SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice

TRIAL/IAS PART 5
NASSAU COUNTY

WILLIAM PROEFRIEDT and SHIRLEY PROEFRIEDT,

Plaintiff(s),

- against-

QZO HOME IMPROVEMENT CORP., JOHN CIUZIO, JOHN VILARDI, JR. and JOANN VILARDI,

Defendant(s).

ORIGINAL RETURN DATE:08/30/07
SUBMISSION DATE: 11/13/07
INDEX NO.: 14241/05

MOTION SEQUENCE #2,3

The following papers read on this motion:

Notice of Motion.....	1
Notice of Cross-Motion.....	2
Affirmation in Opposition.....	3
Reply Affirmations.....	4,5
Sur-Reply.....	6

Motion by defendants, John Vilardi, Jr. and Joann Vilardi, for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint as well as any and all cross-claims against them is denied. Cross-motion by defendants, QZO Home Improvement Corp. and John Ciuzio, for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and any as well as all cross-claims asserted against them is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, William Proefriedt, on August 26, 2004. Plaintiff claims that he was injured while he was using a gas-powered saw to cut an opening into a below-grade oil tank at the premises owned by defendants, John Vilardi Jr. and Joann Vilardi (the "Vilardi's'").

Prior to the date of the accident, the Vilardi's contracted with defendants, QZO Home Improvement Corp. ("QZO") and John Ciuzio ("Ciuzio"), for the construction of a patio, garage and driveway at the subject premises. Defendant Ciuzio is the principal owner of QZO. The subject contract included filling the tank located underneath the Vilardi's driveway with sand.

Defendant QZO originally retained the services of another subcontractor to perform the concrete work. The subcontractor's work, however, allegedly was not up to standard. Hence, QZO retained the services of plaintiff to do the work.

In their complaint, plaintiffs advance claims based upon common law negligence and violation of Labor Law § 200. Specifically, plaintiffs allege that QZO was negligent in "failing to provide safe premises and/or negligently instructing plaintiff to perform work in a hazardous area" (Compl. ¶25, Ex. A) and "in the ownership, operation, management, supervision, maintenance and control of the aforesaid premises" (*Id.* ¶26). In his bill of particulars, plaintiff alleges that defendants failed "to prevent the plaintiff from being exposed to a highly explosive device" (Bill of Particulars ¶5, Ex. C).

The Vilardi's move for summary judgment dismissing the complaint claiming, *inter alia*, that the evidence establishes that they did not create any dangerous or defective condition by placing a volatile substance or allowing a volatile substance to accumulate in the subject oil tank and that they did not have actual or constructive notice, or either, of any alleged dangerous condition in the oil tank since the tank was underground for approximately twelve years prior to the accident. They assert that there is no evidence that the condition was the proximate cause of the explosion.

Defendants QZO and Ciuzio cross-move for summary judgment dismissing the complaint on the grounds that plaintiffs have failed to set forth any material facts or credible evidence establishing that QZO and Ciuzio exercised supervision or authority to control plaintiff's activities or operations on the date of the accident, especially in light of the fact that plaintiff, William Proefriedt, used his own crew, tools and equipment. Moreover, plaintiff failed to establish that there was flammable liquid in the tank.

Labor Law § 200 provides that:

> 1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded , and lighted so as to provide reasonable and adequate protection to all such persons. ...

"This section is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work (citation omitted)" (*Lombardi v Stout*, 80 NY2d 290, 294 [1992]). An implicit precondition to this duty is that defendant "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition (citations omitted)" (*Rizzuto v Wenger Construction Co.*, 91 NY2d 343, 352 [1998]).

A landowner may be liable for injuries caused by a dangerous condition on the land if the owner had actual or constructive notice of the condition. However, "where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law (citations omitted)" (*Lombardi*, 8 NY2d at 295).

