

Baumann v Metropolitan Ltfe Insurance Co.
2006 NY Slip Op 30333(U)
March 22, 2006
Supreme Court, New York County
Docket Number: 0116336/2000
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Kornreich

PART 521

Index Number : 116336/2000

BAUMANN, ELAINE J.

vs
METROPOLITAN LIFE INSURANCE

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. 116336/00
MOTION DATE 10/20/05
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 11 were read on this motion to/for SJ

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1-11</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision and order.

FILED

MAR 29 2006

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/22/06

Shirley Werner Kornreich
S. J. S. C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
ELAINE J. BAUMANN, as Administratrix of the
Estate of FREDERICK BAUMANN,

Plaintiff,

Index No.: 116336/00

**DECISION and
ORDER**

-against-

THE METROPOLITAN LIFE INSURANCE COMPANY,
CREDIT SUISSE FIRST BOSTON STRUCTURED
ASSETS, INC., CUSHMAN & WAKEFIELD OF
NEW YORK, INC., PENGUIN AIR CONDITIONING
CORP. a/k/a EMCOR/PENGUIN AIR CONDITIONING
CORP., PENGUIN MAINTENANCE AND SERVICES,
INC., and EMCOR GROUP, INC.,

Defendants.

FILED
MAR 29 2006
NEW YORK
COUNTY CLERK'S OFFICE

-----X
CUSHMAN & WAKEFIELD OF NEW YORK, INC.,

Third-Party Plaintiff,

Index No.: 590091/01

-against-

FOREST ELECTRIC CORP., FOREST ELECTRIC
CORP., INC., FOREST ELECTRIC CORP. ELECTRICAL
CONSTRUCTION/ENGINEERING DATACOM SERVICES
and DOE CORPORATIONS, INC. (1 through 5),

Third-Party Defendants,

-----X
CREDIT SUISSE FIRST BOSTON CORPORATION,

Second Third-Party Plaintiff,

-against-

FOREST ELECTRIC CORP., PENGUIN AIR CONDITIONING
CORP. a/k/a EMCOR/PENGUIN AIR CONDITIONING CORP.,

PENGUIN MAINTENANCE AND SERVICES, INC., and
EMCOR GROUP, INC.,

Second Third-Party Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

Plaintiff brought this action to recover for a work-related accident, in which her decedent, Frederick Baumann, was electrocuted. The accident occurred on or about October 15, 1999, when Mr. Baumann was performing office reconfiguration work in space leased by Credit Suisse First Boston Structured Assets, Inc. ("Credit Suisse") at 11 Madison Avenue, in New York City. The building was owned by Metropolitan Life Insurance Company ("Met Life"), and managed by Cushman & Wakefield of New York, Inc. ("Cushman"). Penguin Air Conditioning Corp. ("Penguin") a/k/a Emcor/Penguin Air Conditioning Corp. ("Emcor"; collectively, the "Penguin Defendants") was responsible for maintenance of certain electrical and mechanical systems at Credit Suisse's premises, pursuant to a written agreement. Forest Electric Corp. ("Forest"), plaintiff's employer, was an electrical subcontractor hired by Credit Suisse as its "in-house" electrician.

Plaintiff initially asserted causes of action for negligence and violation of Labor Law sections 200, 240 and 241. Subsequently, plaintiff conceded that only the Labor Law § 241(6) claim is viable. On October 10, 2003, plaintiff issued Stipulations of Discontinuance to the Penguin Defendants and Cushman, leaving only Met Life and Credit Suisse as direct defendants.

I. Background

At the time of the accident, Credit Suisse was performing certain reconfiguration work in its offices. It appears that Credit Suisse hired Forest directly to perform the electrical aspects of the reconfiguration project, which consisted of moving lighting fixtures. However, the record

does not contain a written agreement covering that work. As stated by counsel for Credit Suisse:

the work that was assigned to the decedent on the evening of his death was not pursuant to a discrete contract for that specific work, and it was not part of a discrete project for which Forest had been hired specifically. Rather, it was part of an ongoing course of dealing among the parties, [Credit Suisse, Penguin and Forest], wherein the contractors employed full-time staff at the premises and occupied their own exclusive office and storage space, which was provided for their convenience.

Affirmation of G. Swartz, para. 10. Mr. Swartz's description of the somewhat ambiguous contractual relationships existing among Credit Suisse, Forest and the Penguin Defendants, is consistent with the testimony of Credit Suisse engineer Dan Hughes, and Penguin Senior Vice President Paul Shields. *See* EBT of D. Hughes, p. 13; EBT of P. Shields, p. 21.

