Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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MANUEL FLORES,

Plaintiff,

-against-

SHERWOOD MANAGEMENT CO., LLC, SYNTHO PHARMACEUTICALS, INC., INTERMAX PHARMACEUTICALS, INC. and MUHAMMED MALIK,

Defendants,

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SHERWOOD MANAGEMENT CO., LLC

Third-Party Plaintiff,

-against-

BUDGET ELECTRIC COMPANY, INC.,

Third-Party Defendant,

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SYNTHO PHARMACEUTICALS, INC., INTERMAX PHARMACEUTICALS, INC., and MUHAMMED MALIK

Third-Party Plaintiffs,

-against-

BUDGET ELECTRIC COMPANY, INC. and BENJAMIN KHALOUIAN,

Third-Party Defendants.

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INDEX NO.: 12337/2004
CALENDAR NO.: 200702027OT
MOTION DATE: 2/28/2008
MOTION NO.: 001 MG
002 XMOT D
003 XMD
004 XMD

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Upon the following papers numbered 1 to 91 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-19 ; Notice of Cross Motion and supporting papers 20-36; 37-55; 56-67 ; Answering Affidavits and supporting papers 68-71; 72-74; 75-76; 77-78; 79-82; 83-84 ; Replying Affidavits and supporting papers 85-86; 87-89; 90-91 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence 001) by third-party defendants Budget Electric Company, Inc. and Benjamin Khalouian for an order pursuant to CPLR 3212 granting summary judgment dismissing both third-party complaints, is granted; and it is further

ORDERED that the cross motion (motion sequence 002) by defendant Sherwood Management Co. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, summary judgment over and against the third-party defendant, and an order pursuant to CPLR 3124 or 3126 to dismiss or to sanction, is granted to the extent that plaintiff's Labor Law § 200 and common-law negligence causes of action are dismissed as against movant, and is otherwise denied; and it is further

ORDERED that the cross motion (motion sequence 003) by plaintiff for an order pursuant to CPLR 3212 granting summary judgment as to defendants' liability, is denied; and it is further

ORDERED that the cross motion (motion sequence 004) by defendants Syntho Pharmaceuticals, Inc., Intermax Pharmaceuticals, Inc. and Muhammad Malik, for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, summary judgment over and against the third-party defendant, and an order pursuant to CPLR 3124 or 3126 to dismiss or to sanction, is denied.

Plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200 and 241(6), and common-law negligence, for injuries he sustained in an electrical accident at a renovation site. The commercial property was owned and managed by Sherwood Management Co., LLC, (Sherwood), which leased the premises to Intermax Pharmaceuticals, Inc. (Intermax). Intermax hired Budget Electric (along with Benjamin Khalouian, collectively Budget) to perform electrical work in additional space it leased from Sherwood, which was eventually occupied by Syntho Pharmaceuticals, Inc. (Syntho). Intermax leased the additional space, located next to its original premises, to expand its pharmaceutical manufacturing business. To meet its needs and to accommodate certain manufacturing equipment, Intermax required construction of rooms for offices and machines, relocation of certain lighting, and increased amperage.

Plaintiff testified at his deposition that he was employed by Budget as an electrical mechanic.[1] His boss and Budget's owner, Benjamin Khalouian, was the only person who supervised and directed his work. Mr. Khalouian had shown him Intermax's new space and told him that it required wiring for the new rooms and upgrading a subpanel to increase the amperage from 100 to 200 amps. The main electrical panel already had two subpanels, but only one subpanel was to be replaced. Plaintiff testified that, on the day of his accident, he had removed the circuit breaker in the main panel which controlled power to the subject subpanel, thereby permitting him to work on the subpanel. Power to the main panel remained on while he worked on the subpanel. He had installed the new breaker in the subpanel and attached the wires, and was attempting to replace the breaker in the main panel. Although plaintiff is not exactly sure what happened next, it appears that there was an 'arc blast' of electricity, plaintiff's clothing caught fire, and he suffered second and third degree burns over 40 percent of his body. Plaintiff's expert, Professor Helmut Brosz, offers that an 'arc blast' explosion is the passage of electric current between two conducting metals through an ionized gas or vapor, usually air. It is initiated by a

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[1] Plaintiff was trained as an electrical technician in his native country, Mexico. He opined that the college program he attended was equivalent to a two-year college in the United States. He began as a helper with Budget and got additional training from his boss, especially in the ways in which the American electrical system is different from that in Mexico. He is not a licensed electrician.

flash over or by a conductive tool or material, and the resultant temperatures can exceed 35,000 degrees. It is Mr. Brosz's opinion that, while plaintiff was attempting to replace the breaker in the main panel, plaintiff's tool made contact with the energized (live) busbar on the main electrical panel, which resulted in the arc blast explosion, and that power to the main panel should have been shut down or de-energized before any attempt to connect the new subpanel.

