

Lee v J. Kokolakis Contr., Inc.
2008 NY Slip Op 33746(U)
July 11, 2008
Supreme Court, New York County
Docket Number: 116128/05
Judge: Shirley Werner Kornreich
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4

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

-----X
THOMAS LEE,

Plaintiff,

-against-

J. KOKOLAKIS CONTRACTING, INC. AND BEYER,
BLINDER, BELL ARCHITECTS AND PLANNERS,
LLP.,

Defendants.

-----X
J. KOKOLAKIS CONTRACTING, INC.,

Third-Party Plaintiff,

-against-

MARYLAND FABRICATORS, INC.,

Third-Party Defendant.

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

Index No.: 116128/05

DECISION & ORDER

Third-Party Index No.: 590895/06

FILED
JUL 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this action based on Labor Law §§ 200, 240, and 241(6), defendants J. Kokolakis Contracting, Inc. (Kokolakis) and Beyer, Blinder, Bell Architects and Planners, LLP. (BBB) move for summary judgment dismissing the complaints against them. Alternatively, Kokolakis also moves for summary judgment against third-party defendant Maryland Fabricators, Inc. (Maryland) for defense, indemnification, attorney's fees, and costs. Plaintiff Thomas Lee has withdrawn his Labor Law §240 claim and all cardiac damages. No party opposes summary judgment dismissing the complaint against BBB. Finally, Kokolakis has agreed to withdraw its motion for indemnification without prejudice, and Maryland has agreed to pay defense costs for Kokolakis. Thus, all that remains before the court is Kokolakis' motion to dismiss the causes of action for Labor Law §§200 and 241(6).

I. Factual Background

Plaintiff's complaint alleges personal injuries from exposure to manganese and lead, resulting from the inhalation of welding fumes during his employment with Maryland. Maryland fabricated and erected structural steel as a subcontractor in the renovation of the Humanities Building at the State University of New York at Stony Brook (SUNY). Kokolakis was the general contractor for that project, and BBB was the architect.

The verified bill of particulars claims the following injuries: manganese poisoning, breathing difficulties, pain in lower chest, diagnostic cardiac catheterization, stent placement, acute myocardial infarction, percutaneous revascularization of LAD vessel, cautery procedure, dizziness, nausea, vomiting, fever, sore throat, chills, headaches, loss of sleep, and six months bed rest. The supplemental bill of particulars adds the following injuries: cognitive disorder, organic personality disturbance, mood irritability, memory loss, resting tremor, agitation, sluggishness, fatigue, muscle pain, severe sensory motor peripheral neuropathy, and sensory loss and numbness in the extremities.

II. Facts

A. Kokolakis Submissions

Lee is a 62-year-old iron worker, with a 22 year history of manual labor jobs. That work included bolting up and raising gangs, setting iron, plumbing-up gangs, stringing cables, and welding. In the majority of his previous welding jobs, Lee worked outside in open space, without a respirator. However, at the Shoreham Power Plant, he did weld indoors for one day and did not request a respirator.

Lee began working with Maryland in November 2003 on the Stony Brook project (the Project) and reported to Jimmy Bonti, the Maryland foreman. He was employed by Maryland for approximately 11 weeks. His responsibilities primarily involved welding 60 different areas on a

catwalk being put up in the ceiling to house air conditioning units. The catwalk, which was 25 feet long by 15 feet wide, was located in a 50 by 25 foot room and was eight feet off the floor with another eight feet between it and the A-frame roof. Lee testified that his actual workspace put him right up against the roof, that he was given limited instructions and that the only equipment he received were a welding shield and welding rods, from Bonti. There were no exhaust fans on the Stony Brook site, the windows in the building were two feet off the floor and only opened six inches, and they were kept closed to keep the cold weather out.

Lee claimed that he asked Bonti for a respirator, citing the accumulation of welding fumes because of poor ventilation, and Bonti said he would look into it, but Lee never got a response. Lee was unsure if Bonti heard his second request for a respirator, as he yelled it down from the catwalk. He did not ask again. Lee testified that another welder started work, complained about the fumes, and never returned and that some other Maryland employees fitting a diamond plate also complained. Lee believed that the manganese fumes came from the welding rods and the lead came from paint on the roof that he was required to chip off and weld on. He recognized the lead from its "sweet smell."

