

Frost v Long Is. Power Auth.

2010 NY Slip Op 32171(U)

July 8, 2010

Supreme Court, Suffolk County

Docket Number: 20822/2005

Judge: Paul J. Baisley

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

COPY

PRESENT:**HON. PAUL J. BAISLEY, JR., J.S.C.**-----X
STEVEN FROST and THERESA FROST,

Plaintiffs,

-against-

LONG ISLAND POWER AUTHORITY,

Defendant.
-----X

INDEX NO.: 20822/2005

CALENDAR NO.: 2009008650T

MOTION DATE: 4/1/2010

MOTION NO.: 003 MD

004 XMG

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Upon the following papers numbered 1 to 52, read on this motion for summary judgment and cross-motion to amend bill of particulars; Notice of Motion/ Order to Show Cause and supporting papers 1-19; Notice of Cross Motion and supporting papers 20-34; Answering Affidavits and supporting papers 35-36; 37-44; 45-48; 49-50; Replying Affidavits and supporting papers 51-52; Other ; (and after hearing counsel in support and opposed to the motion) it is:

ORDERED that this motion (003) by the defendant, Long Island Power Authority, pursuant to CPLR 3212 for summary judgment dismissing the complaint, is denied; and it is further

ORDERED that this cross motion (004) by the plaintiffs, Steven Frost and Theresa Frost, pursuant to CPLR 3025(b) for an order granting leave to amend the bill of particulars is granted.

The complaint of this action sets forth that on or about July 7, 2004, at approximately 1:45 p.m., Steven Frost, during the course of his employment as a lineman with Keyspan Energy, was engaged in alterations to high voltage electric power lines owned by the defendant Long Island Power Authority (LIPA) when he was subjected to an electric current causing a flash explosion and electrocution causing him to sustain serious and severe burns and personal injury. Causes of action sounding in negligence and violation of Labor Law §§240 and 241(6) and the Industrial Code of the State of New York §§23-1.13(a)(4); 23-1.13(b)(3)(4)(8); 23-1.13(c)(iii), and 23-1.13(d)(1)(3) have been asserted. A derivative claim has been asserted by the plaintiff's spouse, Theresa Frost. By way of his bill of particulars, the plaintiff asserts that the defendant was negligent in using unsafe insulation on the exterior high voltage line; failed to de-energize the high voltage electric line; failed to provide reasonable and adequate safety equipment; directed the work be done in an area that created a risk; failed to warn of the defective and hazardous condition at the site, and that the defendant had actual and constructive notice of the condition.

The plaintiff seeks to amend the bill of particulars to include a claim pursuant to Labor Law §200 on the basis that the plaintiff's bill of particulars violated its common law duty to provide him with a safe place to work and that Labor Law §200 is a codification of that common law duty.

Generally, courts allow amendments to pleadings and bills of particulars, even at or after trial, absent proof of actual prejudice to the other party (*Kurnitz et al v Croft*, 91 Ad2d 972, 475 NYS2d 560 [2nd Dept 1983]). Prejudice is not found in the mere exposure of the defendant to greater

liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position (*Loomis v Civetta Corinn Construction Corp.*, 54 NY2d 18, 444 NYS2d 571 [1981]). In the instant action, the defendant LIPA has not demonstrated prejudice or that it has been hindered in the preparation of the action or has been prevented from taking some measure in support of its position. Common law negligence has already been pleaded. “New York State Labor Law §200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work” (*Kim v Herbert Const. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]).

Accordingly, motion (004) is granted and the proposed amendment to the bill of particulars asserting the defendant violated Labor Law §200 by failing to provide a safe workplace for the plaintiff is deemed served nunc pro tunc.

In motion (004) the defendant LIPA seeks summary judgment dismissing the complaint on the basis that it bears no liability for the occurrence; that the plaintiff was negligent and assumed the risk incidental to undertaking the task he was performing; that the condition complained of was open and obvious; and that the action is barred by Worker’s Compensation Law. However, LIPA does not set forth the applicable section of Workmen’s Compensation Law it is basing its defense on and has offered no evidentiary support or arguments in support of this claim.