Initially, the Court notes that the cross motion made by plaintiff, and the cross motion made by defendants Syntho, Intermax and Muhammad Malik, are procedurally defective because they were not interposed within the time limitation prescribed by CPLR 3212(a) (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]); *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). To the extent that the cross motion by Syntho, Intermax and Malik seeks the identical relief sought by Sherwood, those issues shall be considered (*Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2005]; *see also, Boehme v A.P.P.L.E.*, 298 AD2d 540, 749 NYS2d 49 [2002]), but the remainder of their cross motion, and the cross motion by plaintiff, are denied as untimely.

Labor Law § 241(6) requires owners and contractors to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. It creates a duty that is nondelegable and an owner or contractor who breaches that duty may be held liable in damages regardless of whether either had actually exercised supervision or control over the work (*see*, *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]; *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132 [1982]; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 405 NYS2d 630 [1978]). Therefore, a plaintiff who asserts a viable claim under § 241(6) wherein the rule or regulation alleged to have been breached is a "specific positive command" and not merely "general safety standards" need not show that defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*).

Plaintiff has confined his argument to defendants' alleged violation of the Industrial Code at 12 NYCRR §23-1.13 (b)(4).[2] Section 23-1.13, entitled, "Electrical hazards," provides, in relevant part:

> (4) Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means.
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[2] Plaintiff has not addressed the other code violations listed in his bill of particulars, and the Court finds that they are either inapplicable or too general to support plaintiff's Labor Law § 241(6) claim. Since violations of Occupational Safety and Health Administration (OSHA) regulations do not support claims under the liability imposed pursuant to Labor Law § 241(6) (*Rizzuto v L.A. Wenger Contr. Co. supra* at 351; *Fisher v WNY Bus Parts,* 12 AD3d 1138, 1140, 785 NYS2d 229 [2004]), the Court will not address the OSHA violations alleged by plaintiff.

Section 23-1.13(b)(4) has been found to be sufficiently specific to support a Labor Law § 241(6) claim (*Hernandez v Ten Ten Co.*, 31 AD3d 333, 819 NYS2d 42 [2006]) and has been found applicable to a worker who suffered burns which were caused by an electrical explosion (*Bardouille v Structure-Tone*, 282 AD2d 635, 636, 724 NYS2d 751 [2001]; *Snowden v New York City Transit Auth.*, 248 AD2d 235, 670 NYS2d 32 [1998]), such as plaintiff's injuries. Therefore, summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action is denied to defendants.[3]

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees with a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners and contractors (*Russin v Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 [1981]) who exercised control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (*Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Where, as here, the alleged dangerous condition arises from the method or material controlled by the subcontractor and the owner exercised no supervision or control over the injured plaintiff's work, no liability attaches under the common law or Labor Law § 200 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). Therefore, summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action is granted to Sherwood.

However, plaintiff argues that Mr. Malik, the principal for Intermax and Syntho, denied Mr. Khalouian's request to have power to the main panel de-energized by LIPA. Therefore, there is a question of fact as to whether these defendants exercised sufficient control over the methods used by plaintiff in performing his work so as to be liable under Labor Law § 200 and common-law negligence (*Ifill v Saha Food Stores*, 187 Misc 2d 936, 725 NYS2d 167 [2001]). Accordingly, summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action is denied to Syntho, Intermax, and Malik. All other relief sought by these defendants is denied as untimely.