Lee had a heart attack on his last day of work with Maryland that required the stenting of an artery. He has a family history of high blood pressure, was diagnosed with high blood pressure prior to the heart attack, was prescribed a low-cholesterol diet, has been on blood pressure medication for 12 years and has been obese for his entire adult life outside of a two-year period of dieting. Lee is a regular beer drinker and was a pack-a-day smoker for 30 years prior to his heart attack. He presently is on the following medications: Plavix, Altace, Coreg, Nexium, Lipitor, Zetia, Nitroquick, Xanax, and a nitroglycerin. Lee admitted that the side effects of these medications include dizziness. As a result of his numerous medications and heart condition, his doctors have advised his continuing as an iron worker. He had planned to work until he was

eligible for retirement benefits at 65.

Lee initiated conversations about manganese poisoning with his doctors after reading about it on the internet. He then underwent “chelation therapy,” an unapproved FDA treatment, to try and reduce the manganese levels in his blood. Those levels, however, remained elevated after eight months of treatment. Lee no longer has any nausea, vomiting, fever, sore throat, chills, or headaches. He claimed he cannot sleep, averaging only three to five hours of sleep a night; he used to get at least six before the heart attack.

1. *Leo EBT*

Nicholas Leo is the vice president of Kokolakis and testified that Kokolakis had the ability to stop subcontractors from performing work for any reason, including noncompliance with drafted safety plans. But, Maryland controlled the day-to-day operations of steel erection and the attic area in which Lee worked. The catwalk, which was 120 feet long by 50 to 60 feet wide, was located in the attic area. That area was ventilated because two windows in the roof had been removed, creating two, thirty by fifteen foot spaces. Those windows were closed off toward the end of the renovation. There were no Occupational Safety and Health Administration (OSHA) inspections, even though it sometimes happens on projects this large.

2. *Yowell EBT*

John Yowell, the president of Maryland, testified that Lee started working for the company on November 25, 2003, and he was by it. Maryland’s workers were responsible for their own safety equipment and were not given respirators. Moreover, there was no mechanical ventilation. There were holes in the roof because Mr. Yowell recalled rain would stop work; the east windows were open to bring materials through, and the north side of the building was open to the other roof.

The safety data sheets for the welding rods indicated that respirators should be used when

welding in a confined space or an area where local exhaust and ventilation did not keep heavy metal exposure below a certain threshold value. No other workers from the Project have claimed any heavy metal poisoning, but Yowell did not know if anyone was exposed to the same levels of fumes as Lee. A safety plan was created, but Yowell did not know if the recommended weekly safety meetings took place.

3. *Gunter Affidavit*

Bobby Gunter, a board certified industrial hygienist and fellow of the American Industrial Hygiene Association, has taught courses on OSHA regulations and has conducted studies on the exposure risks from welding. After reviewing the depositions and submissions to the court, he concluded to a “reasonable degree of scientific certainty” that Lee was an iron worker for at least 20 years before the Project and that the catwalk was located in an area called the attic space. The attic space was 120 feet by 50 to 60 feet, had an opening in the roof and numerous windows, and had several means of egress. Based on Gunter’s experience, the area did not constitute a confined space by OSHA standards.

4. *Neuberg Affidavit*

Dr. Gerald Neuberg, a licensed physician, conducted a medical examination (IME) of Lee and reviewed the bill of particulars, Lee’s EBT and Lee’s medical records. Dr. Neuberg found that Lee had a history of hypertension, hyperlipidemia, smoking, obesity, and coronary atherosclerosis. Lee had an acute myocardial infarction that required a stent and had a very good recovery. He now has a stable cardiac status and is not working on the advice of his cardiologist. Lee can walk a half-mile several times a week, without a significant level of fatigue. Walking a flight of stairs leads to mild shortness of breath; whereas, pushing a lawn mower creates significant fatigue. In the IME, Lee denied active chest pain, but did allege occasional dizziness. Dr. Neuberg noted Lee’s complaints of neurological symptoms of irritability, restlessness, memory loss, insomnia,

and leg paresthesias, but also noted that past tests showed Lee with only a borderline elevated manganese level.