The 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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dep. 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In New York, to establish a *prima facie* case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant’s negligence was a substantial factor in bringing about the injury. A landowner will be liable for violation of Labor Law §200 and common-law negligence when the injuries complained of fall into one of two broad categories: either a dangerous condition on the premises, or in the manner in which the work was performed.... If the cause of the loss involves a defect in the premises, the

owner may be liable where he either created the dangerous condition, or had actual or constructive notice of the condition....” (see, *Silva v The City of New York*, 2009 NY Slip Op 50886U, 23 Misc3d 1122A [Supreme Court of New York, Kings County 2009]).

““While the convenience of electric and telephone wires is obvious and their maintenance should not be burdened with excessive liabilities, still it seems clear that a company maintaining dangerous wires should not be relieved on the ground of expense from the affirmative duty of exercising a reasonable degree of care to maintain proper insulation and thereby prevent accidents reasonably to be apprehended to those lawfully coming in the neighborhood of such wires.... The fundamental and general principle that a company, if reasonably chargeable with knowledge, or in the exercise of reasonable prudence bound to anticipate, that people may lawfully come in close proximity to its wires either for purposes of business or pleasure, is under obligation to exercise care to keep the latter in a safe condition is abundantly established..... There is, to be sure, a correspondingly higher duty of care owed as higher voltages are transported. Another circumstance, equally significant, is the proximity and accessibility of power lines to the public where the opportunity and likelihood of contact therewith is more acute (*Miner, Individually and as Administratrix of the Estate Edward Miner, deceased, v Long Island Lighting Company et al*, 40 NY2d 372, 386 NYS2d 842 [1976]).

“Power companies have an affirmative duty to exercise reasonable care in the operation and maintenance of their power lines, and there is a correspondingly higher duty of care owed as higher voltages are transported.... A duty is breached by failing to discover the unsafe clearance of its high voltage power lines” (*Pornichter et al v Niagara Mohawk Power Corporation*, 296 AD2d 837, 744 NYS2d 280 [4th Dept 2002]; see also, *Holz as Administratrix of the Estate of Harold P. Holtz, deceased v Niagara Mohawk Power Corporation et al*, 147 AD2d 857, 538 NYS2d 80 [3rd Dept 1989]; *Capital Mutual Insurance Company v Niagara Mohawk Power Corporation et al*, 137 AD2d 877, 524 NYS2d 561 [3rd Dept 1988]; *Raab v Hudson River Telephone Company*, 139 AD 286, 123 NYS 1037 [1910]).

“The owner of a utility pole owes a duty to persons rightfully thereon to provide a safe place to work if the pole is to be repaired or replaced, a duty to warn. In the case of joint owners, both owe a duty to employees who would work upon the pole, and that while an employee could not sue his own employer pursuant to the Workmen’s Compensation Law, he is free to sue any third party liable, including the joint owner” (*Holohan v Niagara Mohawk Power Corporation*, 42 AD2d 363, 348 NYS2d 234 [3rd Dept 1973]).

In regard to question of the contributory negligence of an employee, his relation to his own employer and his conduct in following the directions and the suggestions of his foreman must govern. The assumption of risk does not include such as may easily be prevented or obviated by the master, (*Ulysses Grant Dutcher v Rockland Electric Company*, 123 AD 765, 108 NYS 567 [2nd Dept 1908]).

In support of the motion for summary judgment, the defendant has submitted, inter alia, an attorney’s affirmation, copies of the pleadings and answer and plaintiffs’ bill of particulars; copies of the transcripts of the examinations before trial of Steven Frost and Theresa Frost, Michael Hervey on behalf of LIPA, non-party witnesses: Charles Chiarello, Patrick Lowry; a copy of the accident investigation report for July 7, 2004; KeySpan accident investigation report dated September 30,

2004; ED&C job briefing documentation and personal protective equipment; copies of various diagrams and photographs; and a copy of a document labeled ED&ESD Insulate & Isolate Training dated September 9, 2003.

It is noted that LIPA has submitted KeySpan documents as set forth above, however, these documents are not authenticated and are not in admissible form and therefore are not considered on this motion for summary judgment.

