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SEBASTIAO CRUZ,

Plaintiff(s)

vs.

HITACHI KOKI U.S.A., LTD.; HITACHI AMERICA, LTD.; HITACHI KOKI, CO., LTD.; HITACHI POWER TOOLS; HITACHI LTD; HITACHI SALES ACCEPTANCE CORPORATION; HITACHI SALES CORPORATION OF AMERICA; ON MY OWN CONSTRUCTION, INC.; OMO CONSTRUCTION, INC.; ADAM HIRSCH; LAUREN HIRSCH; GENESIS CARPENTRY, INC.; THE TRAVELERS INSURANCE COMPANY; AMERICAN ZURICH INSURANCE COMPANY; RUTH MALEND; DAVID BAUMSER; JOHN DOES 1 - 10; ABC CORPORATIONS 1 - 10

DEFENDANT(S)

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY**

Docket No.: ESX-L-3277-12

Civil Action

**SECOND AMENDED COMPLAINT
AND JURY DEMAND**

Plaintiff, **SEBASTIAO CRUZ**, residing in Newark, New Jersey, by way of complaint against defendants alleges upon information and belief as follows:

FIRST COUNT

1. Plaintiff repeats and reiterates the allegations of each and every other count as if set forth at length herein.

2. On or about June 29, 2010, Plaintiff **SEBASTIAO CRUZ**, was working for a company called Genesis Carpentry, Inc., performing certain construction and/or construction related activities related to carpentry. In connection with this work, as the result of the negligence, gross negligence, intentional wrong and/or substantial certainty or harm as described herein of defendants

named herein, plaintiff **SEBASTIAO CRUZ** was struck in the eye while using a nail gun performing his work activities causing him severe, debilitating and permanent injuries.

3. At all relevant times Defendants **ON MY OWN CONSTRUCTION, INC.; OMO CONSTRUCTION, INC.; ADAM HIRSCH; LAUREN HIRSCH; GENESIS CARPENTRY, INC.; DAVID BAUMSER; JOHN DOES 1 - 10; ABC CORPORATIONS 1 - 10**, owned, controlled, maintained and/or oversaw and/or should have owned, controlled, maintained and/or oversaw this work site construction project. At all relevant times referenced herein Defendants **ON MY OWN CONSTRUCTION, INC.; OMO CONSTRUCTION, INC.; ADAM HIRSCH; LAUREN HIRSCH; GENESIS CARPENTRY, INC.; DAVID BAUMSER; JOHN DOES 1 - 10; ABC CORPORATIONS 1 - 10**, which said persons failed to comply with various federal and state safety statutes and regulations, failed to comply with local building ordinances and permits, failed to properly supervise the job site, failed to demand and ensure that construction proceed in compliance with the Uniform Construction Code and other applicable codes and standards and/or failed to comply with ordinary and customary safety procedures common in the industry, and whose acts or omissions were done with knowledge that the consequences of those acts or omissions were substantially certain to result in harm to plaintiff, **SEBASTIAO CRUZ**, and breached other duties as shall become known in the future. At all relevant times referenced herein, the construction project work site premises in question was owned, operated, designed, maintained, supervised and/or was in the possessory control of Defendants **ON MY OWN CONSTRUCTION, INC.; OMO CONSTRUCTION, INC.; ADAM HIRSCH; LAUREN HIRSCH; GENESIS CARPENTRY, INC.; DAVID BAUMSER; JOHN DOES 1 - 10; ABC CORPORATIONS 1 - 10**, and was maintained and permitted to exist in an unreasonably dangerous condition in violation of the duties imposed and/or assumed on defendants **ON MY OWN CONSTRUCTION, INC.; OMO CONSTRUCTION, INC.; ADAM HIRSCH; LAUREN HIRSCH; GENESIS CARPENTRY, INC.; DAVID BAUMSER; JOHN DOES 1 - 10; ABC CORPORATIONS 1 - 10**, failed to promulgate and/or enforce safety procedures, rules and/or regulations which are otherwise widely

known and imposed in the construction industry generally and the breach of which constitute negligence, gross negligence, intentional wrong and/or otherwise resulted in a substantial certainty of harm to plaintiff. Defendants **ON MY OWN CONSTRUCTION, INC.; OMO CONSTRUCTION, INC.; ADAM HIRSCH; LAUREN HIRSCH; GENESIS CARPENTRY, INC.; DAVID BAUMSER; JOHN DOES 1 - 10; ABC CORPORATIONS 1 - 10**, failed to require and enforce said rules and regulations, and/or industry standards, as it relates to the work at issue in this case.

