MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 19

EDWARD BOHAN, et al. X

- against -

F.R.P. SHEET METAL CONTRACTING CORPORATION, et al. X

INDEX NO. 9910/05

MOTION SEQ. NO.: 2

BY: SATTERFIELD, J.

DATED: May 30, 2007

Defendant RC Dolner, Inc. ("Dolner") has moved for, inter alia, summary judgment dismissing the complaint and all of the cross claims against it. Defendant J.T. Falk & Company, LLC ("Falk") has cross moved for, inter alia, summary judgment dismissing the complaint and all of the cross claims against it. Defendant Five Star Electric Corp. ("Five Star") has cross moved for summary judgment dismissing the complaint and all of the cross claims against it. Defendant F.R.P. Sheet Metal Contracting Corporation ("FRP") has cross moved for summary judgment dismissing the complaint and all of the cross claims against it. Plaintiff Edward Bohan (hereinafter "the plaintiff" or "plaintiff Bohan") and plaintiff Kathleen Bohan have cross moved for an order permitting them to serve an amended bill of particulars.

In or about 2000, The Hilton Hotel in New York City hired defendant Dolner to act as the general contractor for a renovation and construction project which included the installation of a fan in the number two fan room on the fourth floor. Dolner

subcontracted electrical work to defendant Five Star and HVAC work to defendant Falk. Defendant Falk undertook to install the fan system, the roof top air conditioning, and the pumps and to renovate the sheet metal ducts. Defendant Falk sub-subcontracted duct and sheet metal work, including the installation of fans, to defendant FRP. A part of the construction work performed by defendant FRP involved the installation of a fan known as the F6 fan in the number two fan room on the fourth floor. The fan had a round electrical motor bolted to the unit and a switch box mounted on the unit. Although defendant Five Star connected the wiring to the switch box, defendant Five Star did not install the switch box, which the manufacturer of the fan unit had pre-mounted. Defendant FRP installed the fan vertically, placing the fan disconnect switch in such a manner that the off and on positions were left and right respectively instead of up and down respectively. The switch had a lock out system comprised of two holes on the sides of the switch unit. A screwdriver, for example, could be put through the holes to prevent the toggle from moving to the on position. Although Dolner subcontracted the work out, its mechanical superintendent oversaw the installation of the fan and inspected the job upon its completion to ensure that it conformed with plans and specifications. On or about March 9, 2001, employees of the City of New York also inspected the fan and found that it conformed to the Electrical Code of the City of New York. The City of New

York, Department of Buildings, Bureau of Electrical Control issued a certificate dated March 9, 2001 stating that "the installation, alteration or repair of electrical wiring and appliances herein described have been inspected and have been found to be in conformity with the requirements of the Electrical Code of the City of New York."

On September 13, 2004, plaintiff Bohan, employed as an engineer by the Hilton Hotel in New York City, reported for work. At approximately 10:30 PM, plaintiff Bohan went to the number two fan room on the fourth floor to change the fan belts on the F6 fan. The plaintiff observed that the switch to the fan had been moved to the off position, but he did not use the lock out safety device on the switch box as he had done in the past. Plaintiff Bohan used an approximately 18" X 2" stick to stop the belts on the fan pulley which had continued to rotate some even though the switch had been turned off. After the belts stopped turning, the plaintiff, holding the stick in his right hand, reached up with his left hand to remove the top belt. As he grasped the belt, the motor went on, because, according to his pretrial testimony, "the stick must have hit the switch and turned the fan on." The turning belt brought the plaintiff's left hand toward the pulley, severely injuring his fingers. The plaintiffs began this action for personal injury on or about May 3, 2005 by the filing of a summons and a complaint. They filed a note of issue on or about July 10, 2006.

The plaintiffs' cross motion for an order permitting them to serve an amended bill of particulars is granted. (See, Lipari v Babylon Riding Center, Inc., 18 AD3d 824.) The amended bill of particulars is deemed served.

Those branches of the motion by defendant Dolner which are for summary judgment dismissing the complaint and all of the cross claims against it are granted. "[T]he 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 ***." (Alvarez v Prospect Hospital, 68 NY2d 320, 324.) Defendant Dolner successfully carried this burden. It is true that a general contractor who retains supervisory control over its subcontractor can be held liable for a subcontractor's allegedly negligent actions. (See, Ruli v Hiro Enterprise, 298 AD2d 256; Cotter v Structure Tone, Inc., 247 AD2d 275.) However, the elements of a cause of action for negligence include "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom ***." (Solomon v City of New York, 66 NY2d 1026, 1027; Murray v New York City Housing Authority, 269 AD2d 288.)

