UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ISABELLE GUZMAN,

Plaintiff,

-against-

UNITED STATES OF AMERICA, WACKENHUT CORPORATION, AND L3 COMMUNICATIONS, SECURITY DETECTION SYSTEMS CORPORATION,

Defendants.

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06 Civ. 3966

OPINION

A P P E A R A N C E S:

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Sweet, D.J.

Defendant, the Wackenhut Corporation ("Wackenhut" or the "Defendant") has moved under Rule 56, Fed. R. Civ. P., for summary judgment to dismiss the personal injury complaint (the "Complaint") of the plaintiff, Isabelle Guzman ("Guzman" or the "Plaintiff"), and the cross claims of the other defendants for contribution and indemnity (the "Cross Claims"). On the facts and conclusions set forth below, the motion is granted, and the Complaint and Cross Claims will be dismissed.

I. PRIOR PROCEEDINGS

The Complaint filed by Guzman on May 24, 2006 alleges that Guzman, a FedCap employee stationed at the Statue of Liberty, was injured when her hand was drawn into a gap or "pinch point" between the conveyer belt and the loading section of the x-ray machine she was cleaning and that was being operated by a Wackenhut employee. Discovery proceeded.

The instant motion was heard and marked fully submitted on May 13, 2009.

II. THE FACTS

The facts are set forth in the parties' Local Rule 56.1 Statements and are not in dispute except as noted below.

The Statue of Liberty (the "Statue"), located on Liberty Island in the State of New York, is a national monument controlled and operated by the National Parks Service ("NPS"), a division of the Department of the Interior. In 2004, NPS entered into an agreement with L-3 Communications, Security Detection Systems Corporation ("L3") wherein L3 agreed to provide NPS with an advanced x-ray detection system. L3 also contracted with NPS to provide NPS with a "4-year platinum scheduled maintenance" program which included a litany of additional maintenance and repair services, including "all necessary parts, labor and . . . annual preventive maintenance." Statement of Facts Pursuant to Local Rule 56.1 ("Statement of Facts") ¶ 13.

FedCap, Plaintiff's employer, was contracted by NPS to provide cleaning services at the subject location.

The Technical Specifications for Custodial and Janitorial Services issued by NPS sets forth that "the contractor shall provide management, supervision, manpower, equipment and supplies necessary to provide custodial and related services." Id. ¶ 8. The specifications further provide that such services are to be provided in and around the perimeter of the security screening tent of the subject location and state that "the contractor shall arrange for satisfactory supervision of the contract work." Id. ¶ 9. The specifications also state that "the contractor shall provide a full time manager who shall be responsible for the competent performance of the work." Id.

NPS entered into an agreement with Wackenhut to provide security services at the Statue. According to the contract, Wackenhut had the following duties at the subject site:

- Protect government property.
- Provide safety for guests.
- Maintain a lookout for fire, floods and other catastrophes on the site.
- Report any and all hostile threats against the facility.
- Report any complaints.

- Maintain proper scheduling for security personnel.
- Direct traffic and parking.
- Maintain all necessary reports and logs.

Id. ¶ 11. Wackenhut was also retained to operate the x-ray machines. It was not retained as a general contractor, nor was it retained to provide general oversight at the subject location.

Lieutenant Charles Guddemi ("Lt. Gudemmi") of the NPS Police force was the second-in-command on site at the Statue. Lt. Guddemi's responsibilities included overseeing daily operations of the site; ensuring adequate staffing levels; ensuring that all training requirements were fulfilled; overseeing contracted guard operations; ensuring that the security technology was functioning properly; coordinating special events; and liaising with other jurisdictions and outside agencies.

NPS, through Lt. Guddemi, worked with L3 to devise a cleaning protocol for the cleaning of the belts of the x-ray machine. With respect to his conversation with an L3 representative, Lt. Guddemi testified:

A. . . . I said we need to come up with solution for this. We watched as the process was going on. I said there should be an easy way to clean this. There was a FedCap employee in the [security] tent at that time.

Q. Do you remember the name of this individual?

A. I do not. The individual had a spray bottle with cleaning solution and a rag. He took the spray bottle and a rag from the individual.

