

Lamb-Shapiro v Maxi Constr. Corp.

2007 NY Slip Op 32586(U)

August 14, 2007

Supreme Court, New York County

Docket Number: 0106531/2005

Judge: Emily Jane Goodman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EMILY JANE GOODMAN

PRESENT: _____

PART 17

Justice

Index Number : 106531/2005

LAMB-SHAPIRO, JESSICA

vs

MAXI CONSTRUCTION

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is denied for

affid

FILED

AUG 21 2007

COUNTY CLERK'S OFFICE
NEW YORK

8/14

~~10/14~~
/07

Dated: _____

[Signature]
EMILY JANE GOODMAN L.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: IAS PART 17

-----x
JESSICA LAMB-SHAPIRO,

Plaintiff,

Index No.
106531/05

-against-

MAXI CONSTRUCTION CORP, VERY FINE PAINTING
INC., JOHN DOE and ROE CORPORATION

Defendants.
-----x

FILE

Emily Jane Goodman, J.S.C.:

AUG 21 2007

Defendant Maxi Construction Corp. (Maxi) moves, pursuant to
CPLR 3212 (a), for summary judgment dismissing the complaint as to
it.

COUNTY CLERK'S OFFICE
NEW YORK

This action arises out of property damage resulting from a fire that occurred at plaintiff's apartment (Apartment) on February 13, 2005. Plaintiff had hired Maxi as the general contractor to renovate the Apartment. Maxi, in turn, had retained defendant Very Fine Painting, Inc. (Very Fine) to paint the interior walls and, among other things, to refinish the floors of the Apartment. As required by the specifications of plaintiff's architect, and at Maxi's direction, Very Fine applied tung oil to the floors. Tung oil is a drying oil that permeates wood. It is highly combustible. Plaintiff contends that the fire was caused by the spontaneous combustion of tung oil-soaked rags that were improperly left under a staircase by Very Fine. In the course of the second renovation of the Apartment, after the fire, Maxi's president applied the required tung oil himself. At his deposition, he stated that the directions printed on the container are to dispose of any oil-

soaked materials in a fireproof container.

Maxi argues that it did not supervise Very Fine's application of the tung oil, or Very Fine's disposal of the rags that it had used in the process, and that, as the general contractor, it may not be held vicariously liable for any negligence in the course of such disposal on the part of Very Fine. See e.g. Rosenberg v Equitable Life Assur. Soc. of the U.S., 79 NYd 663 (1992).

While, as a general rule, one who employs an independent contractor is, indeed, not liable for the negligence of that contractor, one exception to that rule is where the work that resulted in the injury is inherently dangerous, and where the employer knew or had reason to know of the danger involved. Id.; Wright v Tudor City Twelfth Unit, Inc., 276 NY 303 (1938); Klein v Beta I LLC, 10 AD3d 509 (1st Dept 2004); Laecca v NYU, 7 AD3d 415 (1st Dept 2004). Maxi acknowledges this exception, but argues that, unlike blasting, for example, polishing floors is not an inherently dangerous activity. Further, Plaintiff and Very Fine maintain that Maxi is not entitled to summary judgment because there is an issue of fact as to whether Maxi was negligent in hiring or supervising Very Fine. See Leeds v D.B.D. Servs., Inc., 309 AD2d 666 (1st Dept 2003).

Whether certain work is inherently dangerous, that is, whether it "involves the creation of a dangerous situation (Wright v Tudor City Twelfth Unit, Inc., 276 NY, supra, at 306), depends on the particular circumstances in which that work is performed, and is generally a question of fact for the jury (Rosenberg v Equitable

Life Assur. Soc., supra). Thus, for example, washing mats with soap and water does not, generally, carry an inherent danger. However, there is an inherent danger to passing pedestrians when that activity is performed on a sidewalk on 42nd Street. Wright supra; see also Rohlf's v Weil, 271 NY 444 (1936) (work performed on scaffolding outside building made inherently dangerous by failure to place warning signs on sidewalk). It has been held that there is a triable issue of fact whether sanding and refinishing floors with flammable materials is inherently dangerous where an oven gas pilot light is left on while the materials are being applied. Montano v O'Connell, 186 AD2d 461 (1st Dept 1992).

In Montano, the New York Board of Fire Underwriters had opined that the flammable vapors from the products used had probably been ignited by the gas from the pilot light. Here, it is undisputed that tung oil is so combustible that oil-soaked rags must be disposed of in fireproof containers. Moreover, plaintiff testified at her deposition that when she arrived at the Apartment after the fire had been suppressed, a fireman told her that the fire was believed to have been caused by the spontaneous combustion of the oil-soaked rags. So too, Mrs. Okjo Choi, the secretary of Maxi, testified at her deposition that a representative of Maxi's insurance company had told her that the fire had broken out on the rags. To be sure, all this testimony is hearsay and, in part, double hearsay. However, while hearsay may not be used to support a motion for summary judgment, it may be used in opposition to such a motion where it is not the only evidence relied upon. Arnold

Herstand & Co. v Gallery: Gertrude Stain, Inc., 211 AD2d 77 (1st Dept 1995). In sum, this court will not find, as a matter of law, that the application of tung oil and the subsequent disposal of the oil-soaked rags were not an inherently dangerous activity, where the testimony indicates that the material is so combustible that the oil soaked rags must be disposed of in fireproof containers.

Further, given the testimony of the owner of Very Fine, that he informed Maxi that he had never used tung oil before, but that he used other stains, and the acknowledgment by Mrs. Choi that she had seen a container of tung oil prior to the fire, knew how to prevent fires, and was able to read the directions on it, an issue of fact is raised as to whether Maxi knew or should have known of the danger posed an inherently dangerous activity, or, was negligent in hiring or supervising Very Fine.

Accordingly, it is hereby

ORDERED that the motion is denied.

This Constitutes the Decision and Order of the Court.

Dated: ~~September 4~~, 2007

Aug. 14 2007

ENTER:

EJG

J.S.C.

EMILY JANE GOODMAN
FILED

AUG 21 2007

COURT CLERK'S OFFICE
NEW YORK