Vitucci v BP Solar Intl. Inc.
2014 NY Slip Op 31180(U)
May 5, 2014
Supreme Court, New York County
Docket Number: 109879/11
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------x

BENJAMIN VITUCCI,

Plaintiff,

- against -

BP SOLAR INTERNATIONAL INC., METLIFE INC., LONG ISLAND SOLAR FARM, LLC, E.W. INFORMATION HOWELL CO., LLC, THE HERTZ CORPORATION AND UNITED RENTALS,

Defendants.

----------x

HERTZ EQUIPMENT RENTAL CORPORATION,

Third-Party Plaintiff,

-against-

HAWKEYE, INC.,

Third-Party Defendant.

----------x

Index No. 109879/11

Mot. seq. nos. 002, 003

DECISION AND ORDER

Index No. 590015/12

BARBARA JAFFE, J.:

For plaintiff:
David Mayer, Esq.
Sacks & Sacks, LLP
150 Broadway, 4th fl.
New York, NY 10038
212-964-5570

For Hertz:
Mary A. Jewels, Esq.
Grant M. Meisels, Esq.
Rubin Fiorella, *et al.*
630 Third Ave.
New York, NY 10017
212-447-4617

For BP Solar, MetLife & LISF:
Mark Aledort, Esq.
Lewis Johs, *et al.*
One CA Plaza, Ste. 225
Islandia, NY 11749
631-755-0101

For Hawkeye:
George Kolbe, Esq.
Justin J. Skvarce, Esq.
Raven & Kolbe, LLP
126 East 56th St., Ste. 202
New York, NY 10022
212-759-7466

On August 1, 2011, plaintiff, an electrician employed by third-party defendant Hawkeye

Inc., sustained injuries when a utility task vehicle (UTV) he was driving overturned at the Brookhaven Laboratory in Suffolk County. As relevant here, plaintiff sued BP Solar International, Inc., MetLife Inc., and Long Island Solar Farm LLC (LISF) for violations of Labor Law §§ 200 and 241(6), and the Hertz Corporation, who rented the vehicles to Hawkeye, for negligence. Hertz Corporation and Hertz Equipment Rental Corporation (collectively, Hertz) then commenced a third-party action for indemnification against Hawkeye. By affirmation dated December 4, 2013, plaintiff withdrew his Labor Law § 200 claim against LISF, all claims against MetLife, and all Labor Law § 241(6) claims not premised on violations of Industrial Code § 23-9.2.

BP Solar and LISF move pursuant to CPLR 3212 for an order dismissing all claims and cross claims asserted against them, which plaintiff opposes. Hertz also moves to dismiss all claims and cross claims against it, and for an order granting it summary judgment on its contractual indemnification claim, which plaintiff and Hawkeye oppose. In opposition, plaintiff asks that the court search the record and grant him summary judgment on his Labor Law § 241(6) claim.

I. BACKGROUND

By agreement dated October 28, 2010, LISF engaged BP Solar to provide it with engineering, procurement, and construction services for the installation of solar panels on its building located at a site owned by Brookhaven National Laboratory. (NYSCEF 86). A management agreement of the same date authorizes BP Solar, as LISF's agent, to contract with other parties on LISF's behalf, and to perform other administrative and management services in connection with construction at the site. (NYSCEF 87). An operation and maintenance (O&M)

agreement authorizes BP Solar, as contractor, to operate and maintain the solar facilities. (NYSCEF 88).

By agreement of the same date, BP Solar retained Hawkeye as its general contractor. Pursuant to their agreement, Hawkeye undertook to furnish its own equipment for the job, ensure that its employees have necessary experience and knowledge to perform their assigned tasks, employ a full-time safety representative, and inspect all equipment. (NYSCEF 54).

On or about July 12, 2011, Hawkeye rented six UTVs from Hertz. The rental agreement, entered into "solely for the purpose of creating a rental transaction," requires Hawkeye to defend, indemnify, and hold Hertz harmless for all losses, including reasonable attorney fees, and injuries arising from the operation of their motor vehicles, even if they result, in part, from Hertz's own negligence. (NYSCEF 102).