Dr. Neuberg found multiple cardiac risks that were poorly controlled before the heart attack and opined that Lee's cardiac disease was not work-related. He further opined that Lee's fatigue and shortness of breath are not related to his heart attack but could stem from Lee's smoking history or from his working conditions. Dr. Neuberg agreed that Lee should not return to work and attributed the recommendation to Lee's coronary disease.

5. *Jacobs Affidavit*

Dr. Alan Jacobs, a licensed physician, conducted an IME of Lee and reviewed parts of his medical record. Dr. Jacobs opined that Lee was "possibly already experiencing" the beginnings of asthmatic bronchitis and peripheral neuropathy, potential symptoms of manganese poisoning, before he worked on the Project. Dr. Jacobs attributed Lee's inability to work solely to his heart attack and pointed out that Dr. Katz, one of Lee's doctors, was worried that Lee's muscle pain were a side effect of Lipitor. Dr. Jacobs questioned Lee's sleep problems, arguing that consistently sleeping less than four hours a day is unsustainable and cited to a Swedish study that found that relatively high levels of manganese in the blood did not correlate with Lee's symptoms.

Dr. Jacobs provided his impressions of the findings of Dr. Singh and Dr. Chacko and ruled out memory, attention span and concentration problems. He also questioned any claims of diminished mental status, arguing that Lee's intelligence tests, which were slightly below average, are to be expected given Lee's limited education. Ultimately, he connected Lee's remaining symptoms to cumulative manganese exposure over Lee's career and contended that Lee's more severe symptoms could not be a result of manganese poisoning without being acute poisoning, which would have put Lee in a hospital emergency room and produced measurable amounts of

manganese in his hair and urine.

B. Plaintiff's Submissions

1. Hill's Affidavit

William Hill, a welder, worked on the Project in the same work area as Lee, in December 2003, for one or two days but left because of the fumes. Hill worked at the site for one or two days and left because of the accumulation of fumes. He recognized the sweet smell of lead and asked for a reassignment out of concern for his health. He described the workspace as a tight space directly under the roof with no air flow. Any windows were far removed from the actual place of welding and were kept closed to keep the heat in the building for those working downstairs. He worked for Maryland for many years, and this Project had the worst conditions of any of his jobs. Hill saw Lee at work.

2. Caddell Affidavit

Dr. Matthew Caddell, a clinical assistant professor at Stony Brook University in the Department of Preventive Medicine, Division of Occupational Health, examined Lee on September 13, 2007. Dr. Caddell opined that Lee was in stage one of manganese poisoning and had cognitive and emotional disturbances. He believed it was reasonable to conclude that Lee's peripheral neuropathy was work-related and caused by lead poisoning. He also opined that Lee's resting tremor, which might be benign, could be indicative of stage III Parkinson's disease. Dr. Caddell recommended further neuropsychological testing to determine the full extent of Lee's manganese poisoning and tremors. Dr. Caddell explained that lab testing of manganese is not useful because of the poor correlation between simple blood level tests and symptoms and because most of the heavy metals would have distributed to Lee's bones by now.

III. Conclusions of Law

A. Labor Law §200

Labor Law §200 codifies the common law obligation of employers to provide a safe workplace. *Jock v. Fien*, 80 N.Y.2d 965, 967 (1992); *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 503 (1993). An owner or general contractor can be held liable for a dangerous condition on its property if it had actual or constructive notice of the condition, even if it did not directly supervise plaintiff's work. *Kerins v. Vassar Coll.*, 15 A.D.3d 623, 626 (2d Dept. 2005); *Smith v. Cari, LLC*, 50 A.D.3d 879, 880 (2d Dept. 2008). However, that is only true for situations in which the cause of the injury is the dangerous condition on the property and not the manner in which the work was being performed. *Payne v. 100 Motor Parkway Assoc., LLC*, 45 A.D.3d 550, 553 (2d Dept. 2007). The common law obligation of §200 has an implicit precondition "that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 344 (1998). Hence, when there is no direct control over plaintiff's work, an owner or general contractor cannot be held liable under §200 for a subcontractor's negligent methods. *Reilly v. Newireen Assoc.*, 303 A.D.2d 214, 221 (1st Dept. 2003).

