

**Hayden v Leon Petroloeum, LLC**

2012 NY Slip Op 30728(U)

March 14, 2012

Supreme Court, Nassau County

Docket Number: 9687/10

Judge: Thomas A. Adams

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,  
Supreme Court Justice

TRIAL/IAS, PART 25  
NASSAU COUNTY

ROBERT HAYDEN,

Plaintiff(s),

MOTION DATE: 1/13/12

INDEX NO.: 9687/10

-against-

SEQ. NO. 1

LEON PETROLEUM, LLC and XERXES CORPORATION, a,  
subsidiary of ZCL COMPOSITES, INC.

Defendant(s)

The defendant Xerxes Corporation's motion, pursuant to CPLR 3212, for summary judgment dismissing the plaintiff's complaint as against it is determined as hereinafter provided.

The defendant Leon Petroleum leases a gasoline service station located at 1235 Deer Park Avenue in North Babylon and retained the plaintiff's employer, Tyree Services, inter alia, to renovate a 10,000 gallon storage tank located there. Tyree engaged the movant to replace the tank's fiberglass collars and "manway covers" (see movant's Exhibit J, plaintiff's 5/19/11 deposition, p.27,L2). A manway cover is "where the access point is to the tank" (p.49,L25-p.50,L2).

The plaintiff was Tyree's "crew chief" (p.28,L10) on the job. In sum, the contractor initially removes the gas from the tank and "blow[s] the lines back" (p.43,L12), i.e., "clear the lines of any liquids that are in the ground" or "blow them back into the tank [so] they could be taken out of the ground" (p.43,L21). The tank is then emptied by a vacuum truck (p.44,L10) and filled approximately "three quarters of the way" (p.46,L25) with water to prevent it from shifting (p.45,L2-15). It thereafter disconnects the pipes (p.48,L3) and removes the pumps (p.49,L10). At that stage, the subcontractor, Xerxes, replaces the fiberglass collars and manway covers (p.49,L17).

On the day of the accident, Xerxes' technician, Lewis Spigler,

had begun to replace the manway covers (p.105,L14). However, he informed the plaintiff that he was having trouble removing the half inch bolts because they were corroded (p.106,L7;p.106,L20) and therefore allegedly asked him for assistance (p.106,L23) ( see movant's Exhibit M, photos F & O).

The plaintiff telephoned Tyree's project manager, Dan Christiansen, to inform him of the situation and Mr. Christiansen reportedly instructed him to aid Mr. Spigler (p.108,L12) but did not address the manner in which the plaintiff was to do so (p.108,L16).

The plaintiff then began cutting the bolts with a gas operated "chop saw" (p.108,L21-p.109,L4) he acquired from Tyree's onsite trailer while Mr. Spigler allegedly stood to the side (p.110,L4). After approximately 10-12 of the 30-35 bolts were removed, the saw "crapped out" (p.109,L18). He called Mr. Christiansen again (p.113,L19) in order to update him and informed him that he was going to use an acetylene torch (p.114,L3. About 20-25 minutes later (p.121,L3), there was a "very loud explosion" (p.122,L22) and the plaintiff was injured. While the plaintiff was utilizing the torch, Mr. Spigler was allegedly about 10 feet away (p.123,L9) and reportedly did not comment concerning its use (p.123,L13;p.248,L7). The plaintiff was not concerned about the presence of gasoline fumes because the tank had been "open to the atmosphere" for approximately two weeks and "there was water in the tank" (p.120,L7). Moreover, he had employed the same procedure on between 25-50 prior occasions without incident (p.221,L14).

Mr. Spigler's recollection of the incident is somewhat different. he testified, in pertinent part, that after the plaintiff was informed of the problem, he inquired as to whether Mr. Spigler had "a sawzall or something" (see movant's Exhibit K, p.114,L24-p.115,L4). He reportedly replied that he was not permitted to use any tool that might create a spark (p.115,L5).