Soon after plaintiff's August 1, 2011 accident, a report was prepared reflecting that the road was dry. (NYSCEF 61). Pictures taken at the scene that day and the following day reflect that the terrain is flat. (NYSCEF 59, 61).

At his examination before trial (EBT) held on April 1, 2013, plaintiff testified that the accelerator pedal stuck, causing the UTV to accelerate rapidly, and that when he stepped on the brake with normal pressure and turned right, it flipped onto its side, pinning him to the ground. Plaintiff denied having been instructed on how to drive the UTVs, and added that while the site was always muddy, the UTVs never got stuck, that it was not particularly muddy where he had fallen, and had had no problems with the UTVs. He also recalls that Alexis Vitone, BP Solar's Health, Safety, Security and Environmental (HSSE) manager, sometimes walked around the site to say hello, but that the two never discussed anything concerning UTVs. (NYSCEF 55).

At an EBT held on April 16, 2013, Hertz's service manager testified that he had never heard of a UTV accelerator or brake pedal becoming stuck. He observed that Hertz had inspected the UTV before it was delivered to the site and discovered no problems, and that he personally inspected and rode it after the incident. While he discerned no defects, he noticed mud on its wheels and fender walls. He also testified that Hertz rents UTVs with or without doors and that plaintiff was injured on one with no doors, and maintained that no special training is needed to drive UTVs. (NYSCEF 56).

At an EBT held on July 2, 2013, Vitone testified that BP Solar was hired by the site owner to provide design specifications for solar panels, and that Hawkeye, as general contractor, retained tradesmen for the project. Her duties consisted of overseeing compliance with the site's policies and procedures. She spent half of her time in the job trailer, and the other half surveying the site, attending daily safety meetings with Hawkeye and others. According to Vitone, using UTVs was Hawkeye's idea; BP Solar neither used nor inspected them, nor did it instruct employees on their use. She recalls having been told by a BP Solar field employee that Hawkeye sometimes used the UTVs in muddy areas and inclines, or at speeds exceeding the 10-mile-an-hour speed limit, and she recalls discussing these issues with it. She heard no complaints that the UTVs malfunctioned and if she saw a UTV driver engaging in imminently dangerous activity, she would direct him to stop, although everyone on the site was so authorized. She denies instructing plaintiff on how to perform his work, and admits having been concerned about the possibility of workers falling out of doorless UTVs, although she subsequently qualified her testimony on an errata sheet, stating that she thought she had been asked about her post-accident concerns. (NYSCEF 58, 62).

At an EBT dated August 14, 2013, Hawkeye's on-site safety representative testified that Hawkeye was responsible for construction management, and BP solar was its client. He denied knowing that BP Solar directed the means and methods of plaintiff's work, or of problems with the UTVs. (NYSCEF 60).

II. CONTENTIONS

Plaintiff attributes his injuries to the absence of doors on the UTV or inadequate side protection, along with the accumulation on the UTV of hardened mud which, he claims, caused the accelerator to stick. He submits affidavits from his coworkers who claim that it was known that the UTV gas pedals stuck due to the mud, and that the issue had been brought to the attention of safety personnel and supervisors. (NYSCEF 73, 74). Plaintiff also maintains that Vitone's errata sheet merely presents a credibility issue for trial. He thus argues that there is sufficient evidence that BP Solar had notice of the danger sufficient to hold it liable under Labor Law § 200, even if it did not supervise or control plaintiff's work. (NYSCEF 68, 69, 109).

According to plaintiff's expert, who inspected the UTV on May 24, 2012, UTVs are susceptible to rollovers, and the absence of side protection constitutes a defect in power-operated equipment in violation of Industrial Code § 23-9.2 which the expert asserts was a substantial factor in causing plaintiff's accident. The expert also claims that mud should have been removed from the UTV to prevent the accelerator from becoming stuck, that BP Solar and LISF are at fault for furnishing plaintiff with an unsafe UTV and for failing to provide him with any training, and that Hertz should have known that its UTVs would be used on the site's rugged terrain, and should have equipped them with side protection. (NYSCEF 94).