4. As a direct and proximate result of the unreasonably dangerous condition of the nail gun in question at the aforementioned time and place, and otherwise failure to manage safety and enforce safety standards of care, Plaintiff **SEBASTIAO CRUZ** was needlessly caused to suffer severe, painful and permanent bodily and emotional injuries, which have caused and will in the future cause him to incur various and diverse expenditures for medical treatment and care, which have in the past and will in the future continue to require him to seek and undergo medical attention, procedures, therapies, consultations, and other various treatments, which have in the past and will in the future continue to cause disability and lost function of bodily and mental capacity, which have in the past and will in the future continue to incapacitate him and render him incapable of pursuing his regular and ordinary occupation, activities, and pursuits and has suffered significant lost wages all as a result of the negligence of the defendants.

5. As a direct and proximate result of the negligence, carelessness, acts or omissions, intentional or otherwise, of defendants **ON MY OWN CONSTRUCTION, INC.; OMO CONSTRUCTION, INC.; ADAM HIRSCH; LAUREN HIRSCH; GENESIS CARPENTRY, INC.; DAVID BAUMSER; JOHN DOES 1 - 10; ABC CORPORATIONS 1 - 10**, in the ownership, operations, design construction, maintenance, control, supervision and/or repair of the subject work site and nail gun, and as otherwise set forth herein, Plaintiff was exposed to a substantial certainty of harm and as a result sustained severe and permanent injuries, has and will suffer pain, has and will incur medical expense, lost wages and has and will be unable to engage in

his usual activities, all to his damage.

6. At all relevant times Defendants **ON MY OWN CONSTRUCTION, INC.; OMO CONSTRUCTION, INC.; ADAM HIRSCH; LAUREN HIRSCH; GENESIS CARPENTRY, INC.; DAVID BAUMSER; JOHN DOES 1 - 10; ABC CORPORATIONS 1 - 10**, acted and were in such a capacity and position with respect to the construction project in question that they had and it would be fair and reasonable to impose duty and responsibility to see to it that the premises and work site were maintained in a safe condition the saw at issue and/or that the work was conducted in a safe manner consistent with the federal and other workplace safety regulations under OSHA and others, so as to prevent injuries to workers, Plaintiff **SEBASTIAO CRUZ**, and others on the job site and others who may foreseeably come in contact with the worksite or be in its vicinity including children, homeowners and others. Their failure to do so here resulted in a substantial certainty of harm to Plaintiff, **SEBASTIAO CRUZ**.

7. **JOHN DOES 1 - 10; ABC CORPORATIONS 1 - 10** are fictitious names representing one or more legal entities and/or individuals who were responsible for Plaintiffs injuries to the same force and extend set forth herein as to the named defendants. The identities of **JOHN DOES 1 - 10; ABC CORPORATIONS 1 - 10** are presently unknown.

WHEREFORE, plaintiff(s) demand(s) judgment against all defendants, jointly and/or severally for compensatory damages in an amount to be determined at trial; punitive damages; attorneys' fees and costs and for such other relief as the Court deems appropriate.

SECOND COUNT

1. Plaintiff repeats and reiterates the allegations of each and every other count as if set forth at length herein.

2. On or about June 29, 2010, defendants **HITACHI KOKI U.S.A., LTD.; HITACHI AMERICA, LTD.; HITACHI KOKI, CO., LTD.; HITACHI POWER TOOLS; HITACHI LTD; HITACHI SALES ACCEPTANCE CORPORATION; HITACHI SALES CORPORATION OF AMERICA; ABC CORPS. 1-20 and/or JOHN DOES 1-20** manufactured,

designed, distributed, sold and/or otherwise placed into the stream of commerce a certain nail gun and/or component parts of same. While using said product(s) in a normal, intended and/or foreseeable manner, said nail gun failed, specifically causing plaintiff severe, debilitating and permanent injuries when a nail from the gun struck him in the eye.

