SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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JOSE MARTINEZ,

Plaintiffs

-against-

THE CITY OF NEW YORK, GSF ENERGY LLC, FRESH GAS LLC, UUP, INC., DQE., INTERSTATE INDUSTRIAL CORPORATION, PAULUS, SOKOLOWSKI and SANTOR ENGINEERING, P.C.,

Defendants.

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GSF ENERGY, LLC FRESH GAS LLC and DQE, FINANCIAL CORP.,

Third-Party Plaintiffs,

-against-

WASTE ENERGY TECHNOLOGY LLC,

Third-Party Defendant.

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Part: C-2

Present:
Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No. 11068/02
Motion No. 511-013

Index No. A11068/02

The following papers numbered 1 to 4 were marked fully submitted on the 7th day of April, 2010:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendant Paulus, Sokolowski and Santor Engineering, P.C., with Supporting Papers (dated January 27, 2010)	1
Affidavits of Timothy Conlon, P.E. and Joseph Lifrieri, P.C. (dated February 2, 2010 and February 10, 2010, respectively)	2
Affirmation in Opposition by Defendants GSF Energy LLCV, Fresh Gas LLC and DQE Financial Corp. (dated February 11, 2010)	3
Reply Affirmation (dated March 9, 2010)	4

Upon the foregoing papers, the motion for summary judgment of defendant Paulus, Sokolowski and Santor Engineering, P.C. dismissing the cross claims asserted against it by defendants GSF Energy LLC, Fresh Gas LLC and DQE (hereinafter, collectively "GSF") is

granted.

This action was commenced to recover damages for personal injuries allegedly sustained by plaintiff on August 8, 2001 at the Fresh Kills Landfill on Staten Island while in the employ of third-party defendant Waste Energy Technology LLC. According to the complaint, plaintiff was instructed on the above date to shut-down flare station 2/8. As he attempted to do so, the wheel controlling a valve that was located approximately eighteen feet above the ground broke off its shaft, causing him to fall to the ground. Plaintiff claims, *inter alia*, that flare station 2/8 was defectively designed and/or constructed in that the subject valve wheel was not equipped with either a chain mechanism which could be operated from the ground, or adequate ladders, stairs, platforms or the like which would permit safe access to the elevated valve wheel. It is undisputed that the moving defendant, Paulus, Sokolowski and Santor Engineering, P.C. (hereinafter, "PSS"), was retained by Interstate Industrial Corporation (hereinafter, "Interstate") to prepare plans and specifications for the construction of four modular flare stations to be located at the Fresh Kills Landfill, which included flare station 2/8.

By way of background, in a stipulation dated October, 2008, plaintiff discontinued his action against the moving defendant. Somewhat similarly, the City of New York and former codefendant Interstate have likewise discontinued their cross claims against PSS.[1] However, the codefendants, collectively referred to herein as GSF, have not.

In moving for summary judgment dismissing GSF's remaining cross claims for, *inter alia*, indemnification and/or contribution, PSS relies upon the prior determination of this Court in its Decision and Order dated February 10, 2009, that the aforementioned chain actuators had been installed on the elevated valve wheels at flare station 2/8 before construction was completed in 1999. PSS also maintains that the uncontroverted affidavits of its president, Joseph Lifrieri, P.E., and its project engineer, Timothy Conlon, P.E., are sufficient to establish that PSS (1) did not manage, control, supervise or direct any

[1] In a prior Decision and Order dated February 10, 2010, this Court granted the motion of defendant Interstate for summary judgment dismissing the complaint and all cross claims against it.

construction work at flare station 2/8 either before or after its completion in early 1999, and (2) was required to "visit" the site only at the request of its client, Interstate. This is consistent with the written contract between Interstate and PSS, pursuant to which the latter was not required to provide site inspections during the construction of the flare stations in question. According to Mr. Conlon, his last "visit" to the site was on October 16, 1998, nearly three years before plaintiff's accident, and was undertaken for a purpose wholly unrelated to the so-called "butterfly valves" at flare station 2/8 which apparently broke causing plaintiff's injury. Both affiants further attest that at no time prior to plaintiff's accident was PSS notified that there were defects in any of the butterfly valves installed at flare station 2/8.

In opposition, the GSF defendants submit the affidavit of Cecil Bonnell, the plant manager for plaintiff's employer during the period from 1994 until 2006, along with (1) a photocopy of a "2000 Environmental Compliance and Safety Audit Report" dated February 2001 and (2) a "Field Observation Report" dated October 29, 2001. Both reports were prepared by the moving defendant, PSS, which, according to Mr. Bonnell, had been hired to perform annual safety audits after the facility was completed. The witness further states that these audits were undertaken for the purpose of inspecting the landfill for "hazardous situations". According to Mr. Bonnell, PSS failed to identify any hazard relating to the subject valve in either report or recommend that a chain mechanism be installed at flare station 2/8. In addition, the witness claimed that (1) the subject valve wheel had never been equipped with a chain mechanism; (2) it had never been operated manually prior to plaintiff's incident; and (3) a ladder had been made available to the workers at the site if access to this valve wheel was required.

Insofar as it appears on the papers before this Court, any cross claims against PSS predicated upon its alleged negligent design of the flare stations must take into account that the plans prepared by this defendant merely specified the location of the butterfly valves, but did not indicate that any specific mechanism or methods should be implemented to achieve compliance with OSHA's safety requirements. Rather, as acknowledged by both Interstate's plumbing foreman, David Thierry, and Timothy Conlon (the PSS project engineer), the plans

and specifications prepared by the moving defendant simply required "that the work be code [i.e., OSHA] compliant". As such, the means utilized to achieve OSHA compliance for the safe operation of the elevated valves at each of the flare stations was left up to the contractor (Interstate), not PSS. Pertinent in this regard, Mr. Conlon's averment that "OSHA requires that valve wheels over a certain elevation be operable in [any] one of a number of ways", i.e., chains, a fixed platform or readily accessible ladders, any of which would have been acceptable in this case.

In view of the foregoing, it must be noted that the affidavit of Mr. Bonnell (the authenticity of which has been challenged by PSS[2]) is at variance with both Mr. Conlon's affidavit and so much of this Court's prior determination as found that chain mechanisms had initially been installed at each of the elevated valve locations. Accordingly, Bonnell's affidavit on this particular issue appears flawed and/or intended to raise a feigned issue of fact with respect to the allegations of negligence against PSS, which adequately established on both this and the prior motions that it played no role in the contractor 's decision on the best way to achieve OSHA compliance. Our courts have repeatedly rejected the attempt to raise feigned issues in order to defeat summary judgment (*see* Gomez v Rodriguez, 31 AD3d 497, 498).

Finally, GSF premises its claim of liability on the purported failure of PSS to identify the hazard at issue during any of its prior annual environmental and safety audits. Even speculating that the chain actuator may have been "missing" at the time of the prior audits, the absence of such a mechanism on an elevated valve is not *per se* violative of OSHA's requirements, as alternative methods could have been implemented at flare station 2/8 to achieve compliance.

In view of all of the foregoing, PSS has adequately demonstrated its prima facie entitlement to judgment as a matter of law dismissing any cross claims asserted against it by

[2] It is alleged, *inter alia*, that Bonnell's affidavit was executed outside the State of New York and must, therefore, be accompanied by a certificate authenticating the authority of the one administering the oath (*see* CPLR 2309[c]). In addition, the signature page of the affidavit is separate and apart from the text.

GSF through the introduction of admissible evidence establishing (1) its freedom from negligence in the design of flare station 2/8, (2) the absence of any obligation on its part to maintain or repair said flare station prior to plaintiff's injury, and (3) its lack of authority to direct, control or supervise the injured plaintiff's work. As a result, PSS has made out a prima facie case for the dismissal of any claims for indemnification and/or contribution by its GSF codefendants in the event of a judgment against any of them (*see generally*, Kader v City of NY Hous. Preserv. & Dev., 16 AD3d 461, 463).

In opposition, the GSF defendants have failed to raise a triable issue of fact on their cross claims against the moving defendant.

Accordingly, it is

ORDERED, that the motion of defendant Paulus, Sokolowski and Santor Engineering, P.C. for summary judgment dismissing the cross claims of GSF Energy LLC, Fresh Gas LLC and DQE is granted, and said cross claims are hereby severed and dismissed; and it is further

ORDERED, that the Clerk enter judgment accordingly.

E N T E R,

Dated: July 1, 2010

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Hon. Thomas P. Aliotta
J.S.C.