In opposing this motion, the plaintiff Steven Frost has submitted, inter alia, his affidavit and the affidavits of Charles Chiarello, Robert Frein, Austin Bollen, P.E., and various exhibits annexed to the affidavits.

The adduced testimonies and unrefuted evidence establishes that Mr. Chiarelli was going to remove the service line on pole 2 on Hickory Street, Farmingdale, but could not reach it so Mr Frost told him he would. Mr. Frost was wearing rubber gloves, rubber sleeves, flame-retardant clothing, hard hat, glasses, traffic vest, and a fall protection harness. He removed the service line by maneuvering the bucket of the bucket truck between the primary (top) line and the secondary (second) line separated by a distance of approximately five feet. The bucket was less than five feet deep and forty inches wide, so one would duck going under the primary line, lifting the primary line over one's head, and maneuvering in or out between the lines. Mr. Frost maneuvered in his bucket from the street side to the field-side of pole number 2 by lifting the upper boom out of cradle of the truck to approximately the height of the secondary line, and rotating the bucket into the field side, using the pistol grip control on the right side of the bucket. As Mr. Frost approached the wires, he slid an eel (a protective rubber hose covering) on the primary line, continued to rotate in, grabbed the primary line, lifted it over his head and rotated into the field. Mr. Frost then maneuvered into a position to grab the house service line which provided electrical service to house number 6, leaned over the side of his bucket, took his pliers out and cut the B-leg, then the A-leg, then the neutral of the service line. He held the deenergized house service line in his left hand and rotated the bucket to the field to his right to return to the street side of the pole. Mr. Frost was maneuvering the bucket at first with his right hand, but had to switch to the left hand and hold the house service wire with his right hand and rotate his body in the bucket facing the road with the field to his back to maneuver out from under the primary line. He then turned back around and took the service line in his left hand and put his right hand back on the controls and continued backing out under the primary facing the field with the wire to his back and backing out of the secondary which was still energized. Mr. Frost could not lift the primary on his way out as the service wire he was holding in his hand outside the bucket was a ground, so he squatted in the bucket and slid the eel over the line. That was when the lower corner of the bucket got caught on the secondary line. Mr. Frost then peeked his head over the bucket and was looking down; went up on the upper boom, the secondary came under the bucket, and he proceeded to back out on the lower boom. Mr. Frost had rotated to give himself a bigger distance between the neutral and the primary lines, and when he rotated, the service wire which he was holding in his hand outside the bucket coiled causing it to turn in Mr. Frost's hand. The service line then hit the primary line at a point not covered by the eel while Mr. Frost's bucket was still between the primary and the secondary lines. There was then a flash and a loud bang from the cut-out exploding open. No portion of Mr. Frost's body came into contact with any lines; it was wire to wire-a direct fault.

Steven Frost testified to the effect that he has been employed by KeySpan since 1985 and worked as a lineman since November 1989 where his duties as a lineman were to repair, replace,

install, remove electric wires and high line wires, distribution wires and transmission wires. He worked outside and on the poles and on overhead wires, including high voltage electrical transmission lines. Prior to becoming a lineman and throughout his employment, training was given by Keyspan in Hicksville for climbing, high school, primary school, transmission school, transformer school, underground school and others. His supervisor was Tom Brandt and the foreman on the job was Pat Lowry when the incident occurred on July 7, 2004 in Farmingdale. He did not know what street he was working on, what the job was, or how the incident occurred. When he arrived at the site, there were other Keyspan employees there, Pat Lowry and Charlie Ciarello, his lineman partner, but no LIPA employees were there.

Mr. Frost described the wires on the pole from the top: open number 6 bare copper (uninsulated) primary on the top, a secondary Triplex about five feet down from the primary; and below that, Cablevision and telephone wires. Mr. Frost stated that when working with the uppermost wire on other jobs, the copper wire is not insulated. 7,620 volts run through the primary copper wire which feed or distributes high voltage throughout the neighborhood to transformers that step down the voltage to 120/240. Charlie couldn't reach the service wire to be cut so he advised Charlie he would cut it. He had no idea what happened after he cut the service wire. The next he knew he was being lowered in the bucket. After he was lowered down, he was lying on the cement on his stomach and was then airlifted to Stony Brook burn center. He stated that they all hate open wire because it is dangerous. The rubber gloves and sleeves he was wearing were given to him from Keyspan and as they are dielectrically tested. The rubber gloves go to the elbow and the rubber sleeves go to the shoulder. He thought he was wearing a fire retardant coverall as well.

