

Reece v J.D. Posillico, Inc.

2013 NY Slip Op 32376(U)

September 23, 2013

Sup Ct, Suffolk County

Docket Number: 10-24476

Judge: Joseph Farneti

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COPY

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

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 3-21-13 (007, 008, 009 & 013)
MOTION DATE 4-1-13 (010 & 012)
ADJ. DATE 6-27-13
Mot. Seq. # 007 - MotD # 010 - MD
008 - MD # 012 - MD
009 - MotD # 013 - MotD

-----X
ERNEST REECE as Administrator of the Estate
of ARTHUR WILLIAM REECE, Deceased on
behalf of Infants, and as Conservator of JEZOAR
REECE and ZAHYR REECE,

Plaintiffs,

- against -

J.D. POSILICO, INC., JOHNSON
ELECTRICAL CONSTRUCTION CO., WILEY
ENGINEERING, P.C., ATHENA LIGHT &
POWER, TOPINKA & DANGELO, INC. and
HAPCO

Defendants.
-----X

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10-1-13

-----X
 TOPINKA ASSOCIATES INC. d/b/a TOPINKA
 & DANGELO INC. and KEARNEY-
 NATIONAL INC. d/b/a HAPCO,

Third-Party Plaintiffs,

- against -

AKRON FOUNDRY COMPANY,

Third-Party Defendant.
 -----X

CALLAN, KOSTER, BRADY & BRENNAN
 Attorney for Third-Party Defendant Akron
 Foundry
 One Whitehall Street, 10th Floor
 New York, New York 10004

Upon the following papers numbered 1 to 107 read on these motions to compel, to dismiss, and for sanctions; Notice of Motion/ Order to Show Cause (motion sequence #007) and supporting papers 1 - 28; Amended Notice of Motion (motion sequence #013) and supporting papers 29 - 31; Answering Affidavits and supporting papers 32 - 41; Replying Affidavits and supporting papers 42 - 44; Notice of Motion/ Order to Show Cause (motion sequence #008) and supporting papers 45 - 60; Answering Affidavits and supporting papers 61 - 64; Replying Affidavits and supporting papers 65 - 70; Notice of Motion/ Order to Show Cause (motion sequence #009) and supporting papers 71 - 77; Answering Affidavits and supporting papers 78 - 80; Replying Affidavits and supporting papers 81 - 82; Notice of Motion/ Order to Show Cause (motion sequence #010) and supporting papers 83 - 86; Answering Affidavits and supporting papers 87 - 99; Replying Affidavits and supporting papers ; Notice of Motion/ Order to Show Cause (motion sequence #012) and supporting papers 100 - 102; Answering Affidavits and supporting papers 103 - 105; Replying Affidavits and supporting papers 106 - 107; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. #007) and the amended notice of motion (seq. #013) by defendants Kearney-National Inc. d/b/a HAPCO and Topinka Associates Inc. d/b/a Topinka & Dangelo Inc. for an Order, pursuant to CPLR 3124, to compel, the motion (seq. #008) by Wiley Engineering, P.C. for an Order, pursuant to CPLR 3212, to dismiss all claims against it, the motion (seq. #009) by third-party defendant Akron Foundry Company for an Order, pursuant to CPLR 3124 to compel and CPLR 3126 to preclude, and the motion (seq. #010) by plaintiff for an Order striking defendants' answers, are consolidated for the purposes of this determination and are decided together with the cross-motion by defendants Kearney-National Inc. d/b/a HAPCO and Topinka Associates Inc. d/b/a Topinka & Dangelo Inc. for an Order granting sanctions against plaintiff; and it is further

ORDERED that the motion (and amended motion) by defendants Kearney-National Inc. d/b/a HAPCO and Topinka Associates Inc. d/b/a Topinka & Dangelo Inc. for an Order pursuant to CPLR 3124 to compel plaintiff to provide outstanding discovery or pursuant to CPLR 3126 (2) precluding plaintiff from introducing at trial evidence not provided pursuant to discovery demands is determined as follows; and it is further