On a motion for summary judgment, it is the proponent's burden to "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. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (citations omitted)" (*JMD Holding Corp. v Congress Financial Corp.* , 4 NY3d 373, 384 [2005]). If this showing is made, however, "the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

As to the Vilardi's, the Court finds that issues of fact have been raised which preclude the granting of summary judgment. In opposition to the Vilardi's motion, plaintiffs have offered: a) the expert affidavit of Ernest Garber, a physical engineer; and b) a report from Action Remediation which indicates that 82 gallons of a "non hazardous waste liquid (oil/water)" was removed from the site one day after the accident (Ex. C). Mrs. Vilardi testified that Action said the substance was not flammable.

While the Vilardi's testified that they were told by Slomins some twelve years earlier that some fluid would be left inside the tank, they did not warn plaintiff of its presence until they were asked. Plaintiff testified that he did not commence work on the oil tank until after he was convinced that the oil had been evacuated out of it and that he would not be responsible for an contamination to the earth. After observing liquid inside the tank, plaintiff testified that he was informed by the Vilardi's that "the tank had been pumped out and that the substance inside was probably water" (Brino Aff. ¶14). Plaintiff further testified that John Vilardi stated that he would take full responsibility.

Under the circumstances, issues of fact exist as to whether the Vilardi's knew or should have known about the allegedly defective condition, whether they provided reasonable and adequate protection for plaintiff's injury and whether the explosion was, in fact, caused by the substance within the tank.

Turning to QZO and Ciuzio, a critical element as to plaintiff's claims is supervisory control over the work which caused plaintiff's injury. In support of their motion, QZO and Ciuzio assert that they did not exercise any supervision or authority to control the method and manner of the work being performed. Ciuzio testified that plaintiff was never instructed to fill the tank. Plaintiff testified otherwise. Specifically, he testified that he contacted Ciuzio who directed him to cut a hole in the tank and pour sand into it and that he would take full responsibility for the tank. Plaintiff proceeded to cut "an opening in the oil tank with a Mikita 14-inch abrasive saw" (Shook

Aff. ¶19). Ciuzio's testimony contradicts plaintiff's in that he states that it was his understanding that plaintiff was going to leave and wait for him to come back (Ex. G., p.30).*

Plaintiff further maintains that defendants QZO and Ciuzio had been at the site instructing him as to what work needed to be done before the incident and directing plaintiff and his crew to stop pulling trucks onto the driveway due to problems with the concrete. In addition, plaintiff claims that defendants Vilardi's instructed plaintiff that he could not pour any more concrete until the tank was filled. Whereupon, plaintiff contacted defendants QZO and Ciuzio by telephone for directives and was advised by these defendants that the tank had to be filled before the work could continue.

The decisive consideration upon a motion for summary judgment is the existence of issues of fact (*Werfel v Zivnostenska Banka*, 287 N.Y. 91; *Ugarriza v Schmieder*, 46 NY2d 471). "Issue-finding, rather than issue-determination is the key to the procedure" (*Esteve v Abad*, 271 AD2d 725, 727). The Court is not authorized to try the issues; its function is merely to determine whether any issue exists (*Sillman v Twentieth Century-Fox*, 3 NY2d 394; *Cross v Cross*, 112 AD2d 62). Summary judgment cannot be granted unless it is clear that the movant has made out a case by the undisputed material facts presented on the record by affidavit or other proof (*Barrett v Jacobs*, 255 NY 520; *Piccolo v DeCarlo*, 90 AD2d 609). Credibility is not ordinarily to be determined on a motion for summary judgment (*Ferrante v. American Lung Ass'n*, 90 NY2d 623 [1997]). If material facts are in dispute or different inferences may reasonably be drawn from facts themselves undisputed, the motion for summary judgment must be denied (*Supan v. Michelfeld*, 97 AD2d 755).

Based upon the record submitted, plaintiff has raised an issue of fact as to whether QZO and Ciuzio had authority to control the activity which brought about his injury; and, hence, whether they can be liable for plaintiff's injuries. Therefore, dismissal of plaintiffs' causes of action based upon common-law negligence and violation of Labor Law § 200 is unwarranted here.

This decision constitutes the order of the court.

Dated: 1-24-08

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

* He was out of town at the time of the incident.

RE: PROEFRIEDT v. QZO, et al.

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