SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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ANATOLIA VILLEGAS and JOSE ROMERO,

Plaintiffs,

-against-

RHEEM TEXTILE SYSTEMS, INC., HOFFMAN/NEW YORKER, INC., HARRIS HOWARD LLC and SEICKEL & SONS, INC.

Defendants.

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Index No.: 150100/15

Mot. Seq. Nos.: 005, 006

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

In this action, plaintiffs seek damages for personal injuries allegedly sustained by plaintiff Anatolia Villegas ("plaintiff") on October 17, 2013 while working at American Drive-in Cleaners ("American Drive-in").[1]

In Motion Number Sequence 005, defendant Seickel & Sons, Inc. ("Seickel") moves pursuant to CPLR 3212 for an Order granting summary judgment dismissing plaintiff's Complaint and all cross-claims asserted against it, striking the answer of Harris Howard LLC ("Harris Howard"), and precluding plaintiff from offering any expert testimony or evidence obtained in pre-action discovery regarding the subject steam press (the "Press") which allegedly injured plaintiff Anatolia Villegas.

In Motion Number Sequence 006, defendant Harris Howard moves pursuant to CPLR

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[1]Plaintiffs consented to the dismissal of plaintiff Jose Romero's claim for loss of consortium on grounds that he was not legally married to plaintiff Anatolia Villegas (Notice of Cross-Motion [Plaintiff's Affidavit], ¶ 27). Plaintiff Anatolia Villegas will hereinafter be referred to as "plaintiff." Furthermore, plaintiff discontinued action against defendant Hoffman/New Yorker, Inc. (*Id*, ¶ 4). Plaintiff also discontinued her cause of action against the remaining defendants for breach of an express warranty, and consented to not asserting a claim for failure to warn (*Id*, ¶ 26).

3212 for an Order granting summary judgment dismissing plaintiff's Complaint and all cross-claims asserted against it.

Plaintiff cross-moves pursuant to CPLR 3212 [Motion Sequence 005] for an Order granting it summary judgment against Seickel and dismissing the claims alleged for spoliation of the Press. Plaintiff also cross-moves pursuant to CPLR 3212 [Motion Sequence 006] for an Order granting her summary judgment against Harris Howard on grounds that Harris Howard violated Labor Law § 200.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff testified that she commenced working for American Drive-in, a dry cleaning facility, on June 3, 2013. Plaintiff was trained by an employee of American Drive-in named "Johanna" regarding how to utilize the Press for the ironing of sweaters. Her supervisor was named "Harry."

Plaintiff testified that her daily work cycle on the Press involved placing a sweater on the Press, pressing the vacuum, and adjusting the sweater for wrinkles. Plaintiff maintains that a bar, which she later clarified was red in color, would be pressed to close the Press. She would then push on a lever to enable the Press to come down and add steam. Plaintiff would use her right hand to close the Press, while her foot was located on the vacuum pedal. To keep the Press closed, her hand had to stay on the red bar. The steam would automatically come out when the Press was closed. It would take her about fourteen to fifteen seconds to press a sweater.

Plaintiff testified that at the time of her accident, she had taken a sweater and placed it on the Press, while stepping on her toes so that she could adjust the back part of the sweater.

Plaintiff had both hands on the sweater when her thigh hit the bar, making the Press close on her hands. The Press was on her hands for "some" seconds until she was able to pull away. After pulling away, she realized that she had been burned and went directly to the hospital. Plaintiff alleges that as a result of the accident, she suffered severe and disfiguring burns with residual scarring and functional limitations.

Following her accident, plaintiff returned to American Drive-in to view the subject Press with her attorney and with another individual who took measurements. She was not advised that any other workers had an accident on the same Press.

Harris Moreida, executive vice president of American Drive-in, testified on behalf of Harris Howard.[2] He maintains that American Drive-in is a retail dry cleaner with a plant located at 1347-45 Peninsula Boulevard ("1347-45 Peninsula"). American Drive-in launders clothing, cleans, tailors, performs alterations, and repairs garments. He reviewed a "C2" "Employer's Report of Work Related Injury/Illness" (the "Worker's Compensation Form"), a worker's compensation report, signed by Howard Moreida as president of American Drive-in.