3. While using the nail gun and/or its parts for an intended and foreseeable purpose, due to a design and/or manufacturing defect, and/or due to a breach of express or implied warranty, and/or negligence the nail gun and/or its parts in question failed and caused injuries to plaintiff. As a direct and proximate result of the failure of this nail gun and/or its parts, plaintiff was injured, severely and permanently.

4. Defendants **HITACHI KOKI U.S.A., LTD.; HITACHI AMERICA, LTD.; HITACHI KOKI, CO., LTD.; HITACHI POWER TOOLS; HITACHI LTD; HITACHI SALES ACCEPTANCE CORPORATION; HITACHI SALES CORPORATION OF AMERICA; ABC CORPS. 1-20 and/or JOHN DOES 1-20**, were the manufacturer(s) designer(s), seller(s) and/or otherwise are responsible for placing said defective product and/or any of its component parts, into the stream of commerce, said defect(s) having existed at the time the product left the control of the defendants.

5. The defendants, **HITACHI KOKI U.S.A., LTD.; HITACHI AMERICA, LTD.; HITACHI KOKI, CO., LTD.; HITACHI POWER TOOLS; HITACHI LTD; HITACHI SALES ACCEPTANCE CORPORATION; HITACHI SALES CORPORATION OF AMERICA; ABC CORPS. 1-20 and/or JOHN DOES 1-20**, were at all times negligent in their design, manufacture, distribution and/or sale of the nail gun and/or its parts, and/or any of its component parts or accessories, and breached their warranties, both express and implied and are strictly liable in tort and under the New Jersey Products Liability Act, all of which resulted in the injuries to plaintiff.

WHEREFORE, plaintiff(s) demand(s) judgment against all defendants, jointly and/or severally for compensatory damages in an amount to be determined at trial; punitive damages;

attorneys' fees and costs and for such other relief as the Court deems appropriate.

THIRD COUNT

1. Plaintiff repeats and reiterates the allegations of each and every other count as if set forth at length herein.

2. On October 13, 2010 Melissa Bernhart, Technical Specialist of defendants **THE TRAVELERS INSURANCE COMPANY; AMERICAN ZURICH INSURANCE COMPANY** wrote to counsel for plaintiff Sebastio Cruz asserting a workers compensation lien and asking for a status on the third party claim. The correspondence also includes some seven areas of inquiry as to the potential third party products liability claim. (*Exhibit 1, 10/13/2010 Bernhart Correspondence*).

3. On November 12, 2010, counsel for plaintiff, Gerald Clark, Esq., wrote to Melissa Bernhart, Technical Specialist of defendants American Zurich Insurance Company, asking for the workers compensation carrier to cooperate in our mutual interests (carrier's subrogation interest and plaintiff's interest in a recovery) related to proving a third party claim. On that same date Ms. Bernhart wrote an email back providing the serial number and model number of the nail gun at issue. (*Exhibit 2, 11/12/2010 Correspondence to Bernhart and email*).

4. On January 27, 2011, the Hitachi nail gun was secured as evidence by defendants **THE TRAVELERS INSURANCE COMPANY; AMERICAN ZURICH INSURANCE COMPANY; RUTH MALEND**A, or any one of them. A Chain of Custody form was completed by defendants accordingly. (*Exhibit 3, Correspondence of Ruth Malenda and Evidence Chain of Custody Form*)

5. On January 28, 2011, Ruth Malenda, Technical Specialist of defendants American Zurich Insurance Company, wrote to counsel for plaintiff's asserting their workers compensation lien and asking to be contacted in connection with any third party settlement negotiations with regard to the workers compensation lien. The correspondence also states:

“We have secured the Hitachi NV83A2 Coil nail gun involved in the

incident which caused Mr. Cruz's eye injury. Please call me to discuss the case."