The plaintiff then reportedly walked away, returned approximately five minutes later and stated that he was having a chop saw brought to the site (p.115,L9). After the chop saw arrived, the plaintiff started cutting the bolts until, about 10-15 thereafter, it malfunctioned (p.121,L9). During this period Mr.

Spigler allegedly stayed "as far away from [the plaintiff] as [he] could" (p.121,L17). When the plaintiff subsequently switched to the acetylene torch, he reportedly retreated to his vehicle (p.130,L9) until he heard the explosion. He repeatedly denied discussing the use of the torch before the plaintiff began employing it (p.132,L18;p.172,L20).

On May 19, 2010 the plaintiff filed this personal injury action (see movant's Exhibit A). His amended complaint ( see movant's Exhibit B) pleads a single cause of action asserting common law negligence and violations of Labor Law §§200 and 241(6) against each defendant. Following joinder of issue and the completion of disclosure, the case was certified for trial on July 21, 2011 (see movant's Exhibit G) and on July 25, 2011 a note of issue was filed (see movant's Exhibit F). The October 24, 2011 motion is therefore timely (see CPLR 3212[a]).

Labor Law §200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343,352). Cases involving this provision fall into two broad categories: those where workers are injured as a result of dangerous or defective premises conditions at a work site or those involving the manner in which the work is performed (see Ortega v Puccia, 57 AD3d 54,59). This case concerns the latter category. "[W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law §200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (id. at 61).

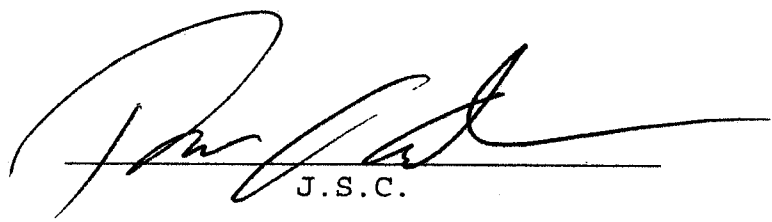
A subcontractor may, nevertheless, be liable for common law negligence "where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area" (Ortiz v I.B.K. Enterprises, Inc., 85 AD3d 1139,1140 quoting Poracki v St. Mary's R.C. Church, 82 AD3d 1192,1195). Here, contrary to the plaintiff's contention, the movant has established its prima facie entitlement to summary judgment dismissing the complaint as against it by demonstrating that it was not acting as the co-defendant's statutory agent (see Ortiz supra at 1140-1141;

cf. Poracki supra at 1195).

Rather, accepting the plaintiff's testimony as true and according him every favorable inference (see CPLR 3212), the movant has established its prima facie entitlement to summary judgment by demonstrating that the accident arose from the means and methods of his work, i.e., his unilateral decision to use the acetylene torch (see Robinson v County of Nassau, 84 AD3d 919,920; LaRosa, Jr. v Internap Network Services Corp., 83 AD3d 905,909).

Notably, while the plaintiff's November 29, 2011 affidavit in opposition avers, inter alia, that Mr. Spigler was "aware" that [the plaintiff] was "actively performing his work at his request", he does not allege that Mr. Spigler proposed the method or means employed. Moreover, although he asserts that "[f]or some reason [Mr. Spigler] had already installed the fiberglass collar for this manway which ... prevented the use of a long wrench or sawzall to remove the rusty nuts and bolts", this new allegation is beyond the scope of his bill of particulars. In any event, it is unsupported by an expert's affidavit referencing an appropriate industry standard (see Romano v Stanley, 90 NY2d 444; DeLeon v State of New York, 22 AD3d 786) which establishes that Mr. Spigler's methodology was either dangerous or created the condition which caused the plaintiff's injury. Accordingly, the defendant Xerxes Corporation's motion, pursuant to CPLR 3212, for summary judgment dismissing the plaintiff's complaint as against it is granted.

Dated: MAR 14 2012

  
J.S.C.

**ENTERED**  
MAR 19 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE