

**Tower Ins. Co. of N.Y. v Kingston Bakery Network,
Inc.**

2015 NY Slip Op 30123(U)

January 22, 2015

Supreme Court, New York County

Docket Number: 155474/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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TOWER INSURANCE COMPANY OF NEW YORK
a/s/o GENESIS BEAUTY SUPPLY, INC.,

Plaintiff,

Index No. 155474/12

-against-

DECISION/ORDER

KINGSTON BAKERY NETWORK, INC. d/b/a
PAUL'S CARIBBEAN BAKERY and G.S.
CONSTRUCTION,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1.</u>
Affirmations in Opposition to the Motion	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Tower Insurance Company of New York a/s/o Genesis Beauty Supply, Inc. ("Tower") commenced the instant action against defendants Kingston Bakery Network, Inc. d/b/a Paul's Caribbean Bakery (the "Bakery") and G.S. Construction ("GS") to recover damages for property damage to its subrogor's premises as a result of a fire which occurred next door at the Bakery's premises located at 4376 White Plains Road, Bronx, New York on or about July 23, 2011 (the "premises"). Defendant Bakery now moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint. For the reasons set forth below, defendant Bakery's motion is denied.

The relevant facts as alleged in the complaint are as follows. On or about July 23, 2011, a fire broke out at the Bakery's premises, originating above the entrance door, allegedly as a result of welding that was performed by GS during the installation of an air-conditioning unit the day before the fire. Specifically, GS was hired by the Bakery "[t]o fit air conditioner unit into metal frame" at the cost of \$150.00. Plaintiff then commenced the instant action to recover for damage to its subrogor's store located next to the premises. The Bakery now moves for summary judgment dismissing the complaint.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

As an initial matter, the Bakery's motion for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint on the ground that no welding work was done on the premises is denied as there exists an issue of fact as to whether welding work was done on the premises. In support of its motion, defendant provides the testimony of Richard Levi, the President of the Bakery, who stated that no welding was performed during the installation of the air conditioner unit. Specifically, Mr. Levi testified as follows:

Q: In order to secure it, did they have to weld it?

- A: No. They did not weld the physical air conditioner, from which I remember.
- Q: Did they have to encase it in a welded framework to secure it?
- A: I believe, once again, it has been some time, I believe the frame itself was welded prior to bringing it to the store. I believe they had taken measurements and welded it offsite. So I don't remember specifically what was being welded on the day that they installed the frame.

Additionally, defendant provides the testimony of Gerald Sinclair, owner of GS, who stated that no welding was performed on the premises but rather that the welding to assemble the metal frame for the air conditioner was done at GS' shop located at 443 DeRimmer Avenue, Bronx, New York and that the assembled frame was then brought to the premises for installation only.

However, there exists an issue of fact as to whether the fire was caused due to welding which occurred on the premises based on Mr. Levi's own testimony. Specifically, Mr. Levi stated as follows:

- Q: Was any welding taking place during the installation of the framework for the air conditioning unit?
- A: Yes.
- ...
- Q: When you observed [Mr. Frances] and perhaps Mr. Sinclair on the ladder, what were they doing specifically? What could you see?
- A: There were various things happening. Like I told you before, there was some welding taking place. Also, there was some - - to the best of my knowledge, I believe there was some drilling that took place. Some fastening. Some - - those types of things.
- ...
- Q: Did you observe sparks being generated during the process, whether it was welding or cutting?
- A: Yes.
- ...

Q: What area on the storefront was he welding?

A: In the area adjacent to where the air conditioning was going to be mounted.

Mr. Levi went on to state that

I just wanted to mention that I cannot say with 100 percent certainty that I witnessed the person that was with Mr. Sinclair doing actual welding. He may have very well been doing it, but he could have been doing grinding or cutting of the metal, because I remember that there was a metal piece in the way of where the air conditioner was going and it had to be removed. Now, that would imply from my memory that it was something that was cut, rather than something that was welded. Was there welding that was done afterwards, I can't remember. I wanted to clarify that it could have been something other than welding.