Harris Moreida testified that he was plaintiff's supervisor at American Drive-in[3] and that he controlled the overall production flow on the floor, distributed work to different stations, and inspected the final product. He had the authority to tell plaintiff which machines to utilize, where

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[2]Howard Moreida is the President of American Drive-in and of Harris Howard. Harris Moreida testified that both American Drive-in and Harris Howard are owned 50/50 by Harris and Howard Moreida (Harris Moreida Deposition at 61). Although Harris Moreida testified on behalf of Harris Howard, he also testified as to his knowledge of American Drive-in.

[3]The subject testimony regarding Harris Moreida's role covered a review of the Worker's Compensation Form filled out by American Drive-in. Harris Moreida was listed therein as plaintiff's supervisor.

to work, and what to do. He was not a direct witness to plaintiff's accident, but was at American Drive-in when it occurred. He maintains that the dry cleaning facility was a plant and not a factory, however, he later referred to an area of the facility as a "factory space."

Harris Moreida testified that in 2009, the subject Press was purchased and ordered from Seickel and was utilized for steaming sweaters. He was aware that the Press was one which was refurbished. This Press was known as a "47" because the bottom part of the Press, known as the buck, measured "47" inches long. According to a Stipulation entered into between plaintiff and Howard Harris, sworn to on March 3, 2016, neither Harris Howard nor American Drive-in "modified, changed or altered the [P]ress from the date of its purchase [from Seickel] up to and including [the accident]."

Harris Moreida also testified that American Drive-in had about twenty presses on the floor in 2013. He maintains that all of the machines had a red bar underneath the bed or the buck of the Press, and that he was not aware that the bar was a safety release bar. Harris Moreida stated that when a worker pulled the bar, it would go down, while releasing the bar would cause it to go up. He maintains that there was no locking mechanism and that he never saw an instruction manual. He did not personally train the operators of the machines. He maintains that there was no safety device or guard which would prevent a worker from accidently touching the red bar to close the Press. Harris Moreida estimates that the bar had to be moved two to three inches for it to be activated with ten to twenty pounds of force. He remembers a similar accident occurring four years prior to that of plaintiff.

Harris Moreida testified further that Harris Howard had nothing to do with the operation

of American Drive-in, as it was a real estate corporation which owned the building at 1347-45 Peninsula. Harris Moreida maintains that American Drive-in used the machine following the accident, but that it was eventually scrapped following two inspections after their lawyer told them they need not preserve it.

Howard Moreida submits an affidavit which states that Harris Howard was the owner of the building located at 1347-45 Peninsula, and that Harris Howard performed no other business activities aside from the ownership of the building. Howard Moreida states that both he and his brother are responsible for the day to day operations of American Drive-in including the supervision of all workers and the management of the business. He maintains that American Drive-in hired plaintiff and trained plaintiff in the operation of a press which it purchased from Seickel. He states that as president of American Drive-in, he signed the Workers Compensation Form advising American Drive-in's workers' compensation carrier that plaintiff's accident had occurred and that she had sustained injuries.

George Thompson ("Thompson") testified that from 1983 to 1994, he was employed by Rheem Textile Systems and that the name of the company changed in 1989 to Hoffman/New Yorker ("Rheem/Hoffman"). Rheem/Hoffman was the original manufacturer of the pressing machines. Thompson was a designer of these machines and supervised the engineering department for all manufacturing. At his deposition, he reviewed photographs of the subject Press.

Thompson states that the design of the Press was reasonably safe when it was originally designed in 1975. He testified that even if someone had inadvertently pushed the close button

while hands were in the machine, the machine would not supply enough air to fully close. Upon reviewing a picture of the inspected Press, Thompson noticed that the original control system with table-mounted lock lever, release bar, timers, and pneumatic interlocking controls, were all missing and replaced by an under table bar close mechanism. He also noticed that the half-inch pressure feature was disabled. Thompson testified that the color of the machine was changed, that the close bar was not original to the machine, and that the pneumatic control valves had been replaced.

Thompson testified that the machine was taken apart and at some point placed back together. He noticed that the safety release bar was changed to a red actuating bar and that he had seen this same change made by Seickel in which two other accidents occurred. Thompson testified that the subject Press violated industry standards as the machine built in 1975 required both hands to be out of the point of operation in order for it to be closed and locked. He concluded that the incident would not have occurred if the Press was not modified and that the Press in its current condition is not safe and has the potential to trap a worker's hands. Thompson would have recommended that the company purchase a different machine if it was being utilized for anything but for pressing pants.