BP Solar argues that as it served as a construction manager with limited authority, and

given Hawkeye's role as general contractor, it was not the owner's agent for purposes of establishing Labor Law liability. It denies overseeing the use of the UTV, and thus denies owing plaintiff any duty. It also observes that there is no evidence that it had notice of the UTVs' alleged defects, and maintains that the affidavits of plaintiff's coworkers should be disregarded as they are based on hearsay and do not specify to whom the alleged complaints were made. According to BP Solar, Industrial Code § 23-9.2 does not apply to vehicles used exclusively for transportation. (NYSCEF 46, 103).

Hertz alleges that the Transportation Equity Act, the Graves Amendment (49 USC § 30106) precludes a finding that it is vicariously liable for plaintiff's accident and rejects plaintiff's contention that leasing a doorless UTV constitutes negligence. It submits an affidavit from its engineer who inspected the UTV on August 4, 2011 and reports that the UTV was in excellent condition, fully functional, that its rollover protection structure was fully intact, and that there was no indication that the accelerator pedal could have stuck. (NYSCEF 108). Hertz also observes that its rental agreement with Hawkeye is not a construction contract, and thus, the indemnification and attorney fees provisions are enforceable. (NYSCEF 101).

Hawkeye, however, contends that the rental agreement is sufficiently construction-related to be governed by General Obligations Law (GOL) § 5-3.221, rendering unenforceable the indemnification provision. (NYSCEF 65).

III. BP SOLAR AND LISF'S MOTION

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ.*

Med. Ctr., 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853). Courts may not assess credibility on a motion for summary judgment, and the facts must be viewed in the light most favorable to the nonmoving party. (*Forrest,* 3 NY3d 314; *Ferrante v Am. Lung Assn.*, 90 NY2d 623, 631 [1997]).

A. Labor Law § 241(6) claim

Labor Law § 241(6) imposes a non-delegable duty on owners and contractors to comply with regulations promulgated by the Commissioner of Labor (*Morton v State of New York*, 15 NY3d 50, 56 [2010]). A claim may thus be advanced against an owner or contractor based on a specific violation of such regulations. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 495 [1993]). As a violation of the Industrial Code does not, as a matter of law, establish liability under Labor Law § 241(6), a plaintiff must demonstrate that the violation proximately caused his injury. (*See generally St. Lewis v Town of N. Elba*, 16 NY3d 411 [2011]; *Long v Forest-Felhaber*, 55 NY2d 154 [1982]).

For entities that are neither owners nor general contractors, liability under this section attaches only upon a showing that they possessed authority to supervise and control the work at issue, in which case they become statutory agents of the owner or general contractor. (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *Addonisio v City of New York*, 112 AD3d 554 [1st Dept 2013]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 148 [1st Dept 2012]).

1. BP Solar

A construction manager may be held liable for Labor Law violations as a statutory agent of the owner. (*Walls v Turner Const. Co.*, 4 NY3d 861 [2005]). In *Walls,* the Court found that the defendant construction manager's broad responsibility to coordinate and supervise work at a site constituted sufficient supervisory control and authority over the plaintiff-employee's work to render it liable. There, the defendant was obligated to oversee the construction site and trade contractors given the absence of a general contractor, and its superintendent had acknowledged her authority to stop unsafe work practices. (*Id.* at 861).