ORDERED that the motion by defendant Wiley Engineering, P.C. for an Order pursuant to CPLR 3212 dismissing plaintiff's claims and all cross-claims against it is denied; and it is further

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ORDERED that the motion by third-party defendant Akron Foundry Company for an Order pursuant to CPLR 3124 compelling plaintiff to provide outstanding discovery and pursuant to CPLR 3126 precluding plaintiff from introducing evidence at trial not provided pursuant to discovery demands is determined as follows; and it is further

ORDERED that the motion by plaintiff for an Order striking defendants' answers for their willful failure to comply with the Preliminary Conference Order and multiple discovery demands is denied; and it is further

ORDERED that the cross-motion by defendants Kearney-National Inc. d/b/a HAPCO and Topinka Associates Inc. d/b/a Topinka & Dangelo Inc. for an Order granting sanctions against plaintiff pursuant to 22 NYCRR 130-1.1 (a) is denied.

This action arises out of a single vehicle accident that occurred on January 26, 2009, at or near the Exit 57 off ramp on the eastbound side of the Long Island Expressway ("I-495"), when the motor vehicle owned and operated by plaintiff's decedent, Arthur William Reece, struck a guardrail and multiple trees, and caught fire after the gas tank ruptured, apparently as a result of coming into contact with a jagged piece of metal upon a broken stanchion near the roadway. There were no witnesses to the accident in which plaintiff's decedent and two children perished. Plaintiff commenced this action to recover damages for the conscious pain and suffering and the wrongful deaths of the three occupants of the car.

Subsequent to the submission of the motions by defendants Kearney-National Inc. d/b/a HAPCO ("Hapco"), Topinka Associates Inc. d/b/a Topinka & Dangelo Inc. ("Topinka"), and Akron Foundry Company ("Akron") for Orders to compel or preclude, plaintiff alleges that he complied with all outstanding discovery requests. However, defendants maintain that several items still remain to be provided. Accordingly, within thirty (30) days of the date of this Order plaintiff shall provide to defendants, to the extent not previously provided: all papers with regard to the Court of Claims action commenced by plaintiff, including but not limited to motions, discovery responses, and Orders, a complete set of all existing color photographs relative to this matter, collateral source information as demanded, authorization for the Suffolk County Medical Examiner's autopsy report, authorizations for no fault records, and all information required by the Preliminary Conference Order not previously provided. Failure to comply with this directive shall result in an Order of preclusion or sanctions, as the Court deems appropriate, at the time of trial.

Plaintiff's request for an Order striking defendants' answers for their failure to appear at depositions scheduled at the November 15, 2012 Preliminary Conference is denied. However, the parties are to appear for examinations before trial in the succession provided by the November 15, 2012 Stipulation and Order, commencing no later than sixty (60) days from the date of this Order and concluding within forty-five (45) days from the date they are commenced. The motion by defendant Hapco and Topinka for sanctions against plaintiff is denied, the Court finding that plaintiff's conduct in requesting that defendants' answers be struck did not amount to "frivolous conduct" within the meaning of 22 NYCRR § 130-1.1.

Defendant Wiley Engineering, P.C. (“Wiley”) moves for an Order granting summary judgment dismissing plaintiff’s claims and all cross-claims interposed against it on the grounds that it did not owe decedent a duty of care and that it was not negligent in the happening of the accident. Defendant Wiley states that I-495 and the adjacent embankment where the accident occurred was owned by New York State. The New York State Department of Transportation (“DOT”) hired defendant J.D. Posillico, Inc. (“Posillico”) as the general contractor for work to be performed in that area and the DOT hired defendant Wiley, as part of that project, to select the location of light poles to which pole-mounted vehicle detectors would be installed. Additionally, defendant Wiley was to determine that the poles and bases into which the poles would be set, conformed with the written specifications promulgated by the DOT. The standard DOT specifications “dictated the material which could be used in the fabrication of these poles and bases, the method of how they were to be manufactured, and their expected performance characteristics.” Plaintiff alleges that defendant Wiley set forth the specifications for the poles and their bases to defendant Hapco and created a “plan sheet” for the installation project. Plaintiff maintains that the original specifications called for “truss arms” for the subject poles, but the poles were later switched from “poles used for acoustic detection to poles used for radar detection” which did not require the use of truss arms, and that defendant Wiley cut the truss arms from the order but the “final cut sheet ... did not indicate that dampeners for the subject poles should now replace the truss arms.” Furthermore, plaintiff claims that defendant Wiley did not perform any pre-installation inspection of the poles prior to their installation.