Joseph Seickel ("Mr. Seickel"), president of Seickel, testified that it sells steam equipment as well as parts. Mr. Seickel maintains that Seickel had a relationship with American Drive-in for twenty years and that it sold the company between seven to eight presses. American Drive-in informed Seickel as to the kind of machine it needed Seickel to supply and the machine's configuration. According to Mr. Seickel, American Drive-in requested a bar closing

mechanism. The machines sold to American Drive-in would have an automatic vacuum and a bar closing mechanism and most of the activation bars were painted red or made of a red bar.[4] He did not have any recollection about the particular transaction or sale of the subject Press other than knowing that Seickel sold it to American Drive-in.

Mr. Seickel testified that a two-hand button activation control device was safer for a worker than the red bar close activation device as sold to American Drive-in, but that American Drive-in insisted on the red bar configuration.[5] He maintains that prior to 2009, he had mentioned to Harris or Howard Moreida that for safety purposes, most of the new machines were being produced with a two button close and a third button for locking, so that the operator did not have their hands anywhere on the locking surface.

Mr. Seickel believes that while there was an "ANSI" standard which determined that a two-hand activation system was the safest. He testified that from reviewing the invoice for the Press, someone other than Seickel made changes to remove a lock lever and the release bar.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any

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[4]Mr. Seickel testified that American Drive-in informed Seickel about "the type of machine, type of closing mechanism they would want on the machine and automatic steam, automatic vacuum on the machine" (Seickel motion, Exhibit "I" [Seickel deposition] at 40).

[5]Mr. Seickel also testified that he spoke to the Moreida's informing them of the safer configuration but that they did not want Seickel to deliver a different configuration "because that is what their people were used to working with, this is what they wanted" (Moreida Deposition at 102, 104). A two-palm control necessitates that both hands are away from the point of operation (*Id.* at 99).

material issues of fact . . . ." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).[6]

Seickel's Motion for Summary Judgment

Seickel argues that summary judgment must be granted in its favor because it sold the Press pursuant to American Drive-in's specifications and therefore, it cannot be held liable for a claim alleging a design defect. Seickel contends that a "contract specification defense" applies to manufacturers and sellers if a product is manufactured according to instructions and blueprints (*See Beckles v General Elec. Corp.*, 248 AD2d 575, 576 [2d Dept 1998] [holding "[a] contractor who manufactures a product following the plans and specifications of the purchaser will not be held liable for an injury caused by an alleged design defect in the product"]). Seickel argues that the bill of lading and invoice for sale includes a date of sale of June 10, 2009, and states that the machine had "BAR CLOSE AS REQUESTED BY CUSTOMER TO MATCH HIS EXISTING PRESSES IN USE."

Seickel maintains that American Drive-in has been utilizing this configuration of the steam press for decades and that American Drive-in has never had a similar accident. Seickel claims that although it advised American Drive-in that there were options other than utilizing the activation bar, including button closing mechanisms, American Drive-in allegedly refused to

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[6]At the outset, plaintiff argues that the motion for summary judgment filed by Seickel must be denied as it was filed more than 60 days from the filing the Note of Issue. Here, given the motion was filed on the first business day following the dispositive motion deadline of 60 days after filing the Note of Issue, which fell on a weekend, the motion is timely.

consider such configurations for the Press.

In opposition to Seickel's motion, plaintiff contends that the moving papers are devoid of any argument that the subject Press was reasonably safe at the time of its refurbishment and sale. Plaintiff argues that the subject Press was modified by Seickel and sold to American Drive-in. Plaintiff maintains that the modification by Seickel removed an emergency stop bar located in front of the operator and changed an activation bar, making the machine unreasonably dangerous. Plaintiff argues that the bar was a safety device so that if the Press unexpectedly cycled, moving it a fraction of an inch would open it, rather than close it. Plaintiff also argues that Thompson testified that the machine was not reasonably safe, that it violated industry standards, and that the incident would not have occurred if the Press had remained in its original design.