Mr. Baumann was an experienced "A" journeyman electrician, who had been working for about a year under the supervision of Forest's foreman, John Ventura. At the time of the accident, Mr. Baumann was moving lighting fixtures in the Credit Suisse office space, with another "A" electrician, Howard Pomerantz. The two were working on ladders on either side of a ceiling partition, connecting an outlet box on Pomerantz's side of the partition, to a previously existing outlet box on Baumann's side. Mr. Pomerantz testified that he heard Mr. Baumann say he saw a "bad slice," then heard a "loud gasp," and found Mr. Baumann unconscious, still standing on the ladder, wedged into the drop ceiling from his armpits up.

Mr. Ventura inspected the accident scene after the accident. On the floor below where Baumann's ladder had been positioned, he observed Baumann's set of orange-handled, "extra insulated," "high-voltage pliers." When Ventura climbed up to examine the junction box inside the dropped ceiling on which Baumann had been working at the time of his accident, he saw, on the outside cover of the junction box, a sticker warning: "High voltage, 277/480 volts." Ventura

observed that Baumann had unscrewed the cover to the junction box. Several of the wires had been pulled out of the box, and some were uncapped, i.e., had exposed ends. Mr. Ventura opined that Mr. Baumann had attempted to “fix” the “bad splice,” but had failed to use the appropriate procedures, and had failed to wear his insulated gloves, or use his volt-meter to test the live wires.

Mr. Ventura and Mr. Pomerantz testified to the effect that the work that Mr. Baumann was performing did not require him to open the junction box and, therefore, did not require shut-off of the breaker. On the other hand, they testified that in order to perform any work that required opening the box, Mr. Baumann was required to follow established “lock-out/tag-out” safety procedures, with which he was familiar. Mr. Pomerantz testified that he believed that Mr. Baumann had opened the junction box. Pomerantz based his belief on his inspection of the junction box, and on Mr. Baumann’s statement about seeing a “bad splice,” just prior to the accident.

By order dated March 1, 2004, the Court granted summary judgment to Met Life and Credit Suisse, dismissing plaintiff’s complaint against them. The Court held that “Mr. Baumann’s failure to turn off the current and to follow his own company’s ‘lock-out/tag-out’ procedures constituted the proximate cause of his tragic accident.” *See Derdarian v. Felix Contracting Corp.*, 51 N.Y.2d 308 (1980).

By decision dated April 26, 2005, the First Department reversed the Court’s grant of summary judgment, and reinstated plaintiff’s complaint. *See Baumann v. Metro. Life Ins. Co.*, 17 A.D.3d 260 (1st Dept. 2005). The appellate panel held as follows:

The facts of record simply do not establish that decedent exceeded the scope of the survey work or that he had undertaken to fix the

splice with his bare hands when he was electrocuted. Indeed, decedent's co-worker, who was nearby when the accident occurred, stated that it was the customary procedure for the electricians not to shut off the power while doing survey work, that performing such work could include opening the outlet box (although it did not involve touching exposed wires), and that he believed decedent was performing survey work at the time of the accident. Furthermore, decedent's insulated pliers were found on the floor immediately after the accident.

Finally, even if decedent had undertaken to fix the bad splice, it cannot be said as a matter of law that the failure to shut off the electricity was so 'extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct' as to constitute 'a superseding act which breaks the causal nexus.' Therefore, there are questions of fact concerning defendants' liability (if any), including how the accident occurred, whether decedent's conduct was a substantial factor and, if so, to what extent was decedent responsible for the accident that caused his death.

Baumann v. Metro. Life Ins. Co., 17 A.D.3d 260, 261-262 (1st Dept. 2005) citing *Derdiarian*, 51 N.Y.2d at 315 (1980).

Coleen Weill was Credit Suisse's project manager for the reconfiguration project. Ms. Weill testified that she was responsible for coordinating and overseeing the work of contractors, including Forest. She further testified that she was not familiar with the contractual duties of the Penguin Defendants, as they were not part of the reconfiguration project. It is undisputed that the Penguin Defendants were not involved with Mr. Baumann's work on the day of the accident, although they performed certain administrative tasks with respect to the processing of bills and invoices for the reconfiguration project.

II. Motions

The Penguin Defendants now move for summary judgment dismissing the Second Third-Party Complaint, and all cross-claims against them. The motion is opposed by Forest, Credit

Suisse and Met Life.

Forest cross-moves for partial summary judgment dismissing all contractual claims interposed against it in the third-party complaints. The cross-motion is opposed by Credit Suisse and Penguin.

Credit Suisse cross-moves for summary judgment: (1) dismissing plaintiff's Labor Law §§ 200 and 240(1) and negligence claims; and (2) for indemnification against Forest. The cross-motion is unopposed.

III. Conclusions of Law

A. Summary Judgment

In order to prevail on a motion for summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, and do so by tender of evidentiary proof in admissible form. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557 (1980). If the movant makes out a prima facie case, the opponent must come forward and "lay bare his proofs" of any alleged triable issues of fact. *See In re Dissolution of Rencor Controls, Inc.*, 263 A.D.2d 845 (3rd Dept. 1999) citing *Hanson v. Ontario Milk Producers Coop., Inc.*, 58 Misc.2d 138 (Sup.Ct. Oswego County 1968) (Aronson, J.); *Bank of New York v. Spitzer*, 43 A.D.2d 105 (1st Dept. 1973).

B. The Penguin Defendants' Motion for Summary Judgment

The Penguin Defendants argue that Credit Suisse's common-law and contractual indemnification claims against it must be dismissed because: (1) plaintiff has released the Penguin Defendants from liability; (2) the Penguin Defendants were not responsible for supervising Mr. Baumann's work at the time of the accident; and (3) there was no contract

between the Penguin Defendants and Credit Suisse for the injury-producing work. The Court agrees that, on the record submitted, the Penguin Defendants cannot be held liable for contractual or common-law indemnification.

1. General Obligation Law § 15-108

General Obligation Law § 15-108 provides that “[a] release given in good faith by the injured person to one tortfeasor ... relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.” NY CLS Gen Oblig § 15-108. Thus, no party may seek contribution from the Penguin Defendants. However, the General Obligation Law does not preclude any party from pursuing a claim of indemnification against the Penguin Defendants. *See County of Westchester v. Welton Becket Associates*, 66 N.Y.2d 642 (1985) (Gen. Oblig. Law § 15-108 held inapplicable to indemnification claims). The Court, therefore, turns to the indemnification claims against the Penguin Defendants.

2. Contractual Indemnification

Pursuant to an Agreement for Operation and Maintenance of Electrical and Mechanical Equipment Systems, dated March 1, 1996, the Penguin Defendants agreed to “routinely inspect, adjust, operate, maintain, test and repair” the HVAC and electrical systems on the premises occupied by Credit Suisse. The contract further requires that the Penguin Defendants indemnify Credit Suisse for, *inter alia*, “any act, omission, fault or neglect of Contractor, or ... claims of [loss] occurring or resulting directly or indirectly, or alleged to have resulted directly or indirectly, from the Maintenance Services or the other activities of Contractor... .”

None of the parties opposing the Penguin Defendants’ motion has put forward any evidence demonstrating that Mr. Baumann’s electrocution was in any way connected to

maintenance work provided by the Penguin Defendants. It is undisputed that the Penguin Defendants did not supervise or control plaintiff's work. Indeed, the Credit Suisse project manager was not even aware of the Penguin Defendants' responsibilities to the project, if any. Credit Suisse argues that the fact that Forest "rendered its invoices to Penguin" implies some responsibility for the accident. The Court disagrees. Without more, this fact does not give rise to a contractual duty to indemnify Credit Suisse for Mr. Baumann's death. Thus, the Penguin Defendants' motion to dismiss the contractual indemnification claims against them is granted.

3. Common Law Indemnification

A party vicariously liable under Labor Law 241(6) may seek common-law indemnification from the "at-fault parties," in amounts "ordinarily to be apportioned at trial." *See Keegan v. Swissotel N.Y., Inc.*, 262 A.D.2d 111, 114 (1st Dept. 1999) citing *Buccini v. 1568 Broadway Assocs.*, 250 A.D.2d 466 (1st Dept. 1998); *Sheridan v. Beaver Tower*, 229 A.D.2d 302, 304 (1st Dept. 1996) *lv dismissed* 89 N.Y.2d 860 (1996) (in absence of supervisory control, owner entitled to indemnification from tortfeasor). Here, there is no evidence that the Penguin Defendants were at fault. The record shows that Mr. Baumann was performing work for Forest, supervised by a Forest foreman. It is undisputed that the Penguin Defendants played no role in the performance or supervision of the injury-producing work. Thus, they cannot be found liable under a common-law indemnification theory.