Q. Who did?

A. Mark Bush [an L3 employee]. Then standing on the entrance side of the x-ray machine, just said if we spray some solution on the rag and put it down on the entrance side of the conveyor belt while it's operating, the friction will keep cleaning the belt. When he demonstrated it, some of the dirt started to come off and you could see the color green appear.

Id. ¶ 2.

Under the protocol developed by Lt. Guddemi and L3, a Wackenhut security guard would turn on the machine at the request of a FedCap employee when the machine was to be cleaned. Lt. Guddemi testified that he did not direct that the Wackenhut guard remain at the controls during the cleaning:

Q. Again, just so we're clear, this is your expectation, that the Wackenhut guard would stay at the controls as the FedCap employee is cleaning the machine, correct?

A. It would have been my expectation since the only one authorized to operate the machine would have been the contracted guard force.

Q. That's what you communicated to the Wackenhut guard force, would that be fair to say?

A. No.

Q. Why is that not fair to say?

A. I do not recall making that communication, stating that the guard would have to stay there when the machine was operating.

Id. ¶ 4.

Lt. Guddemi never discussed the procedure for cleaning the conveyor belt of the x-ray machine with anyone from Wackenhut besides alerting Wackenhut that it was required to turn the conveyor belt on when asked by FedCap employees. However, Lt. Guddemi informed FedCap, through its NPS liason Bill Rivera ("Rivera"), of the safe procedures for cleaning the conveyor belt:

Q. Did you talk to him about the procedure as to how the cleaning of the belts was supposed to work?

A. Yes, I mentioned to him the direction because I was concerned about the safety issue.

Id. ¶ 5. Lt. Guddemi further testified that he specifically informed Rivera of the potential dangers associated with cleaning the machine:

Q. Did you tell Mr. Rivera the procedure as to how the machine was to be cleaned?

A. . . . Yes.

Q. . . . What did you tell him?

A. This is the concern, when we clean the machines from a safety standpoint, to make sure they're on the entrance side, and explained - the concern was if they would slip and lose the rag, we would just lose the rag into the x-ray machine. If you were on the other side going against the friction, you could end up getting hurt with the transition between the conveyor belt and the slide that we have.

Id. ¶ 3. Rivera, however, testified that Lt. Guddemi never told him about the procedure or the hazards of cleaning the x-ray machine while the belt was moving.

At the time of the incident leading to the present lawsuit, Guzman was employed by FedCap at the

Statue. Prior to that, she had been an employee of FedCap since 1993.

Guzman testified that her typical duties included mopping, sweeping, cleaning bathrooms, dusting, and picking up trash, and if she was scheduled on a Monday, Wednesday or a Friday, her duties included cleaning the subject x-ray machine. According to Wackenhut, Guzman was only required initially to clean the exterior of the x-ray machine. In 2004, pursuant to a directive from NPS, FedCap was required to clean the moving conveyor belt.

According to Guzman, she was directed to clean the x-ray machines by NPS officials and her supervisors from FedCap, but nobody instructed her in the proper method for cleaning the machine:

> Q. And what does that mean to clean the machine?
>
> A. When - they they send them a memo saying that we had to clean machines, the inner of the machines. No more out - outer and inner.
>
> Q. Did anyone instruct you to do that?
>
> A. It was my - Julio [a FedCap Supervisor] told everyone whoever works in the tents to clean the inner of the machine.

* * *

Q. Did he tell you how to clean the inner of the machine?

A. Nobody showed us. They just - the lieutenant came around, Guddemi, and told us to use a spray bottle and rag.

Q. Was anything else told to you?

A. Just to clean the machines.

Q. Did FedCap - did your supervisor at FedCap at any point show you how to clean the machine?

A. No.

Q. Did any of your coworkers show you how to clean the machine?

A. No. The lieutenant just told us to use a rag and a spray bottle.

Q. Who did you take your instructions from?

A. From Julio. But he came around to the tent and told us that we -

Q. Who is "he?"

A. The lieutenant [Guddemi]…

Q. Okay.

A. Showed us a bottle and a rag and he says, this is how you clean the machine. That's it.

Q. He actually showed you how to clean the machine?

A. No. He just said this is the bottle and a rag.

Id. ¶¶ 18, 19.

On September 16, 2005, at approximately 8:15 A.M., Guzman was "wiping the conveyor belt of the x-ray machine on lane number three with a rag when her hand got pulled into the machine between the belt and the first metal roller." Id. ¶ 20.

Guzman filed a Notice of Claim with NPS in accordance with the requirements of the Federal Torts Claims Act. Thereafter, NPS convened a Board of Inquiry (the "NPS Board" or "Board") and commenced a full investigation into the incident, the findings for which were released in January of 2006.

According to the Board's findings, several discouraged practices were utilized in cleaning the conveyor belts, including cleaning the belts while the machine was running and failing to use a swifter-type cleaning device in order to avoid direct contact with the conveyor belt. The Board further found that "Sgt. Nurdeen's [a Wackenhut employee] quick action with stopping and reversing the belt is highly commendable" and that "the

NPS will prepare a formal letter of commendation to Sgt. Mohammed Nurdeen for his quick and professional actions that he performed during the incident." Id. ¶ 25. In addition, the expert retained by L3, Clyde C. Richard, Ph.D. ("Dr. Richard"), opined that "[b]ecause of the speed at which [Guzman's] accident occurred, it would not be possible for someone at the control console to prevent the entrapment of Ms. Guzman's hand." Id. ¶ 28.

III. THE APPLICABLE STANDARD

Summary judgment is granted only where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); SCS Commc'ns, Inc. v. Herrick Co., 360 F.3d 329, 338 (2d Cir. 2004). The courts do not try issues of fact on a motion for summary judgment, but, rather, determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

"The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish [its] right to judgment as a matter of law." Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995). In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Gibbs-Alfano v. Burton, 281 F.3d 12, 18 (2d Cir. 2002). However, "the non-moving party may not rely simply on conclusory allegations or speculation to avoid summary judgment, but instead must offer evidence to show that its version of the events is not wholly fanciful." Morris v. Lindau, 196 F.3d 102, 109 (2d Cir. 1999) (internal quotes omitted). Summary judgment is appropriate where the moving party has shown that "little or no evidence may be found in support of the nonmoving party's case. When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." Gallo v.

Prudential Residential Servs., L.P., 22 F.3d 1219, 1223-24 (2d Cir. 1994) (citations omitted).

IV. NO WACKENHUT DUTY OF CARE TOWARDS THE PLAINTIFF HAS BEEN ESTABLISHED

To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was the proximate cause of his or her injuries. Gordon v. Muchnick, 579 N.Y.S.2d 745, 746 (App. Div. 1992). A defendant must have owed a duty of reasonable care to the particular plaintiff; absent such a duty, there can be no breach thereof and no liability. See Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928); Gordon, 579 N.Y.S.2d at 746. Where the facts concerning the relationship between the parties and the circumstances surrounding the occurrence are undisputed, the determination of whether a duty exists and negligence may be found is a question of law appropriate for summary judgment. Gordon, 579 N.Y.S.2d at 746; see also Palka v. Edelman, 358 N.E.2d 1019, 1020 (N.Y. 1976); Caserta v. Pennisi, 305 N.Y.S.2d 351, 352 (App. Div. 1969); Restivo v. Conklin, 157 N.Y.S. 627, 629 (App. Div. 1916); Carrillo v. Kreckel, 352 N.Y.S.2d 730, 732 (App. Div. 1974). The

determination of whether a duty exists is based on a careful inquiry whereby common sense, science, and policy play an important role in determining whether to impute liability for the damage suffered by one onto another. Waters v. N.Y. City Hous. Auth., 505 N.E.2d 922, 923 (N.Y. 1987) (citing De Angelis v. Lutheran Med. Ctr., 449 N.E.2d 406, 407 (N.Y. 1987)).

Plaintiff was an employee of FedCap, a company that was contracted by NPS to provide certain cleaning services at the subject site and other similar government owned facilities. FedCap was hired as an independent contractor and maintained control over the means and methods by which its employees performed these cleaning services.

Wackenhut was also hired by NPS as an independent contractor to provide general security services at the Statue and other government owned facilities. At the Statue, Wackenhut employees were expected to: 1) allow FedCap employees access to the x-ray screening device; 2) to activate the device at the request of FedCap employees; and 3) to keep track of how often FedCap employees cleaned the belts. Wackenhut and FedCap employees worked side-by-

side as separate, private contractors hired by the Federal Government and served at the pleasure and direction of NPS. Oversight of the Statue was the duty of the NPS. Oversight of individual employees fell to supervisors appointed by the contracting entities.

Under this arrangement, Wackenhut had no authority to supervise or control the work of other on-site contractors' employees. Nor did it do so, according to Guzman, who testified that she took direction solely from her FedCap supervisors and from NPS officers such as Lt. Guddemi. The only entity with the direct contractual authority to exert control over the means and methods utilized by FedCap employees, besides FedCap itself, was NPS.

As a general rule, negligence will not attach in such circumstances, where the first entity had no direct ability to control or direct the method in which the other entity, an independent contractor, performs his or her work. See Kleeman v. Rheingold, 614 N.E.2d 712, 715 (N.Y. 1993); Cun-En Lin v. Holy Family Monuments, 796 N.Y.S.2d 684, 686 (App. Div. 2005) ("[T]here is no liability under the common-law or [New York] Labor Law § 200 unless the

owner or general contractor exercised supervision or control over the work performed." (citations omitted)); Russin v. Louis N. Picciano & Son, 429 N.E.2d 805, 807 (N.Y. 1987) ("An implicit precondition to [the duty to provide a safe construction site] is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." (citation omitted)).

Further, the duty of care of a subcontractor requires that he perform the work for which he is contracted and does not dictate that he make additional efforts beyond the scope of his contract that perfect hindsight indicates he should have taken. See Rodriguez by Rodriguez v. Presbyterian Hosp., 688 N.Y.S.2d 120, 122 (App. Div. 1999) (holding that contractor "had no duty to go beyond the specifications of its contract to detect and warn of other latent hazards or defective conditions." (citing Stern v. 522 Shore Rd. Owners, 655 N.Y.S.2d 51, 53 (App. Div. 1997))); see also Russin, 429 N.E.2d at 808; H. R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 897-98 (N.Y. 1927); Lippman v. Island Helicopter Corp., 670 N.Y.S.2d 529, 529-30 (App. Div. 1988).

The undisputed evidence in the record establishes that Plaintiff's injuries were caused either by a defect in the design or manufacture of the x-ray machine or by a defect in the protocols implemented to clean the machine. Wackenhut was contracted to provide access to the machine and to turn the machine on when asked. No evidence on the record suggests that Wackenhut had any involvement in the design and manufacture of the machine, and Guzman has testified that no one from Wackenhut ever instructed her to clean the machines or prescribe a method by which she was to perform this task. The undisputed evidence therefore establishes that Wackenhut's contractual duties did not extend to ensuring the safe cleaning of the machine by other subcontractors over which it had no authority or control.

Moreover, Guzman has not demonstrated that some "failure" or "omission" on the part of Wackenhut proximately caused her injuries. To the contrary, the actions of Sgt. Nurdeen, the Wackenhut security guard at the subject site on the date of the incident, were "commendable," according to the findings by the NPS Board. Furthermore, the uncontested findings of L3's expert, Dr. Richard, established that even if the control panel of the

machine had been manned while Guzman cleaned the conveyor belt, the speed at which her hand was drawn into the pinch-point on the belt would have prevented the machine from being deactivated in time to prevent her injury.

Guzman has failed as a matter of law to demonstrate that Wackenhut owed Guzman a duty of care. Where a plaintiff cannot demonstrate that a defendant owed the plaintiff a duty of care, negligence cannot attach. See Palsgraf, 162 N.E. at 100; Gordon, 579 N.Y.S.2d at 746. Guzman's claims against Wackenhut for common law negligence are dismissed.

VI. CONCLUSION

Upon the facts and conclusions set forth above, the motion of Wackenhut is granted and the complaint of Guzman and the cross-claims for contribution and indemnification are dismissed with prejudice.

Submit judgment on notice.

So ordered.

New York, N.Y.
November 16, 2009

ROBERT W. SWEET
U.S.D.J.