"On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact" (*S. J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see also Medrano v Port Auth. of N.Y. & N.J.*, 154 AD3d 521, 521-522 [1st Dept 2017] [holding the assistant foreman's affidavit contradicted the plaintiff's account of the accident raising a credibility question]; *Psihogios v Stavropoulos*, 269 AD2d 295, 296 [1st Dept 2000] [holding issues of credibility should be left for resolution by the trier of fact]).

Here, based upon the testimony from the various witnesses, a question of fact exists as to whether the Press which Seickel provided was safe and whether or not Harris Moreida requested a specific design which contributed to plaintiff's accident. Harris Moreida testified that he did not request modifications from Seickel before the Press was delivered and that he did not ask

Seickel for a bar closure to match the other presses at the premises. He testified that he asked for the machines which he always received and that he did not ask Seickel to change the way in which the presses were activated. He testified that although the bill of lading states that the bar close was requested by the customer to match the existing presses currently in use, he did not make such request.

Thompson's testimony also questions whether the Press was safe as he testified that the Press was modified and that the incident would not have occurred if it had remained as originally designed. He testified that in its current condition, the Press is not safe and has the potential to trap a worker's hands during a cycle.

Therefore, given that the testimony raises an issue of fact as to whether or not the Press was designed pursuant to American Drive-in's specifications, Seickel's motion for summary judgment must be denied.

Spoliation

Seickel also argues that because the Press was destroyed before it had an opportunity to conduct an inspection, the answer of Harris Howard must be stricken and plaintiff should be precluded from offering any expert testimony or evidence obtained in pre-action discovery of the Press.

Seickel contends that on September 18, 2014, there was a "pre-suit" court proceeding and a court order was issued in Supreme Court, Nassau County allowing plaintiff to inspect the machine (Decision and Order, dated September 16, 2004, granting plaintiff's motion for pre-action disclosure [Hon. Margaret C. Reilly, J.S.C.] ["Justice Reilly Order"]). Seickel maintains

that on January 6, 2015, less than three and a half months later, plaintiff commenced the subject action against Seickel. Seickel argues that the Press was sold for parts before they were brought into the action, that they were not part of the two inspections of the Press, and that the deliberate and willfull destruction of the Press by American Drive-in and by Harris Howard has compromised Seickel's ability to defend the claims alleged by plaintiff.

Seickel also contends that plaintiff's complaint against Seickel should be stricken or plaintiff must be precluded from offering any evidence obtained from the inspections because plaintiff has refused to disclose who inspected the Press. At no time before the commencement of the lawsuit was Seickel made aware of the incident or inspections.

In opposition, Harris Howard contends that Seickel has not met its burden of proving that Harris Howard negligently and/or intentionally destroyed key evidence. It contends that at the time the Press was removed, American Drive-in was not under a court order to preserve the machine and plaintiff had not placed any party on notice of the potential for a future lawsuit. Harris Howard also contends that Seickel has failed to demonstrate that it is prejudiced by the absence of the Press as it had the opportunity to review photos of the Press. It contends that numerous photographs and video files of the Press were generated and disclosed in April of 2015.

Both CPLR 3126 and New York's common law-doctrine of spoliation may authorize the imposition of sanctions for either willful or negligent destruction of evidence. "Under CPLR 3126 if a court finds that a party destroyed evidence that ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are just [internal quotation

marks omitted]" (*Ortega v City of New York*, 9 NY3d 69, 76 [2007]).

Under the common-law doctrine of spoliation, "[w]hen a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned [internal quotation marks and citation omitted]. . .." (*Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2d Dept 2007]; *see also Squitieri v City of New York*, 248 AD2d 201, 202-203 [1st Dept 1998] [Spoliation occurs "[w]hen a party alters, loses or destroys key evidence before it can be examined by the other party's expert" and spoliation sanctions "are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense"]).

Here, Seickel fails to meet its burden to demonstrate that either American Drive-in or Harris Howard negligently or intentionally destroyed evidence. The Justice Reilly Order does not require the preservation of the Press following plaintiff's inspection. The Order states that American Drive-in "is directed to permit the inspection, testing, and photographing/videographing of the subject commercial iron at a date and time to be arranged by the parties that is convenient for all, to occur within twenty (20) days from the date of this order" and that "the temporary restraining order issued in the initiating order to show cause, dated December 9, 2013, shall remain in effect until the above directed pre-action discovery is completed" (Affirmation in Support of Seickel's Motion for Summary Judgment, Exhibit "K").