LIPA's witness, Michael Hervey testified that he has been employed by Long Island Power Authority for seven years and has been the vice president of operations for one and a half years. Prior to that, his position with LIPA was that of director and then executive director of transmission and distribution, which position he held in July 2004. He is currently responsible for overseeing the contract LIPA has with KeySpan Energy to maintain and operate LIPA's electric system and has some responsibility to customer operations. He has not dealt with safety training at LIPA and stated that LIPA does not have any practices and procedures regarding safety as those procedures are administered by KeySpan Energy. He is generally aware of that safety training and practice such as the common work practices used in and around electrical equipment, safety procedures linemen follow to work near energized equipment or to deenergize equipment as set forth in a safety manual. LIPA does not provide any program or training regarding linemen safety, and he was not aware of the substance of any training programs provided by KeySpan to the linemen. He was aware that KeySpan had an apprenticeship style program for linemen during their initial years in the position and an annual retraining on significant portions of their profession. He never worked as a lineman or supervised linemen at LIPA, but stated when he worked at Commonwealth Edison that he was a general foreman in overhead construction which involved, among other things, supervising linemen.

Mr. Hervey further testified that LIPA has some cursory oversight of KeySpan overall of their safety program. If LIPA thought there was a failing in the overall safety program, it may pursue that, but he did not know as far as specifics for this accident, LIPA would have no followup and would not participate in any investigation. When asked how LIPA would determine whether or not there was a failing in the safety program then, he stated LIPA has contractual targets which show the number of incidents per year, but not the severity of an incident. He stated LIPA conducted no investigation into the incident involving Mr. Frost and testified to the procedure to be followed by linemen when working in the area of a primary uninsulated line, but stated he had no knowledge

concerning the procedure followed at the time of the accident. He stated that the procedure is outlined in written material provided by KeySpan as part of their regular training, however, he has not seen a copy of it and LIPA does not have a copy of the document. Mr. Hervey testified to the procedure to be followed by linemen when working in the area of a primary uninsulated line, and stated that the linemen and crew made the determination if they could work the particular site safely without deenergizing the line. If they feel they cannot, given their experience and training, then they would request a deenergization of the primary line. If they can safely work in the vicinity they have protective gear than to insulate themselves and the line. He stated the practice is either to insulate the line with rubber hoses applied to the line in the area they would not be working on and also to use their own protective gear, gloves and sleeves to insulated themselves from the line and maintain a proper distance from the open primary line which has 7,260 volts. If the linemen cannot completely cover the primary wire with proper insulation they would request the line be deenergized by requesting permission from the dispatcher to remove the fuse at a nearby location (probably at the nearest street intersection) and properly ground the line. Such a request could be handled immediately, the same day, and would take about a half hour. Any crew member has the right and the ability to request that the line be deenergized and the instruction and the permission to deenergize it comes from a dispatcher in the electric service department. The only thing that would prevent the line from being deenergized is if there is a critical load on a line, such as a medical patient or critical business, in which case the job would have to be cancelled and rescheduled. This procedure is outlined in written material provided by KeySpan as part of their regular training, however, he has not seen a copy of it, thought it existed in 2004, and stated LIPA does not have a copy of the document.

Mr. Hervey was not aware of what the particular crew consisted of on the day of the incident. No one from LIPA was at the scene of supervising the job. He did not give a verbal response when asked if there was a procedure if it was necessary for a lineman to access the work by going in between the primary line and the secondary line below. Even if maneuvering between the primary and the secondary line, the vast majority of jobs of this type are done while the conductors are energized by a normal practice so that LIPA can minimize the number of customers affected by an outage. He was not aware of the standard distance between the primary line and the secondary line, but if the distance did not meet the minimum, then it would be the type of situation where the primary may have to be deenergized to work it safely. By looking at certain documents he could not determine what pole Mr. Frost was working at, but stated he knew that he was working in front of house number 6 at pole number 2 which had lines going from the pole that would actually service the properties on either side of number 6. He did not go the accident scene at any time and was not familiar with the layout of the accident scene, and was not aware of any factors that would have prevented a lineman in a bucket from approaching the wire to be disconnected in the aforementioned manner. He did not know if the line should have been deenergized based upon what he knew of the circumstances of Mr. Frost's incident. He was not aware of anyone at LIPA making that inquiry. He knew of no determination or a way to tell the difference between the damage done to the primary line as to what happened. He was not aware of whether there was a disruption of electrical service in the area following Mr. Frost's accident and stated KeySpan would maintain an outage report which LIPA would have access to. He did not know if Mr. Frost's coworkers were interviewed by KeySpan or LIPA.

W. Austin Bollen, P.E., a licensed professional engineer who is plaintiff's expert, has set forth his opinions with a reasonable degree of engineering certainty and opines that Mr. Frost suffered 1st, 2nd, and 3rd degree burns on his upper torso and right flank from intense heat generated

by an electrical arc created when a house service line he was relocating came into contact with an uninsulated 7,620 volt primary line while working from an insulated aerial bucket. Mr. Bollen opines that there are two main factors that caused Mr. Frost's accident: (1) the vertical distance between LIPA's primary and neutral lines was 4 inches less than the minimum fifty eight inches clearance required by LIPA's Construction Standard 4203 and that LIPA violated its own standard, proximately causing the accident; and (2) Mr. Frost could not fully insulate LIPA's primary line due to his reasonable belief that this old deteriorated, bare copper wire with two hot line clamps on it would break and come down energized if he did. Mr. Bollen set forth the basis of his opinions and further sets forth, inter alia, that LIPA should have replaced the hazardous primary line with PE aluminum wire used by LIPA and its predecessors over the last several decades to eliminate this hazard to the linemen and the public.

In reviewing the evidentiary submissions, it is determined that LIPA has failed to establish *prima facie* entitlement to summary judgment dismissing the action as asserted against it. LIPA has not submitted an expert affidavit in support of this motion. There are factual issues raised in the moving papers which preclude summary judgment including, but not limited to the nature and extent of LIPA's oversight of KeySpan employees; the nature and extent of LIPA's oversight of KeySpan's safety policies and procedures; LIPA's policies, if any, concerning de-energizing of electrical lines while certain repair and replacement work is being conducted; LIPA's safety procedures and policies; whether LIPA was negligent in having failed to replace the open electrical lines with insulated lines; LIPA's relationship to KeySpan/National Grid; and whether the plaintiff is an employee of KeySpan or LIPA as LIPA claims the action is barred by Workmen's Compensation Law. No copy of the agreement or contract between LIPA and KeySpan has been submitted for this court to ascertain the provisions contained therein relative to the parties to the contract and any provisions therein. KeySpan did not admit to ownership of the trucks and buckets used at the site and LIPA has submitted no maintenance records for inspections concerning insulation of the plaintiff's bucket. There are further factual issues concerning whether or not the pole number two was congested with wires and lines at the time of the incident; whether Mr. Frost was prevented from going under the secondary line to do his job whether the lines were properly spaced; whether LIPA provided a reasonably safe place for the plaintiff to work; and whether LIPA complied with its own safety standards and requirements.

LIPA has not submitted an expert affidavit setting forth its basis for its claims that it was not negligent. LIPA has not submitted any evidence in support of its conclusory assertion that Mr. Frost's action is barred by the applicable Workmen's Compensation Law precluding the plaintiff from maintaining an action against its employee, nor has LIPA set forth the section of the Workmen's Compensation Law it claims bars the action by plaintiff. Additionally, LIPA has not submitted an expert affidavit to support its conclusory assertion that the condition complained of was open and obvious or how the plaintiff contributed to the occurrence.

Accordingly, motion (003) is denied.

Dated: July 8, 2010

PAUL J. DUFFIN, JR.

J.S.C.