Here, as in *Walls,* Vitone admitted that she was obligated to ensure compliance with safety policies and procedures at the site, and that in connection with her duty, she attended daily safety meetings with Hawkeye, routinely walked around the site, and was authorized to stop employees from using UTVs if she felt they were being used dangerously. Consequently, triable issues exist as to whether BP Solar was a statutory agent within the meaning of Labor Law § 241(6). (*See also Ewing v ADF Const. Corp.*, 16 AD3d 1085 [4th Dept 2005] [even if defendant named in agreement as construction manager, it was responsible for coordinating and supervising project and had concomitant power to enforce safety standards and hire responsible contractors, thereby subjecting itself to safety requirements of Labor Law]; *Maniscalco v Liro Eng'g Const. Mgt., P.C.*, 305 AD2d 378 [2d Dept 2003] [construction manager responsible for coordinating and supervising all aspects of project, thus deemed agent of owner]; *Falsitta v Metro. Life Ins. Co. Inc.*, 279 AD2d 879 [3d Dept 2001] [construction manager who hired another contractor to erect injury-producing personnel hoist nonetheless had sufficient authority to supervise, direct, or control plaintiff's work to be held liable]; *Ortega v Catamount Const. Corp.*, 264 AD2d 323 [1st

Dept 1999], *abrogated on other grounds by McCarthy v Turner Const., Inc.*, 17 NY3d 369 [2011] [construction manager supervisor's testimony that it had overall responsibility for work at site, including matters of safety sufficient to support finding it had authority to control or supervise injury-producing activity]).

2. LISF

The agreements between LISF and BP Solar identify Brookhaven National Laboratory, not LISF, as the site owner, and plaintiff offers no evidence that LISF played any active role at the site.

3. Industrial Code § 23-9.2(a)

Industrial Code § 23-9.2(a) provides, in pertinent part, as follows:

> (a) *Maintenance*. . . . Upon discovery, any structural defect or unsafe condition in [] [power-operated] equipment shall be corrected by necessary repairs or replacement.

At issue here is whether a motor vehicle is power-operated equipment within the meaning of section 23-9.2(a). As a variety of vehicles have been found by appellate courts of this state to be power-operated equipment within the meaning of section 23-9.2(a) (*see Misicki v Caradonna*, 12 NY3d 511, 518 [2009] [motor trucks]; *Fisher v WNY Bus Parts, Inc.*, 12 AD3d 1138, 1140 [4th Dept 2004] [forklift trucks]; *Tillman v Triou's Custom Homes, Inc.*, 253 AD2d 254 [4th Dept 1999] [flat-bed trucks]), and absent any authority to the contrary, so too are UTVs (*but see Salsinha v Malcolm Pirnie, Inc.*, 76 AD3d 411, 412 [1st Dept 2010] [declining to rule definitively on applicability of section 23-9.2 to truck at issue]).

a. Mud on the UTV

Absent any non-speculative and non-conclusory expert opinion as to how the alleged

failure to remove mud from the UTV caused the accident, plaintiff has failed to raise a triable issue.

b. Absence of adequate side-protection

The discrepancy in Vitone's testimony concerning the absence of side protection on the UTV raises triable issues as to whether BP Solar had actual notice of the alleged unsafe condition. (*See Terrero v New York City Hous. Auth.*, __ AD3d __, 2014 NY Slip Op 02685 [1st Dept 2014] [conflict between original deposition and errata sheet raised issues of credibility inappropriate for resolution on summary judgment]; *Binh v Bagland USA, Inc.*, 286 AD2d 613 [1st Dept 2001] [same]). And, whether the absence of side protection constitutes an unsafe condition within the meaning of section 23-9.2(a), and whether this unsafe condition proximately caused plaintiff's injury constitute questions for the fact finder. (*See Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013] [that defendants furnished excavating machine without working backup alarm raised triable issue as to whether they violated section 23-9.2(a)]; *Cappabianca*, 99 AD3d at 147 [plaintiff, who lost footing while using wet saw to cut bricks stated valid claim under section 23-9.2(a); triable issues raised as to whether saw was defective and whether it contributed to accident]; *Salsinha*, 76 AD3d 411-12 [whether inability to open driver's side door from inside of truck constituted structural defect or unsafe condition under section 23-9.2(a), and whether such structural defect or unsafe condition proximately caused plaintiff's injury were issues for fact finder]; *Shields v First Ave. Builders, LLC*, 39 Misc 3d 1223[A], 2013 NY Slip Op 50707[U] *6 [Sup Ct, New York County 2013] [defendant's knowledge that pump could only be cleaned manually, and that cleaning was undertaken with its engine running, thereby exposing plaintiff to injury, raised triable issues as to whether defendant

had actual notice of defect within meaning of section 23-9.2(a)]).