(Exhibit 3, Correspondence of Ruth Malenda and Evidence Chain of Custody Form)

6. Several more correspondence were sent by Ruth Malenda, Technical Specialist of defendants American Zurich Insurance Company, from January 28, 2011 through December 27, 2011 to Plaintiff's counsel re-asserting the workers compensation lien and asking for a status on the third party matter. *(Exhibit 3, Correspondence of Ruth Malenda)*

7. On March 16, 2011, plaintiff, Sebastiao Cruz, plaintiffs liability expert, Theodore Moss, P.E., and a representative of the office of Plaintiff's counsel inspected the nail gun at the facility of defendants in Morristown, New Jersey. At that time, the office of Plaintiff's counsel specifically requested it be permitted to take possession of the nailgun as it was important evidence in this matter. The request was denied and the office of Plaintiff's counsel was told the nailgun could not be released and insisted it had to stay in the possession of defendants **THE TRAVELERS INSURANCE COMPANY; AMERICAN ZURICH INSURANCE COMPANY; RUTH MALEND**A, in its evidence locker, for the third party litigation.

8. On or about June 25, 2012, Ruth Malenda, Technical Specialist of defendants **THE TRAVELERS INSURANCE COMPANY; AMERICAN ZURICH INSURANCE COMPANY**, advised that her office had released the nail gun in question from its evidence locker, back to its insured.

9. Ruth Malenda later advised that on April 10, 2012, her office had removed the nail gun from its evidence locker and gave it back to its insured, who thereafter sold it to unknown contractors.

10. At no time before getting rid of the nail gun did defendants **THE TRAVELERS INSURANCE COMPANY; AMERICAN ZURICH INSURANCE COMPANY; RUTH MALEND**A; give Plaintiff or its counsel any notice- oral, written or otherwise- that it intended to do so.

11. At no time did plaintiff's counsel advise defendants that it was abandoning the third party litigation claim.

12. On or about September 7, 2012, the office of Plaintiff's counsel advised defendants that if they do not retrieve the nail gun, that we would have no choice but to name them as a defendant in this matter for spoliation of evidence and fraudulent concealment of evidence.

13. At no time did the office of Plaintiff's counsel advise defendants that the litigation was being abandoned.

14. Based on the above, and otherwise as set forth herein and as discovery will show, defendant **THE TRAVELERS INSURANCE COMPANY; AMERICAN ZURICH INSURANCE COMPANY; RUTH MALEND**A have committed negligence, negligent and/or intentional spoliation of evidence, and/or fraudulent concealment of evidence.

15. Spoliation of evidence occurs in a civil action when evidence pertinent to the action is destroyed, interfering with the proper administration and disposition of the action. A duty to preserve evidence would exist if (1) the third party has knowledge of a potential lawsuit and accepts responsibility for preserving the evidence; (2) the third party voluntarily undertakes to preserve the evidence and a plaintiff reasonably and detrimentally relies thereon; (3) the third party agrees with plaintiff to preserve the evidence; or (4) plaintiff makes a specific request to the third party to preserve a particular item. A duty may also be created by the spoliator voluntarily undertaking to preserve the evidence and a plaintiff reasonably and detrimentally relying thereon. Defendant may voluntarily assume a duty by affirmative conduct. In any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.

16. New Jersey has also recognized the tort of fraudulent concealment of evidence which has the following elements: (1) pending or probable litigation involving the plaintiff; (2) knowledge on the part of the defendant that litigation exists or is probable; (3) willful or, possibly, negligent destruction of evidence by the defendant designed to disrupt the plaintiff's case; (4) disruption of the

plaintiff's case; and (5) damages proximately caused by the defendant's acts.

17. Based upon the fact and circumstances herein, and as discovery may otherwise show, defendants **THE TRAVELERS INSURANCE COMPANY; AMERICAN ZURICH INSURANCE COMPANY; RUTH MALEND**A have committed negligence, negligent and/or intentional spoliation of evidence, and/or fraudulent concealment of evidence, and are liable to plaintiff who has been proximately damaged thereby.

JURY DEMAND

Pursuant to R 4:35-1 Plaintiff demands a trial by jury for all issues so triable.

DESIGNATION OF TRIAL COUNSEL

Pursuant to R 4:25-4, Gerald H. Clark. is hereby designated trial counsel.

CERTIFICATION

Pursuant to R 4:5-1 the undersigned certifies that the matter in controversy is not the subject of any other action pending in any other court of a pending arbitration proceeding nor is any other action or arbitration proceeding contemplated and all known, necessary parties have been joined in this action.

Clark Law Firm, PC
Attorneys for Plaintiffs

By: _____
GERALD H. CLARK

Dated: November 11, 2013