favor on the basis of common-law indemnification is premature absent proof, as a matter of law, that the party from whom indemnification is sought was negligent or had authority to direct, supervise, and control the work giving rise to the plaintiff's injury (*McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1097-1098 [2nd Dept 2018]; *Shaughnessy v Hutington Hosp. Assn.*, 147 AD3d 994, 999 [2nd Dept 2017]).

Here, Pierless has failed to establish itself free from negligence precluding summary judgment for common law indemnification at this time.

In most cases, a party who retains an independent contractor is not liable for an independent contractor's negligent acts (*Allstate Vehicle & Property Insurance Company v Glitz*

Construction Corp., 214 AD3d 691 [2d Dept. 2023]). Control of the method and means by which the work is to be done is the critical factor in determining whether one is an independent contractor or an employee for purposes of tort liability (*Id.*; *Sanabria v Aguero-Borges,* 117 AD3d 1024 [2d Dept. 2014]; *Meehan v County of Suffolk*, 144 AD3d 640 [2d Dept. 2016]). Whether a worker is an independent contractor or an employee for the purposes of tort liability is usually a factual issue for the jury. However, where there is no conflict in the evidence, the question may properly be determined as a matter of law (*Lombardi v. Alpine Overhead Doors, Inc.*, 92 AD3d 921 [2d Dept. 2012]).

Factors relevant to assessing control include whether the worker (1) worked at [her or] his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll, and (5) was on a fixed schedule (*D. S. v Positive Behavior Support Consulting and Psychological Resources, P.C.*, 197 AD3d 518, 520 [2d Dept 2021]; citing *Bynog v Cipriani Group, Inc.*, 1 NY3d 193 [2003]). Incidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship (*Id.; Matter of Ted is Back Corp. [Roberts]*, 64 NY2d 725 [1984]; see *Weinfeld v HR Photography, Inc.*, 149 AD3d 1014 [2d Dept. 2017]).

There are various exceptions to the general rule against vicarious liability for the acts of an independent contractor (*see Bennett v State Farm Fire and Cas. Co.*, 198 AD3d 857 [2d Dept 2021]; citing *Brothers v. New York State Elec. & Gas Corp.*, 11 NY3d [2008]; *Kleeman v. Rheingold,* 81 NY2d 270 [1993]). These exceptions fall into three basic categories: "negligence of the employer in selecting, instructing or supervising the contractor; employment for work that is especially or 'inherently' dangerous; and, finally, instances in which the employer is under a specific nondelegable duty" (*Id.*; *Kleeman* at 274; *see Brothers* at 258). There are no clearly defined criteria for identifying duties that are nondelegable (*Id.*). A nondelegable duty has been found, for example, "when services, though in reality rendered by an independent contractor, were accepted by a third party after assurance that they were being supplied by its employer" (*Feliberty v. Damon,* 72 NY2d 112 [1988]; citing *Miles v. R & M Appliance Sales,* 26 NY2d 451 [1970]).

Here, Plaintiff's Amended Complaint alleges that CSA negligently and carelessly allowed a dangerous and hazardous condition to exist on the equipment/property or failed to warn of the condition which caused a trip-and-fall incident to occur where plaintiff sustained severe and permanent injuries. While CSA provided its Transportation Agreement holding that FMD employees are independent contractors, the fact that a contract exists designating a person as an independent contractor is to be considered, but is not dispositive (*D.S.* at 521; *Araneo v. Town Bd. for Town of Clarkstown*, 55 AD3d 516 [2d Dept. 2008]; see *Carlson v American Intl. Group, Inc.*, 30 NY3d 288 [2017]; *Shanklin v. Wilhelmina Models, Inc.*, 161 AD3d 610 [1st Dept. 2018]). Especially where as here, the scanned copy of the

Transportation Agreement between CSA and FMD is illegible and the signed Returns List form that contained Plaintiff's work assignment was provided on CSA's letterhead. Therefore, CSA has failed to demonstrate its prima facie entitlement to judgment as a matter of law dismissing the amended complaint and all cross claims or eliminate triable issues of fact as to whether it may have maintained control over the method and means by which FMD and its employees were to perform the work (*D.S* at 521; *Carlson v American Intl. Group, Inc.*, 30 NY3d 288 [2017]; *Rivera v Fenix Car Serv. Corp.*, 81 AD3d 622 [2d Dept. 2011]).

Accordingly, it is hereby,

ORDERED, that Pierless Fish Corp.'s motion (Motion Seq. 8) for summary judgment is denied, and it is further,

ORDERED, that Canon Solutions America, Inc., F/K/A Canon Business Solutions' motion (Motion Seq. 9) for summary judgment is denied.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice