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SHORT FORM ORDER

INDEX No. 06-33474
CAL. No. 09-01735-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 1-14-10 (#005)
MOTION DATE 1-28-10 (#006)
ADJ. DATE 6-10-10
Mot. Seq. # 005 - MD
006 - MG

JEFFREY G. McFARLAND and MARY McFARLAND,

Plaintiffs,

- against -

AMERICAN OXYGEN COMPANY and TRI-WELD INDUSTRIES, INC.,

Defendants.

Action No. 1
Index No. 06-33474

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TRI-WELD INDUSTRIES, INC.,

Third-Party Plaintiff,

- against -

AMERICAN OXYGEN COMPANY,

Third-Party Defendant.

Action No. 2
Index No. 07-9603

STATE FARM AUTOMOBILE INSURANCE COMPANY a/s/o JEFFREY G. McFARLAND,

Plaintiff,

-against-

TRI-WELD INDUSTRIES, INC.,

Defendant.

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Upon the following papers numbered 1 to __101__ read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24; 25 - 30; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 31 -84; 85 -86; 87 - 89 ;Replying Affidavits and supporting papers __; Other __; it is,

ORDERED that the motion by defendant/third-party plaintiff Tri-Weld Industries for summary judgment dismissing plaintiffs' complaint against it is denied; and it is further

ORDERED that the motion by third-party defendant American Oxygen Company for summary judgment dismissing the third-party complaint against it is granted.

Plaintiffs Jeffrey McFarland and Mary McFarland commenced this action to recover damages for injuries allegedly sustained by Jeffrey McFarland ("plaintiff") on April 14, 2006, as a result of the explosion of oxygen cylinders being transported in a van he was operating on behalf of his employer, defendant American Oxygen Company ("AOC"). The accident allegedly occurred when leaking oxygen cylinders stored in the van caught fire and exploded. The oxygen cylinders were allegedly owned by defendant Tri-Weld Industries, Inc. ("Tri-Weld"), an industrial supplier of gases and welding supplies. Plaintiffs' complaint alleged causes of action against both AOC and Tri-Weld. By way of their bill of particulars, plaintiffs' allege, among other things, that defendants failed to conduct safety tests or inspect the oxygen cylinders; that defendants recklessly and carelessly loaded the defective cylinders into the van; that defendants caused the subject cylinders to leak during the refilling process, and failed to test or inspect them prior to loading them into the van. On April 12, 2007, State Farm Insurance Company ("State Farm"), plaintiffs' insurer, commenced a separate action against Tri-Weld for subrogation of the benefits it paid on plaintiffs' behalf as a result of the subject accident.

By Order dated March 31, 2008, this court granted a motion by AOC for summary judgment in its favor dismissing plaintiffs' claim against it pursuant to Section 11 of the Workers' Compensation Law. Shortly thereafter, on May 29, 2008, Tri-Weld commenced a third-party action against AOC seeking common law and contractual indemnification. Tri-Weld then served AOC an amended third-party complaint on June 16, 2008, alleging plaintiff sustained a grave injury as defined by the Workers' Compensation Law. By Order dated September 19, 2008, this Court further granted Tri-Weld's motion to consolidate its third-party action against AOC with the separate action for subrogation commenced by State Farm for the purposes of joint discovery and trial.

Tri-Weld now moves for summary judgment in its favor dismissing plaintiffs' complaint against it on the grounds that it neither created the alleged defect nor had notice of its existence prior to the accident. In addition, Tri-Weld asserts the Court should consider that its ability to defend itself against plaintiffs' claims has been prejudiced by the alleged destruction of the exploded oxygen cylinders by AOC. In opposition, plaintiffs argue that Tri-Weld's motion should be denied as triable issues exists as to the causation of the accident. Plaintiffs further assert the unavailability of the oxygen cylinder permits an inference in their favor as to its defective nature, and that they should be permitted to prove their case on circumstantial evidence. The Court notes that the opposition papers submitted by State Farm were not considered for purposes of this motion, as they are not a party to the underlying action.

AOC also moves for summary judgment in its favor dismissing Tri-Weld's third-party complaint against it. AOC argues it is exempt from Tri-Weld's claims for indemnification and contribution under

the Workers' Compensation Law as plaintiff Jeffrey McFarland did not suffer a grave injury as defined by the statute. Additionally, AOC asserts that the agreement for the sale of the oxygen cylinders it entered with Tri-Weld did not contractually obligate it to provide Tri-Weld with contribution or indemnification for losses it suffers as a result of its own negligence.

During his examination before trial, plaintiff testified he smelled an odd odor and heard a constant hissing sound in the rear of the van shortly before the accident. He testified he did not hear the hissing sound at any other time earlier that day, and that he did not recall hitting any potholes that caused the oxygen cylinders to jostle or collide with each other. Plaintiff testified he slowed the van and switched on the map-light in order to take a look at the cylinders when he noticed the air before him sparkling just before he observed a flash of light in the vehicle. He testified the vehicle began to fill with smoke as he realized that his feet and legs were on fire. He testified the van exploded within seconds after he exited. He testified that he did smoke cigarettes but always avoided doing so within the van where the oxygen cylinders were stored.

During his examination before trial, John Gellineau, a member of the Suffolk County Police Department Arson Squad, testified his investigation revealed that there was no violation as to the number of oxygen cylinders transported within the vehicle on the day of the accident. He testified his investigation identified an electrical spark or improperly extinguished cigarettes as the two possible causes of the ignition of the oxygen cylinder. He testified that while no cigarettes or lighters were found in the vehicle, a box of cigarettes was discovered in the pocket of plaintiff's burnt jacket that was collected as evidence at the scene of the accident. Gellineau testified the investigation also revealed the location of the source of the fire to be a bulkhead between the seats at the front of the vehicle where maps were stored.

It is well-settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist, not to resolve issues of fact or determine matters of credibility (*see* ***Ferrante v American Lung Assn.,*** 90 NY2d 623, 665 NYS2d 25 [1997]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Uni. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Initially, the court notes that under New York law, spoilation sanctions are only appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them (*see* CPLR 3126; ***Kirkland v New York City Hous. Auth.***, 236 AD2d 170, 666 NYS2d 609 [1st Dept 1997]). In this case, the alleged destruction or loss of crucial evidence allegedly occurred as a result of the actions of AOC, who has previously been granted summary judgment in its favor dismissing plaintiffs' complaint against it. Nevertheless, AOC has been named as a third-party defendant in an action by Tri-Weld seeking indemnification or contribution. In declining to recognize spoilation of evidence as an independent tort, the New York

Court of Appeals stated that "[i]n a third-party spoilation case, because the content of the lost evidence is unknown, there is no way of ascertaining to what extent the proof would have benefitted either the plaintiff or the defendant in the underlying lawsuit, and it is therefore impossible to identify which party, if any, was actually harmed" (***Ortega v City of New York***, 9 NY3d 69, 80, 845 NYS2d 773 [2007]). Thus, while the Court regrets the possible loss of evidence, neither of the parties involved in this action are entitled to any inference in their favor.

As in any cause of action founded upon negligence, a successful plaintiff must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party (*see* ***Becker v Schwartz***, 46 NY2d 401, 413 NYS2d 895 [1978]). It is possible to establish both negligence and causation through circumstantial evidence, but to do so a plaintiff must show facts and conditions from which the negligence of the defendant, and causation of the accident by that negligence, may be reasonably inferred (*see* ***Schneider v Kings Highway Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Feder v Tower Air, Inc.***, 12 AD3d 190, 785 NYS2d 49 [1st Dept 2004]). The plaintiff need not exclude every other possible cause of the accident, but must offer proof that causes other than defendant's negligence are sufficiently remote or technical to allow a jury to base its verdict on logical inferences to be drawn from the evidence rather than speculation (*see* ***Schneider v Kings Highway Hosp. Ctr.***, *supra*; ***Feder v Tower Air, Inc.***, *supra*).

With regard to portion of plaintiffs' complaint seeking liability based upon a defective product claim, where, as in this case, the alleged defective product is unavailable for testing, liability may be proven by circumstantial evidence, such that the plaintiff need not identify a specific product defect (*see* ***Ramos v Howard Indus., Inc.***, 10 NY3d 218, 855 NYS2d 412 [2008]; ***Speller v Sears, Roebuck & Co.***, 100 NY2d 38, 760 NYS2d 79 [2003]). However, "[i]n order to proceed in the absence of identifying a specific flaw, a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's alleged failure that are not attributable to the defendants" (*see* ***Speller v Sears, Roebuck & Co.***, *supra* at 42). In order to defeat summary judgment, the non-movant must raise a triable question of fact by offering competent evidence which, if credited by the fact finder, is sufficient to rebut the movant's alternative cause evidence (*see* ***Ramos v Howard Indus., Inc.***, *supra*; ***Sears, Roebuck & Co.***, *supra*). In any event, where the circumstantial evidence presented leads to a genuine dispute as to the causation of the accident, summary judgment is not appropriate unless "only one conclusion may be drawn from the established facts (*see* ***Speller v Sears, Roebuck & Co.***, *supra* at 43).