C. Forest's Cross-Motion for Partial Summary Judgment

Forest seeks dismissal of all contractual indemnification claims against it, arguing that there is no written agreement upon which to base such claims. Credit Suisse argues that "[t]hough the relationship between CSFB and Forest was not embodied in a single integrated

writing, the course of dealings between the parties, over a span of several years, constituted an ongoing contractual agreement for the provision of electrician services,” citing to *Mirchel v. RMJ Sec. Corp.*, 205 A.D.2d 388, 390 (1st Dept. 1994) (“implied contractual relationship may be established by conduct of the parties”). However, terms of a purported oral agreement must be “sufficiently certain and specific so that the parties’ intentions are ascertainable.” *Maffea v. Ippolito*, 247 A.D.2d 366, 367 (2d Dept. 1998). Here, Credit Suisse provides no evidence of any specific agreed-upon indemnification terms with Forest. Indeed, indemnification provisions in construction agreements are commonly included in written agreements, and there is no evidence that Forest assented to an oral indemnification agreement. *See Tebbutt v. Niagara Mohawk Power Corp.*, 124 A.D.2d 266, 268 (3d Dept. 1986) (oral agreement not enforceable where parties to agreement do not intend it to be binding until it is reduced to writing and signed by both of them) (citation omitted).

D. Credit Suisse’s Cross-Motion for Summary Judgment

Credit Suisse’s cross-motion to dismiss plaintiff’s Labor Law §§ 200 and 240(1) and negligence claims is granted. As discussed above, plaintiff has conceded that the only viable cause of action is under Labor Law § 241(6); *see also Baumann*, 17 A.D.3d at 261 (plaintiff alleges “that defendants are liable under Labor Law § 241(6) based upon a violation of 12 NYCRR 23-1.13(b)(4), which requires that workers be protected from electric shock by de-energizing the circuit and grounding it”).

Furthermore, Credit Suisse’s motion for common-law indemnification against Forest is granted. *See Keegan*, 262 A.D.2d at 114; *Buccini*, 250 A.D.2d 466; *Sheridan*, 229 A.D.2d 302. There is no record evidence suggesting that Credit Suisse “controlled the injury-producing

activity.” *See Fresco v. 157 E. 72nd St. Condo.*, 2 A.D.3d 326, 328 (1st Dept. 2003). Forest argues that a question of fact exists as to whether the injury was caused by a “bad splice” that was part of Credit Suisse’s leased premises, and thus Credit Suisse’s responsibility. However, Forest fails to put forward any evidence that Credit Suisse had actual or constructive notice of a dangerous condition. *See id.* It is undisputed that Forest, not Credit Suisse, was responsible for supervising Mr. Baumann on the day of his fatal accident. The liability, *vel non*, of Credit Suisse is, therefore, vicarious only, dependent on a finding of liability at trial. Accordingly, it is

ORDERED that the motion of defendants Penguin Air Conditioning Corp. a/k/a Emcor/Penguin Air Conditioning Corp., Penguin Maintenance and Services, Inc., and Emcor Group, Inc., for summary judgment dismissing the Second-Third Party Complaint, and all cross-claims against them is granted, the Second-Third Party Complaint is severed and dismissed as against said defendants; and it is further

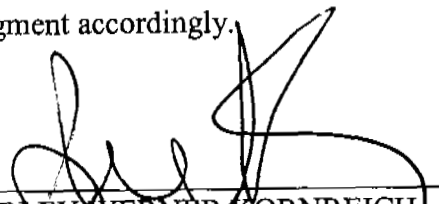
ORDERED that the motion by third-party defendants Forest Electric Corp., Forest Electric Corp., Inc., Forest Electric Corp. Electrical Construction/Engineering Datacom Services, for partial summary judgment dismissing all claims for contractual indemnification interposed against them in the third-party complaints, is granted; and said claims are severed and dismissed against said third-party defendants; and it is further

ORDERED that the motion by defendant Credit Suisse First Boston Structured Assets, Inc., for summary judgment dismissing plaintiff’s Labor Law §§ 200 and 240(1) and negligence claims is granted, and said claims are severed and dismissed; and said defendant’s motion for indemnification against third-party defendants Forest Electric Corp., Forest Electric Corp., Inc., Forest Electric Corp. Electrical Construction/ Engineering Datacom Services, is granted, in an

amount, if any, to be determined at trial; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Date: March 22, 2006
New York, New York



SHIRLEY WERNER KORNREICH

FILED
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