In the case at bar, defendant Dolner showed prima facie that the contractors did not install the fan with its switch in such a manner that they breached a duty of care owed to the

plaintiff. (See, Gralnik v Brighton Beach Associates, LLC, 3 AD3d 518.) Peter Amabile, the Vice-President of defendant Five Star, the electrical contractor, testified at his deposition that placing the toggle disconnect with the long side of the box parallel to the ground is permitted by the Electrical Code. Moreover, inspectors from The City of New York, Department of Buildings, Bureau of Electrical Control, determined that the fan had been installed in conformity with the requirements of the Electrical Code of the City of New York. Defendant Dolner also showed prima facie that plaintiff Bohan's own acts in (1) failing to use the switch's lock out system as he had done elsewhere in the past, and (2) striking the switch with a stick were the sole proximate cause of the accident. A plaintiff cannot recover in negligence where his own actions were the sole proximate cause of his injury. (See, McCormack v Universal Carpet & Upholstery Cleaners, 29 AD3d 542; Capellan v King Wire Co., 19 AD3d 530; Sorrentino v Paganica, 18 AD3d 858; Amaya v L'Hommedieu, 6 AD3d 638.) The burden on this motion shifted to the plaintiffs to produce evidence showing that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, supra.) They failed to carry this burden.

The affidavit of the plaintiffs' expert, Robert E. Polchinski, P.E., a licensed mechanical engineer and Assistant Professor of Environmental Control Technology at New York City Technical College of the City University of New York, is rejected

since the plaintiffs failed to identify the expert in pretrial disclosure and then served the affidavit in opposition to the instant motion after the filing of a note of issue and certificate of readiness stating that discovery had been completed. (See, CPLR 3101[d][1]; DeLeon v State of New York, 22 AD3d 786; Safrin v DST Russian & Turkish Bath, Inc., 16 AD3d 656; Gralnik v Brighton Beach Associates, LLC, supra; Dawson v Cafiero, 292 AD2d 488.) Notwithstanding, the plaintiffs failed to raise a triable issue of fact even if the affidavit of the expert is taken into account. The plaintiff's expert alleges: (1) The contractors did not install the fan horizontally, as designed, but vertically, with the result that the motor-pulley assembly was not fully enclosed. (2) After installing the fan vertically, the contractors did not alter the fan disconnect switch so that the off and on positions were left and right respectively instead of up and down respectively. However, because plaintiff Bohan deliberately reached for the fan belt, installing the fan with an exposed motor-pulley assembly was not a proximate cause of his injury. Moreover, although the plaintiffs' expert opines that the contractors should have installed the switch so that the up and down position were on and off respectively, he cites no rule, regulation, or code provision requiring an installation in that manner. The expert's affidavit, which consists of mere speculative assertions unsupported by adequate foundational facts and which is without a basis in

statute, rule, regulation, code provision, or industry standard, did not raise a triable issue of fact. (See, Romano v Stanley, 90 NY2d 444; Solis v 32 Sixth Ave. Co. LLC, 38 AD2d 389; DeLeon v State of New York, supra; Veccia v Clearmeadow Pistol Club, Ltd., 300 AD2d 472; Cicero v Selden Ass'n 295 AD2d 391.)

That branch of the cross motion by defendant Five Star which is for summary judgment dismissing the complaint and all of the cross claims against it is granted. Defendant Five Star showed prima facie that it did not breach a duty of care owed to the plaintiff (see, Solomon v City of New York, supra; Gralnik v Brighton Beach Associates, LLC, supra), and that none of its actions were a proximate cause of injury to him. (See, 120 Whitehall Realty Associates, LLC v Hermitage Ins. Co., _AD3d_, _NYS2d_, 2007 WL 1366295; Chiles v D & J Service, Inc., 34 AD3d 319; Hersman v Hadley, 235 AD2d 714.) The court notes that defendant Five Star merely connected the power to the switch, but did not install it. The plaintiffs failed to produce evidence showing that there is an issue of fact which must be tried with respect to this defendant. (See, Alvarez v Prospect Hospital, supra.)

That branch of the cross motion by defendant Falk which is for summary judgment dismissing the complaint and all of the cross claims against it is granted. Defendant Falk showed prima facie that it did not breach a duty of care owed to the plaintiff

(see, Solomon v City of New York, supra; Gralnik v Brighton Beach Associates, LLC, supra), and the plaintiffs failed to produce evidence showing that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, supra.)

That branch of the cross motion by defendant FRP which is for summary judgment dismissing the complaint and all of the cross claims against it is granted. Defendant FRP showed prima facie that it did not breach a duty of care owed to the plaintiff (see, Solomon v City of New York, supra; Gralnik v Brighton Beach Associates, LLC, supra), and the plaintiffs failed to produce evidence showing that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, supra.)

The remaining branches of the motion and the cross motions are denied as moot. Short form order signed herewith.

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J.S.C.