Thus, based on said evidence, there exists an issue of fact as to whether GS performed welding work at the premises.

Additionally, the Bakery's motion for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint on the ground that even if the fire was caused by welding performed by GS, it was done by an independent contractor over whom defendant exercised no control and is thus, not liable, is denied.

The general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts. There are exceptions, however. For reasons of public policy, the employer's duty is sometimes held to be nondelegable and, though blameless, it is liable for the independent contractor's negligence. The exceptions generally recognized involve situations where the employer (1) is under a statutory duty to perform or control the work, (2) has assumed a specific duty by contract, (3) is under a duty to keep the premises safe, or (4) has assigned work to an independent contractor which the employer knows or has reason to know involves special dangers inherent in the work or dangers which should have been anticipated by the employer. In such instances, the employer cannot insulate itself from liability by claiming that it was not negligent: the employer is vicariously liable for the fault of the

independent contractor because a legal duty is imposed on it which cannot be delegated.

Rosenberg v. Equitable Life Assur. Socy. of U.S., 79 N.Y.2d 663, 668 (1992)(internal citations omitted). Here, there exists an issue of fact as to whether the Bakery may be held liable for any negligence of GS, its independent contractor, on the ground that the Bakery was under a statutory duty to perform or control the work based on Chapter 26 of the New York City Fire Code (the “Fire Code”), which specifically deals with welding and other hot work. Specifically, “[w]henver hot work is performed in any building or structure,...the owner shall ensure that such work is performed in accordance with this chapter and shall designate a responsible person to ensure compliance.” NYC Code § 2603.2. Additionally,

The responsible person shall ensure that a permit has been obtained from the department when one is required, and ensure that the hot work is performed in compliance with the terms and conditions of the permit. The responsible person shall inspect the hot work site prior to issuing a hot work program authorization and periodically monitor the work as it is being performed to ensure there are no fire safety hazards.

NYC Code § 2603.2.1. Further, “[a] fire watch shall be maintained during hot work operations. The fire watch shall continue for a minimum of 30 minutes after the conclusion of the work. The commissioner, or the responsible person implementing a hot work program, may extend the duration of the fire watch based on the hazards or work being performed.” NYC Code § 2604.2.1. If welding work was performed by GS at the premises, then the Fire Code makes clear that the Bakery and Mr. Levi, as the owner of the premises, would be responsible for ensuring that the welding work and any other hot work was being performed safely. Thus, the Bakery is not entitled to summary judgment based solely on the ground that GS was an independent

contractor.

The Bakery's assertion that it is not liable for the work performed by GS on the ground that plaintiff failed to plead the specific Fire Code statutes in its complaint or bill of particulars is without merit as the Bakery has failed to provide any basis for such assertion. Indeed, the Bakery's reliance on *Barberi v. Fifth Ave. Dev. Co., LLC*, 20 Misc.3d 1106 (Sup. Ct. Bronx County 2008) and *Reilly v. Newireen Assoc.*, 303 A.D.2d 214 (1st Dept 2003) is misplaced as both *Barberi* and *Reilly* are distinguishable. In both cases, the court found that to state a claim under Labor Law § 241(6), all alleged violations of the Industrial Code must be pled in the complaint or the bill of particulars or said claim would be dismissed. As the instant case does not involve any claim brought pursuant to Labor Law § 241(6), such cases are inapplicable. Additionally, plaintiff has not attempted to assert a cause of action against the Bakery for a violation of the Fire Code but is only seeking to use the Fire Code to defeat the Bakery's motion for summary judgment.

Accordingly, the Bakery's motion for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint is denied. This constitutes the decision and order of the court.

Dated: 1/22/15

Enter: PK
J.S.C.

CYNTHIA S. KERN
J.S.C.