Here, Tri-Weld has failed to establish its entitlement to summary judgment as a matter of law by eliminating the existence of triable issues from the case (*see* ***Alvarez v Prospect Hosp.*** *supra*; ***Winegrad v New York Univ. Med. Center***, *supra*). Although the affidavit by Tri-Weld's expert states Tri-Weld complied with FDA regulations regarding the re-filling of its oxygen cylinders and that some venting of gas is a normal and expected phenomena associated with such cylinders, in opposition, plaintiff submitted the affidavit of his own expert which raises a triable issue as to the causation of the accident (*see* ***Ramos v Howard Indus., Inc.***, *supra*; ***Bettineschi v Healy Elec. Contr. Inc.***, 73 AD3d 1109, 902 NYS2d 597 [2d Dept 2010]; ***Garrido v Inatl. Bus. Mach. Corp. (IBM)***, 38 AD3d 594, 832 NYS2d 71 [2d Dept 2007]). The affidavit by plaintiff's expert states, in pertinent part, that based upon the partially blown off roof of the motor vehicle and the direction of the burn patterns within its interior, there is sufficient circumstantial evidence to conclude that the fire and explosion occurred because the excessive

leaking of oxygen from a cylinder resulted in a super oxygenated atmosphere in the vehicle that ignited when plaintiff switched on the vehicle's map light. Indeed, plaintiff testified he heard a hissing sound coming from the back of the vehicle where the oxygen cylinders were stored and that when he switched on the map light in order to inspect the cylinders he saw sparks in the air before him followed by a sudden flash of light. Accordingly, the motion by Tri-Weld seeking summary judgment dismissing plaintiff's complaint against it is denied.

As for the motion by AOC seeking summary judgment in its favor dismissing Tri-Weld's third-party complaint, Section 11 of the Worker's Compensation law exempts an injured party's employer from such claims unless the employee sustained a grave injury as defined by the statute (*see* ***Majewski v Broadalbin-Perth Cent. School Dist.,*** 91 NY2d 577, 673 NYS2d 966 [1998]), or where the employer has entered a written contract by which it expressly agreed to contribution or indemnification of the claimant (*see* ***Bovis v Crab Meadow Enters., Ltd.***, 67 AD3d 846, 889 NYS2d 634 [2d Dept 2009]; ***Martelle v City of New York,*** 31 AD3d 400, 817 NYS2d 504 [2006]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (***Hopper Assocs., Ltd. v AGS Computers***, 74 NY2d 487, 489, 549 NYS2d 365 [1989]).

Here, none of the injuries claimed by plaintiff in his bill of particulars, namely burns to his lower bilateral extremities and flanks, feet and abdomen, fall within the ambit of a "grave injury" as defined by section 11 of the Workers' Compensation Law (*see* ***Spiegler v Gerken Bldg. Corp***., 35 AD3d 715, 826 NYS2d 674 [2d Dept 2006]). Moreover, the sales agreement between AOC and Tri-Weld does not evince any specific obligation by AOC to provide Tri-Weld with contribution or indemnification for accidents to its employees arising out of the use of the oxygen cylinders (*see* ***Tonking v Port Auth. of N.Y. & N.J.***, 3 NY3d 486, 787 NYS2d 708 [2004]; ***Hopper Assocs., Ltd. v AGS Computers***, *supra*; ***Adesso Café Bar & Grill, Inc. v Burton***, 74 AD3d 1253, 904 NYS2d 490 [2d Dept 2010]; ***Ascencio v Briarcrest at Macy Manor, LLC***, 60 AD3d 606, 874 NYS2d 562 [2d Dept 2009]). Although the contract states that the "[s]eller shall not be liable for any damage direct, indirect, special, incidental, consequential or otherwise, arising out of or in connection with any gases," conspicuously absent from the agreement, which was drafted by Tri-Weld, are the words "indemnify" or "hold harmless." In opposition, Tri-Weld failed to raise any triable issues warranting denial of the motion (*see* ***Alvarez v Prospect Hosp***., *supra*; ***Zuckerman v City of New York***, *supra*). Accordingly, the motion by AOC for summary judgment dismissing the third-party complaint against it is granted.

Dated: October 8, 2010

Hon. Joseph Farneti
Acting Justice Supreme Court

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