Here, the alleged injuries did not result from a dangerous condition on the property itself, but from welding in a tight area without bringing in mechanical ventilation or respirators for workers. As all parties concede that Maryland controlled the means and methods of Lee's work, Kokolakis cannot be held responsible for Maryland's negligence, as it did not have the ability to correct the unsafe condition at issue. As a result, summary judgment must be granted to Kokolakis dismissing plaintiff's Labor Law §200 claim against it.

B. Labor Law §241(6)

1. Amended Bill of Particulars and Hill Affidavit

Kokolakis argues that the Industrial Code violations listed in the Amended Bill of Particulars should not be considered, arguing that they were untimely and would cause prejudice.

Kokolakis also maintains that the affidavit of William Hill should not be considered because it is not in admissible form.

A bill of particulars can be amended to allege new regulation violations as long as the addition “entails no new factual allegations, raises no new theories of liability, and has caused no prejudice to the defendant.” *Foley v. City of New York*, 43 A.D.3d 702 (1st Dept. 2007). Here, the newly alleged Industrial Code violations do not entail new factual allegations or theories of liability. Each speaks to the accumulation of dangerous air contaminants, the central issue in the case. There is no surprise or prejudice. The cases cited by Kokolakis are inapposite since they involve situations where plaintiffs did not list any concrete industrial code violations until they submitted response papers. *Mills v. Niagara Mohawk Power Corp.*, 262 A.D.2D 901, 902 (3d Dept 1999). The Amended Bill of Particulars, therefore, will be considered.

In addition, Kokolakis objects to the Hill affidavit, arguing that it does not acknowledge that it was submitted under oath. However, the affidavit does acknowledge it to be the sworn testimony of Hill, is signed by him and was made before a notary public. Again, this will be considered by the court.

2. *Alleged Industrial Code Violations*

Labor Law §241(6) imposes a nondelegable duty on owners and contractors “to provide reasonable and adequate protection and safety” to persons employed in construction areas. *Rizzuto, supra* at 348. It is intended to place ultimate responsibility for safety practices on owners and general contractors by making them vicariously liable for the negligence of a subcontractor, even without control or supervision over work. *Id.* at 348-349. In order for Labor Law §241(6) to come into play, plaintiff must allege a violation of specific, concrete rules and regulations promulgated by the Commissioner of the Department of Labor [New York State Industrial Code (12 NYCRR Subchapt. A)] for the protection of such worker. *Rizzuto, supra* at 349-50; *Ross, supra* at

501-2. Rules and regulations requiring general safety standards are not sufficient to give rise to a Labor Law §241(6) claim. *Ross, id.* at 504. If a violation of a specific rule or regulation is established, the violation is some evidence of negligence, and it is for the jury to determine whether the negligence of the contractor was a cause of plaintiff's injury. *Rizzuto, supra* at 351. If proven, the general contractor and its agents are vicariously liable without regard to their fault. *Id.* Of course, the owner, general contractor and their agents can raise plaintiff's culpable conduct—but not assumption of the risk—as an affirmative defense. *Ross, supra* at 502, n. 4; *Rocovich v. Con. Ed. Co., Inc.*, 78 N.Y.2d 509 (1991); *Lorefice v. Reckson Operating Pshp., L.P.*, 269 A.D.2d 572 (2d Dept. 2000). Cf. *Blake v. Neighborhood Hous. Servs. of N.Y.C., Inc.*, 1 N.Y.3d 280, 290 (2003) (“if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation”).

In the present case, plaintiff alleges violation of Labor Law §241(6) against all of the defendants, grounding his claim on ten violations of the Code.