According to the caption of the Justice Reilly Order, Seickel was not a named party in the action and American Drive-in was the only defendant. Most significantly, the Justice Reilly

Order does not indicate that the Press was to be preserved following its inspection. Furthermore, there is insufficient evidence that Harris Howard was on notice that the Press would be needed for future litigation (*see Westbroad Co. v Pace El. Inc.*, 37 AD3d 300, 300 [1st Dept 2007]; *Lovell v United Skates of Am., Inc.*, 28 AD3d 721, 721 [2d Dept 2006]). Given that Seickel fails to meet its burden to demonstrate that either plaintiff or Harris Howard intentionally or negligently disposed of the Press after two inspections, and as Seickel was not, at that time, a party to the action, the part of Seickel's motion striking the answer of Harris Howard and precluding plaintiff from offering any expert testimony or evidence obtained as a result of its inspection of the Press is denied.

Harris Howard's Motion for Summary Judgment on plaintiff's Labor Law § 200 Claim

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work'" [internal quotation marks and citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see*

McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts., 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012] [internal citations omitted]). Harris Howard contends that plaintiff has failed to demonstrate that it had the authority to direct, supervise, or control her work. They also maintain that there is no allegation that the subject building had a defect.

Here, plaintiff's claim under Labor Law § 200 fails both standards. Any claim by plaintiff that her injuries were caused by a dangerous condition is dismissed as a matter of law. Plaintiff fails to demonstrate that the building owned by Harris Howard in which American Drive-in was located was defective or that any other defect existed within the facility other than the alleged problem with the subject Press. The Press was not part of the subject building's infrastructure. Rather, the Press constituted equipment purchased by American Drive-in from Seickel for its dry cleaning business.[7]

Likewise, with respect to the means and methods of plaintiff's work, plaintiff fails to demonstrate that Harris Howard purchased the subject Press, trained or supervised plaintiff, or controlled any of plaintiff's work at American Drive-in. The testimony of Harris Moreida

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[7]Plaintiff's claim that the subject building was a factory does not without more make Harris Howard liable under Labor Law § 200.

revealed that Harris Howard has no employees and owns the building in which American Drive-in operates (Harris Moreida Deposition, at 21, 58, 165; Howard Moreida Affidavit, sworn to on July 21, 2016 ["Moreida Affidavit"] at ¶¶ 2-3).

Most significantly, plaintiff testified that she worked for American Drive-in. In addition, the Moreida Affidavit attests that American Drive-in hired plaintiff, trained plaintiff on the machine which caused her injury, and that he signed, in his capacity as president of American Drive-in, the Workers' Compensation Form advising American Drive-in's workers' compensation carrier that plaintiff's accident occurred. Given that Harris Howard did not have the authority to supervise or control the performance of plaintiff's work, Harris Howard's motion for summary judgment dismissing plaintiff's Labor Law § 200 claim is granted and plaintiff's cross-motion for summary judgment on her Labor Law § 200 claim against Harris Howard is denied as moot.[8]

CONCLUSION

Accordingly, it is

ORDERED, that the motion by Seickel & Sons, Inc. for summary judgment dismissing plaintiff's Complaint, and precluding plaintiff from offering expert testimony or evidence obtained in pre-action discovery regarding the subject Press [Motion Seq. No. 005] is denied; and it is further

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[8]In light of the above determination, this Court need not reach the argument by Harris Howard that it is the alter ego of plaintiff's employer American Drive-in, thereby barring plaintiff from seeking recovery against Harris Howard pursuant Workers' Compensation Law § 11. Assuming arguendo however that Harris Howard is considered an alter ego of American Drive-in, plaintiff's claims against Harris Howard would as a result likewise be dismissed.

ORDERED, that plaintiff's cross-motion for summary judgment as against Seickel & Sons, Inc. is granted only to the extent of dismissing claims of spoliation asserted by Seickel and is otherwise [Motion Seq. No. 005] denied; and it is further

ORDERED, that Harris Howard LLC's motion for summary judgment dismissing plaintiff's claim and all cross-claims against it [Motion Seq. No. 006] is granted; and it is further

ORDERED, that plaintiff's cross-motion for summary judgment as against Harris Howard LLC [Motion Seq. No. 006] is denied as moot.

Dated: June 19, 2018

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.