Defendant Posillico subcontracted defendant Johnson Electrical Construction Co. (“Johnson”) to install the poles and bases. Defendant Johnson installed the poles, after which it was determined that the poles vibrated excessively. Plaintiff argues that defendant Wiley made the decision to remove the poles so that dampeners could be retro-fitted into their bases to correct the excessive vibration, without instructing that the transformer bases to the poles be removed as well. The pole removal was completed by defendant Johnson in October 2008, plaintiff’s decedent was involved in the accident on January 26, 2009, before the poles had been reattached to the bases.

Plaintiff alleges that his decedent traveled off of the eastbound lane of I-495 and drove over the top of an unmarked breakaway transformer base which had been installed recently. He maintains that the base failed to breakaway as it was supposed to do, and instead sliced open the gas tank of the vehicle causing it to burst into flames resulting in the death of Arthur William Reece, Jr. and his two children. Plaintiff avers, and defendant Wiley agrees, that the subject transformer base was part of a DOT project and that defendant Wiley had been hired by the DOT as an engineering consultant. In opposition to defendant Wiley’s motion, plaintiff submits an affidavit from Nicholas Gellizzi, P.E., a professional engineer who asserts that he has “extensive experience in traffic, highway, and civil engineering and accident analysis and reconstruction. After an analysis and evaluation of plaintiff’s discovery responses, engineer’s daily project diaries, accident reports, deposition and examination before trial transcripts, DOT documents and specifications and product descriptions, Wiley correspondence and e-mails, various AASHTO standard specifications for structural supports, luminaries, and pole products, and an inspection of the accident location,” Mr. Gellizzi concluded in pertinent part that “Wiley’s miscommunication and error in the type of light pole to be delivered resulted in the light pole’s removal ... which caused and created an unsafe, dangerous and hazardous condition to exist on the date of the

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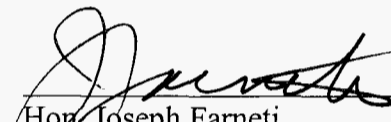
subject accident. Had this error not been made, the poles would have been delivered with dampers and the poles would have never been removed. Had this error been identified upon the poles' delivery the light poles would have never been installed and the transformer base would not have been installed, thereby eliminating the fixed object which was the direct cause of the fire. If the pole had been attached to the transformer base, as designed and as intended, the breakaway safety feature of the pole would have been fully functional and the base would have broken away properly and safely. Wiley's acts and omissions ... was a substantial contributing cause of the fire that resulted in three (3) fatalities."

Defendant Wiley did not submit an expert's affidavit in support of its motion nor in reply to plaintiff's opposition.

The plaintiff's submission of an expert affidavit raises triable issues of fact as to whether defendant Wiley breached its duty to see that the poles were in compliance with applicable safety regulations before their installation and whether the failure to do so was a proximate cause of the accident, and whether their removal (leaving the bases) contributed to the accident (*see McIntosh v Village of Freeport*, 95 AD3d 965, 943 NYS2d 234 [2d Dept 2012]; *Herzog v Schroeder*, 9 AD3d 669, 780 NYS2d 226 [3d Dept 2004]).

Accordingly, defendant Wiley's request for summary judgment dismissing plaintiff's claims and all cross claims against it is denied.

Dated: September 23, 2013



Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION