

COURT OF COMMON PLEAS, LYCOMING COUNTY, PENNSYLVANIA

WAYNE KOCH,	:	NO. 17 - 0613
Plaintiff	:	
vs.	:	
	:	CIVIL ACTION
GGMP, LLC, et al.,	:	
Defendants	:	

Procedural History

Plaintiff Wayne Koch commenced this action by filing a Complaint on or about September 7, 2017, followed by an Amended Complaint on February 18, 2018. Plaintiff's Complaint addressed an incident on September 9, 2015, in which he was struck by a number of trusses which knocked him to the ground causing a laceration to his forehead and an injury to his right shoulder which requires a total reverse shoulder replacement surgery. T.A. Musser Incorporated has acknowledged that they were acting as the general contractor on September 9, 2015. On March 5, 2018, the Musser Defendants filed their Answer, New Matter, and Cross-claim. Defendants' Motion for Summary Judgment was filed on May 3, 2019, to which Plaintiff Koch filed a response on May 24, 2019. Argument was held on May 31, 2019.

Summary Judgment

Pursuant to Pa. R.C.P. 1035.2, the Court may grant summary judgment at the close of the relevant proceedings if there is no genuine issue of material fact or if an adverse party has failed to produce evidence of facts essential to the cause of action or defense. *Keystone Freight Corp. v. Stricker*, 31 A.3d 967, 971 (Pa. Super. Ct. 2011). A non-moving party to a summary judgment motion cannot rely on its pleadings and answers alone. Pa. R.C.P. 1035.2; 31 A.3d at 971. When deciding a motion for summary judgment, the Court must view the record in the light most favorable to the non-moving party, with all doubts as to whether a genuine issue of material fact exists being decided in favor of the non-moving party. 31 A.3d at 971. If a non-moving party fails to produce sufficient evidence on an issue on which the party bears the burden of proof, the moving party is entitled to summary judgment as a matter of law. *Keystone*, 31 A.3d at 971

(citing *Young v. Pa. Dep't of Transp.*, 744 A.2d 1276, 1277 (Pa. 2000)). “In determining the existence or non-existence of a genuine issue of a material fact, courts are bound to adhere to the rule of *Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932) which holds that a court may not summarily enter a judgment where the evidence depends upon oral testimony. *Penn Ctr. House, Inc. v. Hoffman*, 520 Pa. 171, 176, 553 A.2d 900, 903 (Pa. 1989). The Pennsylvania Supreme Court held that in order to defeat a Motion for Summary Judgment, Plaintiff must show sufficient evidence on any issue essential to his case and in which he bears the burden of proof such that a jury could return a verdict in his favor. *Ertel v. Patriot-News Co.*, 544 Pa. 93, 674 A.2d 1038 (1996) rearg. den., 117 S.Ct. 512. With this standard in mind, the Court provides the following discussion.

Discussion

Appropriate Parties

Plaintiff Wayne Koch commenced this action by filing a Complaint against a number of Musser entities; Defendants Troy Musser, individually, T.A. Musser Construction a/k/a T.A. Musser Incorporated d/b/a Musser Construction, a/k/a Musser Construction, Inc.

With regard to the matter at bar, this Court is of the opinion that sufficient evidence has been provided to establish the appropriate named defendants. The application for the zoning/property improvement permit, issued by the Borough of Jersey Shore on September 1st, 2015, lists T.A. Musser, Inc. as the contractor. The Musser Defendants also provide evidence from the Pennsylvania Corporations' website, wherein the current name is also listed as T.A. Musser, Inc. This search was generated on April 22nd, 2019. At the time set for argument on Defendants' Motion for Summary Judgment, it was asserted that the Selective Insurance policy which would cover any sum to be paid to Plaintiff Koch covers T.A. Musser, Inc. and not Troy Musser as an individual. Accordingly, any claims against any alleged Musser entity apart from T.A. Musser, Inc. d/b/a T.A. Musser Construction are hereby DISMISSED.

Troy Musser - Individually

During Plaintiff's deposition of Troy Musser, questions were asked regarding T.A. Musser Construction, and what Mr. Musser's role had been with regard to the Shore Diner project.

Q: Okay. I have an Articles of Incorporation document that uses the words T.A. Musser, Inc.

A: Correct.

Q: Is that your understanding of what your construction company is called?

A: It is (Troy Musser Deposition, 9-10:21-1, 11/20/2018)

Defendant Musser went on to assert that T.A. Musser, Inc. was the entity in charge of the construction project at the Shore Diner.

Q: Okay. But just for today's purpose, the business that was building the addition onto the Shore Diner in 2015 was T.A. Musser, Inc.; is that right?