B. Labor Law § 200

Labor Law § 200, which codifies common law negligence standards, imposes a duty on owners, general contractors, and their statutory agents to furnish a safe environment for their workers. (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Ryder v Mount Loretto Nursing Home Inc.*, 290 AD2d 892, 894 [3d Dept 2002]). In contrast to Labor Law § 241(6), liability under this section may not be imposed vicariously. (*Cappabianca*, 99 AD3d 145-46; *see generally Ross*, 81 NY2d 494).

When an existing dangerous condition on premises causes the plaintiff's injury, liability attaches if the defendant created or had notice of it. (*Cappabianca*, 99 AD3d at 144). However, when the injury arises from the manner and means of the work, including the equipment used, liability attaches only if the defendant actually exercised control over the manner in which plaintiff performed his or her injury-producing work. (*Id.*; *Hughes v Tishman Const. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). General supervisory authority is insufficient. (*Hughes*, 40 AD3d at 306).

Plaintiff's argument that BP Solar had notice of the alleged defective condition of the UTV sufficient to render it liable, presupposes that an unsafe UTV constitutes a dangerous premises condition. Absent any authority for that proposition, the argument is disregarded. (*See Cappabianca*, 99 AD3d at 144-46 [rejecting contention that plaintiff's injury arose from dangerous premises condition; pallette on which he was directed to stand shifted due to slippery floor caused by allegedly defective saw spraying water; accident's cause thus arose from manner and means plaintiff directed to perform task]; *Dalanna v City of New York*, 308 AD2d 400 [1st

Dept 2003] [rejecting contention that protruding bolt upon which plaintiff tripped constituted defect inherent in the property; bolt was created by plaintiff's employer when it was performing work on surface; defect thus arose by manner of its work; defendants consequently not liable even if they had notice of it]).

Here, BP Solar never instructed plaintiff on how to perform his work, and the decision to use UTVs was solely Hawkeye's. Thus, there is no evidence that BP Solar exercised the requisite supervision or control over plaintiff sufficient to impose liability under this section. (*See Hughes*, 40 AD3d at 308-10 [construction manager's continued presence at site, hiring of safety manager to monitor site and ensure compliance with safety regulations, authority to stop work for safety reasons, encouragement of plaintiff to expedite spreading of concrete, insufficient to raise triable issue as to whether it exercised sufficient supervision and control]; *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225 [1st Dept 2006] [although defendant had overall responsibility for safety of work performed by contractors, no evidence offered it provided anything beyond general instructions as to scope of duties, and plaintiff admitted defendant never instructed him; summary judgment granted]; *Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005] [defendant's discussions with contractor to remedy dangerous area, and its inspection of area following allegedly inadequate remedial effort simply evinced general supervision and coordination of site; insufficient to trigger liability]).

IV. HERTZ'S MOTION

A. Liability to plaintiff

A car-rental company satisfies its duty of reasonable care by assuring that its vehicles are in sound operating condition. (*Danielenko v Kinney Rent A Car, Inc.*, 57 NY2d 198, 205 [1982]).

Hertz's engineer and service manager each inspected the UTV days after the accident and concluded that it functioned properly and that there was no evidence of a malfunctioning accelerator. Hertz has thus demonstrated that it satisfied its duty to plaintiff, and plaintiff's expert does not dispute the specific findings set forth in the reports of Hertz's experts. Rather, he conclusorily opines that Hertz should have equipped the UTV with better side protection, given the foreseeability of rollovers. This opinion fails to raise a triable issue as to whether Hertz satisfied its duty of reasonable care, as plaintiff offers no authority imposing a duty on Hertz to refuse to rent a doorless UTV.

B. Indemnification and attorney fees

General Obligations Law § 5-322.1 prohibits agreements "in, or in connection with or collateral to a contract or agreement relative to the construction, alteration or repair or maintenance of a building" purporting to indemnify a promisee for damages caused by its own negligence. The statute prohibits enforcement of a contractual indemnification clause only if the party seeking indemnification was, in fact, negligent. (*Damiani v Federated Dept Stores, Inc.*, 23 AD3d 329, 331 [2d Dept 2005]; *see generally Brown v Two Exch. Plaza Partners*, 76 NY2d 172 [1990]).

A party to a contract who is a beneficiary of an indemnification provision has the burden of establishing that it was free from negligence, when such negligence would bar enforcement of the provision. (*O'Connor v William Metrose Ltd. Bldr./Dev.*, 38 AD3d 1207, 1208-09 [4th Dept 2007]; *Reynolds v County of Westchester*, 270 AD2d 473, 474 [2d Dept 2000]).

Here, even if one credits Hawkeye's contention that the rental agreement is sufficiently related to construction to be governed by GOL § 5-322.1, Hertz has demonstrated its freedom

from negligence. (*See supra*, IV.A.). Thus, the indemnification provision may be enforced, and Hertz is entitled to reasonable attorney fees incurred in this action.

The authority cited by Hawkeye is either distinguishable or contrary to its position. For instance, in *Litts v Best Kingston Gen. Rental*, there was more than sufficient evidence that the party seeking indemnification was negligent. (7 AD3d 949 [3d Dept 2004]). And in *Denci v Bovis Lend Lease, Inc.*, the court emphasized that a non-negligent indemnitee may recover fully, even if the indemnification agreement is overly expansive and appears to violate GOL § 5-322.1. (20 Misc 3d 1123(A), 2008 NY Slip Op 51594[U], *10 [Sup Ct Queens County, 2008]).

Hawkeye also argues, in the alternative, that the indemnification provision is governed by New Mexico law, and is void as New Mexico prohibits indemnification for negligence in construction contracts. In reply, Hertz maintains, correctly, that Hawkeye has misread the provision by ignoring a relevant word, namely, "if."

V. PLAINTIFF'S REQUEST TO SEARCH THE RECORD

Plaintiff fails to demonstrate its entitlement to summary judgment on its Labor Law § 241(6) claim. (*See supra*, III.A.2.).

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant The Hertz Corporation's motion for summary judgment dismissing plaintiff Benjamin Vitucci's complaint against it is granted and the complaint is severed and dismissed against it; it is further

ORDERED, that third-party plaintiff Hertz Equipment Rental Corporation's motion for summary judgment granting it reasonable attorney fees as against Hawkeye, Inc. is granted and

the third-party complaint is dismissed as the Hertz Corporation is no longer a defendant in the main action; it is further

ORDERED, that the issue of the reasonable attorney fees to be awarded to Hertz Equipment Rental Corporation is referred to a Special Referee to hear and report with recommendations; it is further

ORDERED, that defendant BP Solar International, Inc.'s motion for summary judgment dismissing plaintiff's Labor Law § 200 claim against it is granted; it is further

ORDERED, that defendant BP Solar International, Inc.'s motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim against it is denied; it is further

ORDERED, that defendant Long Island Solar Farm, LLC's motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is granted; it is further

ORDERED, that plaintiff's motion to search the record and grant it summary judgment on its § 241(6) claim is denied; it is further

ORDERED, that plaintiff's claims against defendant MetLife, Inc. are dismissed as withdrawn and the complaint is severed and dismissed against it; it is further

ORDERED, that plaintiff's Labor Law § 200 claim against defendant Long Island Solar Farm, LLC is dismissed as withdrawn; and it is further

ORDERED, that all of plaintiff's Labor Law § 241(6) claims not premised on violations of Industrial Code § 23-9.2(a) are dismissed as withdrawn.

ENTER:

Barbara Jaffe, JSC

DATED: May 5, 2014
New York, New York