

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 21
NASSAU COUNTY

MICHAEL T. PIZZURRO,

Decision and Order

Plaintiff,

-against-

IWCO DIRECT NEW YORK, INC.,

MOTION SUBMITTED:

April 28, 2010

MOTION SEQUENCE:01, 02

INDEX NO. 10051-08

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion for Summary Judgment	1
Affirmation in Opposition and Reply	2
Notice of Cross Motion	3

Background

In an action to recover damages for personal injuries sustained by the Plaintiff, MICHAEL PIZZURRO, the Defendant, IWCO DIRECT NEW YORK (“IWCO”), moves for an order pursuant to CPLR 3212, granting it summary judgment dismissing the complaint. Plaintiff opposes IWCO’s motion and cross-moves for an order granting him summary judgment on the issue of liability. For the reasons that follow, the motion and cross motion are denied.

On July 25, 2006, at approximately 3:00 P.M., the Plaintiff, a journeyman electrician employed by B&G Electrical Contractors (“B&G”), was at the IWCO printing plant in

Farmingdale to perform thermal imaging of switch gear boxes¹ in the electrical room of the IWCO printing building. Thermal imaging involves opening the panel cover to the switch gear box and taking a picture of the breaker with an infrared camera.

Plaintiff's employer, B&G, was hired by IWCO, as an independent contractor, to perform the thermal imaging at the IWCO plant. The Plaintiff's job involved opening the panel doors to the switch gear box after which an employee of IWCO would take the thermal picture. Pursuant to the contract by which B&G was hired to perform the thermal imaging, IWCO and B&G agreed that the safety equipment was to be provided by IWCO. Specifically, the contract required that (Exhibit "F" to IWCO's Motion for Summary Judgment):

All equipment i.e.: Ladders, Man lifts and safety equipment (safety glasses, gloves, hardhat, hearing protection) are to be supplied by IWCO.

At no time will any IWCO associate be allowed to assist B&G Electrician with any phase of Electrical work.

Notwithstanding this contractual language, it is undisputed that no safety equipment was provided by IWCO. With respect to other tools necessary to complete the work, the Plaintiff testified that, per his union contract, he was required to bring his own tools and equipment, including hand tools, pliers, and screwdrivers.

According to the Plaintiff, neither IWCO nor B&G suggested that he wear protective gear while performing his tasks on July 25, 2006. In contrast, IWCO's facilities maintenance supervisor, Thomas Manship, testified at his deposition, that he asked Plaintiff if he thought he "should use" protective gear, to which Plaintiff responded that his gear was "back at the shop" (Exhibit "E" to Defendant's Motion for Summary Judgment, at p 24).

On the day of the incident, the Plaintiff opened up various panels in order for Thomas Manship to take the pictures. When the plaintiff had difficulty opening several panels, Mr. Manship suggested that the Plaintiff use a screwdriver to open the panel doors. Mr. Manship testified that while he did not remember actually telling the Plaintiff to use a screwdriver to open the panel, "[i]t would make sense. That's how you would do it." (Exhibit "E" to Defendant's Motion for summary Judgment at p 36). In this regard, the boxes were old and required a particular key to open their panel doors. Because IWCO did not provide such a key, a screwdriver had to be inserted into the side of the panels to release the locking mechanisms. While trying to open one of the panel doors with the screwdriver, the mechanism within the panel broke off, made contact with the fuses, and created an arc flash which, in turn, caused fire to come from behind the panel door. As a result, the Plaintiff sustained burns to his face, ear, and arms.

Notably, the switch gear box that is the subject of this incident had a warning label which

¹A switch gear box contains fuses which regulate the flow of electricity.

was observed by the Plaintiff at the time of the thermal imaging, and read as follows:

Warning
Arc Flash and Shock Hazard
Appropriate PPE² Required

Following the incident, IWCO was cited with three violations from the Occupational Safety and Health Administration (“OSHA”), all stemming from the “employee’s” failure to wear protective equipment.

Analysis

In order to prevail on a motion for summary judgment, the proponent ‘must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The evidence submitted by the moving party must be viewed in a light most favorable to the non-moving party. (*Marine Midland Bank v Dino & Artie’s Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

A cause of action sounding in negligence requires the existence of a duty on defendant’s part owing to the plaintiff; a breach of that duty; and injury to the plaintiff as a result of that breach. (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). Generally, while an employer must exercise reasonable care to keep his place of employment safe for the employees of an independent contractor (see *Persichelli v Triborough Bridge & Tunnel Authority, et al.*, 16 NY2d 136, 146 [1965]), the employer who retains the independent contractor is nevertheless not liable for the latter’s negligent acts. (*Brothers v New York State Elec.*, 11 NY3d 251, 257 [2009]).

Thus, an employer is generally not responsible for the negligence of the contractor for failing to utilize the proper tools for a job. (*Persichelli v Triborough Bridge & Tunnel Authority, et al.*, 16 NY2d at 146, *supra*). An exception to this rule of non-liability arises where the employer assumes a specific duty by contract. (*Brothers*, 11 NY2d at 258, *supra*).

Here, IWCO, by its contract with B&G, had a duty to provide the safety equipment necessary for the Plaintiff to perform the thermal imaging task.³ That IWCO breached its duty to provide safety equipment to the plaintiff, including failing to provide the key needed to open the panel doors of the gear box (which necessitated the use of screwdriver), cannot be disputed.

² PPE is an acronym for personal protective equipment.

³The court rejects IWCO’s assertion that the clear and ambiguous language in the IWCO and B&G contract indicating that IWCO was to provide the requisite safety equipment was a “mistake” and should not have been contained in the contract (*Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 469 [1st Dept 1998]).

Notwithstanding, issues of fact regarding the plaintiff's contribution to the happening of the accident precludes granting summary judgment. In this regard, the plaintiff was an experienced electrician, having his own personal safety equipment, who was allegedly advised of the need to use such equipment in the performance of his duties. In fact, the gear box contained a notice indicating that personal protective equipment was required when working on it.

Accordingly, the motion and cross motion are denied. The matter is hereby referred to the Calendar Control Part for immediate trial on all issues. Said trial will be held on July 21, 2010. The parties shall report to CCP on that date, for assignment to an available trial part.

This constitutes the decision and order of the court.

Dated: June 14, 2010



Hon. Vito M. DeStefano, J.S.C.

ENTERED

JUN 21 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**