A: I believe so. (Troy Musser Deposition, 12:4-8, 11/20/2018)

Plaintiff's brief in response to Defendants' Motion for Summary Judgement contends that Mr. Musser may not have been acting as an employee of T.A. Musser, Inc., but that Mr. Musser, individually, was acting as the general contractor and that he was in charge of the job site. In response, Mr. Musser re-asserted his previous testimony, and stated that he had not been acting as an individual in the matter at bar. Rather, Troy Musser was acting on behalf of T.A. Musser, Inc.

Q: So on this particular job, did T.A. Musser, Inc. have any employees working on the job?

A: No.

Q: Who is the employee of T.A. Musser, Inc.? Is there anybody?

A: Myself.

Q: Okay. So you're the only employee?

A: I'm the only one. (Troy Musser Deposition, 29:18-25, 11/20/2018)

Mr. Musser's testimony here is corroborated by the zoning/property improvement permit, which lists T.A. Musser Inc. as the general contractor. This Court does not believe that Troy Musser was acting in his capacity as an individual while allegedly causing or contributing to the accident which caused Plaintiff Wayne Koch's injuries. Accordingly, any counts specifically directed against Troy Musser as an individual are hereby DISMISSED.

Punitive Damages

In Plaintiff's Amended Complaint, there are allegations that the Musser Defendants were "reckless" in their approach to workplace safety.¹ Accordingly, Plaintiff seeks punitive relief at trial in addition to compensatory relief.

In ascertaining whether Plaintiff Koch is entitled to submit evidence pertaining to a disputed punitive damages claim, this Court has considered the evidence of record, and whether the act in question was intentional, reckless, or sufficiently malicious. *Hutchinson v. Luddy*, 896 A.2d 1260, 1265 (Pa. Super. 2006). The presented testimony has made it clear that Mr. Musser was aware that the metal braces being used were not suitable for bracing the trusses. Mr. Musser admitted that he was provided with OSHA diagrams which detailed the correct installation procedure for the 20 construction trusses:

Q: And actually, when you get the trusses from Allenville, you get a big packet of the OSHA regulations that come with it every time, correct?

A: Yeah. (Troy Musser Deposition, 37:21-24, 11/20/2018)

Mr. Musser admitted that there were no 2x4s being placed on the trusses, which is a departure from typical procedure. Throughout his deposition, Mr. Musser displays a clear understanding of the requisite bracing required, but admits that no bracing was put into place on any of the trusses in the storage area on September 9, 2015. Mr. Musser went on to testify that he was aware that the spacer braces which are used to keep the trusses two feet apart are not designed to hold the trusses up:

¹ Plaintiff's Amended Complaint, 2/18/2018, paragraph 57-59, 65-67, 74, 81, 87-88, and 94-95

Q: And they are not really used to hold the trusses up, correct?

A: No. They are spacer braced. (Troy Musser Deposition, 56:13-16, 11/20/2018)

Mr. Musser was then questioned as to whether he was concerned about the lack of sufficient bracing:

Q: Ok. Did you ever question why there wasn't more bracing being used, other than the 'let in' bracing on the original T-bar attachment?

A: No. It was a concern. It was a concern, but we did not ever get to that spot. We didn't get the opportunity to do it. (Troy Musser Deposition, 298:18-23, 11/20/2018)

This testimony clearly demonstrates that Mr. Musser was aware of the possibility of the trusses falling and injuring somebody. There are also some inconsistencies in Mr. Musser's testimony which may assist a jury in determining whether to award punitive damages against Mr. Musser; Defendant Musser maintains that he was hurt at the Shore Diner by being on top of the collapsing trusses. Denny Waltz asserts that Mr. Musser was not on the trusses when they fell, nor was he injured:

Q: Do you recall where Troy Musser was when the collapse occurred of trusses:

A: Yes.

Q: Where was he?

A: he was sheathing the porch roof and he heard it and come running out front.

Q: Out front of what?

A: Out front of the building. And probably hollering at me probably. (Troy Musser Deposition, 156:23-25 & 157:1-6, 11/20/2018)

Defendant Musser's testimony established that he was concerned about whether the trusses were being placed properly, but took insufficient steps to protect Plaintiff Koch while he was working on the trusses. Based on the testimony presented and the circumstances at bar, this Court is of the opinion that Plaintiff Koch has a colorable claim for which a jury may determine that Mr. Musser caused or contributed to Plaintiff's

accident while exhibiting a malicious motive or conscious disregard for Mr. Koch's safety. Therefore, Defendant's Motion for Summary Judgment to preclude punitive damages is hereby DENIED.

The Court enters the following order.

ORDER

AND NOW, this 26th day of June, 2019 it is ORDERED and DIRECTED that summary judgment is GRANTED IN PART and DENIED IN PART.

BY THE COURT,

Senior Judge, Specially Presiding

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