12 NYCRR §23-1.7(g) provides:

Air-contaminated or oxygen deficient work areas. The atmosphere of any unventilated confined area including but not limited to a sewer, pit, tank or chimney where dangerous air contaminants may be present or where there may not be sufficient oxygen to support life shall be tested by the employer, his authorized agent or by a designated person before any person is suffered or permitted to work in such area. Such testing shall be in accordance with the provisions of Industrial Code Part (rule) 12 relating to the "Control of Air Contaminants" and such areas shall be subject to the other pertinent provisions of Industrial Code Part (rule) 12 and of Industrial Code Part (rule) 18 relating to "Exhaust Systems".

12 NYCRR §12-1.3(f) defines a confined space:

A tank, vault or similar enclosed structure or space with restricted means of egress, such as a manhole or trap door, which is so enclosed and of such volume that natural ventilation through openings provided will not prevent the accumulation of dangerous air contaminants nor supply sufficient oxygen to protect the life, health and safety of any person occupying such structure or space.

Lee's own testimony indicates that his workspace was 25 feet long by 15 feet wide in a room that was 50 feet by 25 feet, with some windows and two exits. Moreover, Kokolakis'

witnesses, experts and shop drawings demonstrate that the area was even large. This does not represent the enclosed space proscribed by the Industrial Code. As a result, summary judgment must be granted against plaintiff's claim that §23-1.7(g) was violated.

12 NYCRR §§ 23-1.26(a)-(d) provide:

(a) General. All hot riveting, welding, flame cleaning and flame cutting of structural steel or other metal which has been coated with any compound containing lead or with any other substance which may create toxic fumes when heated shall be performed in the following manner.

(b) Hot riveting or welding. Where such hot riveting or welding is to be performed in confined spaces, the contact surfaces, exterior surfaces and the rivet holes of field joints to be hot riveted shall be free from any compound containing lead or from any other substance which may create toxic fumes when heated.

© Cleaning coated surfaces.

(1) Removal of paint from rivet holes shall be performed by means of reaming or other suitable method.

(2) All surfaces adjoining rivet holes and surfaces subject to heat from welding shall be so cleaned as to prevent the creation of toxic and noxious fumes during riveting or welding.

(3) Where cleaning is performed with a torch, the person performing such cleaning shall be provided with an approved respirator. Where cleaning is performed by mechanical means, such as in scraping or grinding, the person performing such work shall be provided with an approved respirator.

(d) Flame-cleaning or flame-cutting operations. Unless suitable local exhaust ventilation is provided, all persons performing flame-cleaning or flame-cutting operations on metals that have been coated with any compound containing lead or any other substance which may create toxic fumes when heated, and all persons located within a radius of 15 feet of such operations, shall be provided with approved respirators.

As noted above, Lee was not working in a confined space as defined by the Code.

Consequently, there was no violation of §1.26(b). On the other hand, the remaining Code sections apply. Lee did do hot welding and cleaning of surface paint, and it is undisputed that he was not provided a respirator and that there was no local ventilation. There remains an issue of fact about whether the surface paint Lee cleared contained lead. Defendants are not able to show the absence of lead, and plaintiff's contention that the paint did contain lead is supported by his own expertise

and that of an eyewitness. Manganese is not relevant to §1.26(c), but is relevant to §1.26(d), as it was on the welding rods and not the surfaces to be cleaned. Kokolakis has not met its *prima facie* burden to justify dismissing plaintiff's claim that 12 NYCRR §§ 23-1.26(c) and (d) were violated.

12 NYCRR §23-1.8(b) merely outlines what an approved respirator is. It is undisputed that no respirator was provided.

Two sections deal with the accumulation of dangerous air contaminants. 12 NYCRR §12-1.4(b)(3) states that, "No employer shall suffer or permit an employee to work in a room in which there exist dangerous air contaminants in a work atmosphere." 12 NYCRR §12-1.4(b)(4) mandates that, "No employer shall suffer or permit dangerous air contaminants to accumulate or remain in any place or area subject to the provisions of this Part (rule)." The evidence submitted creates an issue of fact as to violations of these sections.