It would appear that Sherwood also seeks relief under CPLR 3124 or 3126 for spoliation of evidence because plaintiff's employer, Budget, discarded the main panel box before Sherwood had an opportunity to inspect it. Sherwood concedes that Budget discarded the box after OSHA inspected it and told Budget that it could dispose of the box, and after Budget's insurance company and LIPA had also inspected it. Nevertheless, Sherwood argues that its defense is impaired because it cannot inspect the box which was the cause of plaintiff's accident. However, Sherwood's own arguments fail to allege, or establish, that the Budget intentionally or negligently failed to preserve crucial evidence after being placed on notice that such evidence might be needed for future litigation (*Sloane v Costco Wholesale Corp.*, __ AD3d __, 2008 NY Slip Op 1938, 2008 NY App Div LEXIS 1977 [2008]; *Denoyelles v Gallagher*, 40 AD3d 1027, 834 NYS2d 868 [2007]; *Lovell v United Skates of Am.*, 28 AD3d 721, 812 NYS2d 881[2006]) or that it has been unduly prejudiced (*Cameron v Nissan 112 Sales*

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[3] Since Labor Law 241(6) imposes vicarious but not strict liability (*Bauer v Female Academy of the Scared Heart*, 97 NY2d 445, 452, 741 NYS2d 491 [2002]; *Long v Forest-Fehlhaber*, *supra*), and the issues of whether the operation or conduct at the work site was reasonable and adequate under the particular circumstances (*Rizzuto v L. A. Wenger Contr. Co.*, *supra*; *Herman v St. John's Episcopal Hosp.*, 242 AD2d 316, 678 NYS2d 635 [1997]) and whether plaintiff was contributorily or comparatively negligent are issues to be resolved by the jury (*Harris v Arnell Const. Corp.*, 47 AD3d 768, 850 NYS2d 547 [2008]; *Bauman v Metropolitan Life Ins. Co.*, 17 AD3d 260, 793 NYS2d 410 [2005]; *Lorefice v Reckson Operating Partnership*, 269 AD2d 572, 703 NYS2d 507 [2000]), even if plaintiff's motion had been timely made, summary judgment would have been unavailable to him

Corp., 10 AD3d 591, 781 NYS2d 661 [2004]). Accordingly, any relief under CPLR 3124 or 3126 is denied to Sherwood. To the extent that the cross motion by Syntho, Intermax and Malik seeks the same relief, their arguments to dismiss or sanction fail for the same reasons as Sherwood's cross motion, and this relief is likewise denied to them.

The gravamen of Budget's motion for summary judgment dismissing the third-party complaints is that these claims are barred by Workers' Compensation Law § 11 because there was no written contract providing for indemnification and because plaintiff did not suffer a "grave injury," as contemplated by the statute (*Rodrigues v N & S Bldg. Contrs.*, 5 NY3d 427, 805 NYS2d 299 [2005]; *Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771, 828 NYS2d 522 [2007]). Budget argues that the post accident pictures of plaintiff show that he did not suffer a "permanent and severe facial disfigurement." Although plaintiff suffered permanent disfigurement to other parts of his body, his facial scarring is limited to an area under his chin. The Court finds that the pictures of plaintiff's face do not show a severe disfigurement to his face but rather show a disfigurement to the neck area under his chin, which is insufficient to establish a grave injury (*Sergeant v Murphy Family Trust*, 292 AD2d 761, 761-762, 739 NYS2d 790 [2002]). Therefore, Budget established its entitlement to summary judgment as a matter of law (*Giblin v Pine Ridge Log Homes*, 42 AD3d 705, 840 NYS2d 196 [2007] [loss of eye and replacement with prosthetic eye not a grave injury]; *Rosen v Nygren Dahly Co.*, 1 AD3d 998, 768 NYS2d 255 [2003] [scar only slightly lighter than regular skin tone and following hairline not a grave injury]), and the third-party plaintiffs did not rebut this with evidence sufficient to create a question of fact. Plaintiff's physician's opinion that plaintiff suffered permanent scar deformities to his face may be relevant on the issue of permanence, but not severity (*Krollman v Food Automation Service Techniques*, 13 AD3d 1209, 1210, 787 NYS2d 581 [2004] [three-millimeter scar above eyebrow and "some mottling of her cheeks" insufficient for a grave injury irrespective of doctor's opinion]) and the Court determines that the pictures do not show facial disfigurement which could be regarded as "abhorrently distressing, highly objectionable, shocking or extremely unsightly" (*Fleming v Graham*, __ NY3d__, 2008 NY Slip Op 2502; 2008 NY LEXIS 602; 2008 WL 731025 [2008]). Accordingly, Budget's motion dismissing both third-party complaints is granted.

Dated: July 16, 2008

HON. PAUL J. BAISLEY, JR.
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**