The final two regulations outline procedures to control air contaminants. 12 NYCRR §12-1.6(a) and (c) provide:

(a) General control methods. One or more of the following methods shall be used to prevent, remove or control dangerous air contaminants:

- (1) Substitution of a material or a method which does not produce dangerous air contaminants.
- (2) Local exhaust ventilation conforming to the requirements of Industrial Code Part (Rule No.) 18.
- (3) Dilution ventilation.
- (4) Application of water or other wetting agent.
- (5) Enclosure or isolation.
- (6) Other methods approved by the board.

(c) Isolation or segregation of operations. All processes or operations releasing or disseminating dangerous air contaminants shall be isolated, enclosed or otherwise segregated insofar as practicable.

Kokolakis and Maryland did not use any of the proscribed general control methods and did not isolate and segregate operations releasing air contaminants in any way, leaving issues of fact as to 12 NYCRR §12-1.6 (a) and ©.

3. Causation

To recover damages on a §241(6) claim, plaintiff must show that a specific Industrial Code violation proximately caused his injuries. *Jicheng Liu v. Sanford Tower Condominium, Inc.*, 35 A.D.3d 378, 379 (2d Dept. 2006); *Rosado v. Briarwoods Farm, Inc.*, 19 A.D.3d 396, 399 (2d Dept. 2005). At the outset, it is important to exclude the symptoms and injuries Lee now disclaims. There is no evidence that Lee's cardiac episode is related to any work conditions, and Lee has withdrawn those cardiac symptoms. Lee denied presently suffering from nausea, vomiting, fever, sore throat, chills, or headaches in his deposition and admitted that his dizziness was a side effect of Lipitor. Moreover, Kokolakis has submitted uncontroverted evidence that some of the other alleged injuries are directly related to Lee's coronary disease or medications. Those concessions exclude the following damages from consideration: pain in lower chest, diagnostic cardiac catheterization, stent placement, acute myocardial infarction, percutaneous revascularization of LAD vessel, cautery procedure, bed rest, loss of sleep, agitation, muscle pain, and any hospital stays related to the heart attack. These eliminations leave manganese poisoning, sluggishness, fatigue, breathing difficulties, cognitive disorder, organic personality disturbance, mood irritability, memory loss, resting tremor, severe sensory motor peripheral neuropathy, and sensory loss and numbness in the extremities as injuries that cannot be immediately ruled out and that must be causally tied to a regulation violation. Summary judgment cannot be granted dismissing these injuries, as each party has its doctor's testimony supporting or ruling out their applicability. Accordingly, it is

ORDERED that Beyer, Blinder, Bell Architects and Planners, LLP's motion for summary

judgment is granted upon consent, it is dismissed from the case and the Clerk shall enter judgment accordingly; and it is further

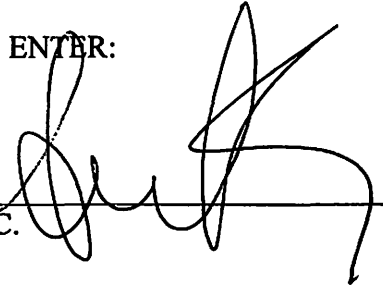
ORDERED that defendant J. Kokolaskis Contracting, Inc.'s motion for summary judgment is granted as to plaintiff's causes of action for violations of Labor Law §§ 200 and 240 and those causes of action are dismissed with prejudice upon consent; and it is further

ORDERED that the third-party action (Index No. 590895/2006) is dismissed without prejudice and the Clerk shall enter judgment accordingly; and it is further

ORDERED that defendant J. Kokolaskis Contracting, Inc.'s motion for summary judgment dismissing Labor law §241(6) is denied, however, its motions to dismiss plaintiff's Labor Law §241(6) cause of action based upon 12 NYCRR §§23-1.7(g) and 23-1.26(b), are granted and those causes of action are dismissed with prejudice; and it is further

ORDERED that the parties are to appear in Part 54, 111 Centre Street, New York, N.Y., for a pre-trial conference on July 31, 2008.

ENTER:



J.S.C. 7/11/08

FILED
JUL 16 2008
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