

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RICHARD JULIANO,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 96-CV-6455
AMERICAN REMODELING, INC., d/b/a	:	
AMRE, INC., SEARS SIDING, and	:	
METROPOLITAN EDISON,	:	
Defendants.	:	

MEMORANDUM

Green, S.J.

May _____, 2002

Presently before the Court is Defendants American Remodeling, Inc., d/b/a AMRE, Inc. and Sears Siding's Motion for Summary Judgment, Plaintiff's Response, Defendants' Reply and Plaintiff's Sur-reply. For the following reasons, Defendants' motion will be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a negligence action initiated by Plaintiff Richard Juliano ("Plaintiff") to recover for injuries sustained while performing work as an independent contractor at the home of John Angst and Anne Marie Angst. The material facts are not in dispute. Mr. and Mrs. Angst entered into a contract with Defendant Sears Siding, a division of Sears Roebuck, Co., to install siding, gutters and down spouts to their home at 199 North Chestnut Street in Bath, Pennsylvania. Subsequently, Defendant Sears Siding entered into a contract with their authorized contractor, Defendant American Remodeling, Inc., d/b/a AMRE, Inc. ("AMRE"), to complete the job; the AMRE contract provided that the work could be completed by a qualified installer.

Thereafter, Defendant AMRE entered into an agreement with Plaintiff, entitled "Work Order for Subcontractors." (See Defs.' Mot. for Summ. J., Ex. D.) To assist Plaintiff in

completing the job, Edmund Coppinger, a Sears salesperson who had previously visited the Angst home to obtain measurements and calculate an estimate, provided Plaintiff with a Specification Sheet that included a list of the necessary materials for the job and a schematic of the Angst home. (See Pl.’s Resp., Ex. B.) The Specification Sheet also included a section entitled “Areas of Special Concern,” which noted only “High Walls 30’ +.” (See Pl.’s Resp., Ex. B.) Plaintiff also saw the work site first hand, because as he had done on previous jobs, he performed an inspection of the premises. (See Defs.’ Mot. for Summ. J., Ex. F.)

It is further undisputed that Plaintiff was injured in the process of completing the job. Specifically, Plaintiff alleges that while he was standing on an aluminum ladder leaning against the top of the Angst home, he attempted to install a liter pipe that needed to be installed behind an overhead, pole-to-pole power line attached to the side of the house. Believing that there was sufficient space between the house and the wire, Plaintiff attempted to slip the pipe over and behind the wire. The pipe touched the electrical connection and Plaintiff suffered severe electrical injuries.

As a result of the foregoing, Plaintiff initiated the instant action against several entities, including Defendants AMRE and Sears Siding (“moving Defendants” or “Defendants”), Metropolitan Edison Company, John Angst and Anna Marie Angst, Mark Kenyon, John Doe, and ABC Company in the Superior Court of New Jersey, Ocean County alleging, *inter alia*, negligence, breach of express and implied warranties, and strict liability. The case was then removed to the United States District Court for the Eastern District of Pennsylvania. Subsequently, all of the original defendants, except the moving Defendants and Metropolitan Edison Company, were dismissed from the action.

Defendants moved for summary judgment. Plaintiff responded, Defendants replied and Plaintiff filed a sur-reply. Jurisdiction in the instant matter is premised on diversity under 28 U.S.C. § 1332.¹

II. LEGAL STANDARD

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). A fact is “material” only if it will affect the outcome of the suit under the governing law. See Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). A dispute regarding a material fact is genuine only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id. All inferences must be drawn in favor of the party against whom judgment is sought. See American Flint Glass Workers, AFL-CIO v. Beaumont Glass Company, 62 F.3d 574, 578 (3d Cir. 1995) (citation omitted).

The movant carries the initial burden of showing that no genuine issue of material fact exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 333 (1986). Once the movant carries this burden, the nonmoving party must set forth specific facts showing that there is a genuine issue of material fact and must establish the existence of every element essential to his case, based on the

¹Neither Plaintiff nor Defendants specifically argue that Pennsylvania law does or does not apply. Although Plaintiff resides in New Jersey, the events giving rise to the cause of action occurred in Pennsylvania, and the parties cite Pennsylvania law in their memoranda on summary judgment. Generally, in resolving a claim brought under the Court’s diversity jurisdiction, the law to be applied is the law of the forum state. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); see also Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 417 (1996) (holding that, under Erie doctrine, “federal courts sitting in diversity apply state substantive law and federal procedural law”). Since neither party disputes the application of Pennsylvania law, I will apply Pennsylvania law in the instant action.

affidavits or by the depositions and admissions on file. See Pastore v. Bell Telephone Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994) (citing Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992)); see also Fed.R.Civ.P. 56(e); he cannot rely on conclusory allegations in his pleadings or memoranda. See Pastore, 24 F.3d at 511. Any evidence presented must be viewed in the light most favorable to the nonmoving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983).

III. DISCUSSION

Defendants assert that as a matter of law liability may not be imposed against them because Plaintiff is an independent contractor and as such, is barred from recovery because the task Plaintiff was performing when injured did not present any special danger or peculiar risk. As a general rule, “[t]he employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.” Restatement (Second) of Torts § 409 (1965); see also Hader v. Copley Cement Co., 410 Pa. 139, 150-51, 189 A.2d 271, 276-77 (1963). However, Sections 416 and 427 of the Restatement (Second) of Torts create a limited exception to this general rule.² These sections hold an employer liable for the negligent

²Sections 416 and 427 have been adopted as the law of Pennsylvania. See Philadelphia Electric Co. v. James Julian, Inc., 425 Pa. 217, 228 A.2d 669 (1967). They provide:

§416. Work Dangerous in Absence of Special Precautions. One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

§ 427. Negligence as to Danger Inherent in the Work. One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or

acts of an independent contractor or his employees if the independent contractor is able to demonstrate that the work he was performing at the time of the injury involved a “special danger” or “peculiar risk.” See Ortiz v. Ra-El Dev. Corp., 365 Pa. Super. 48, 52-53, 528 A.2d 1355, 1357-58 (1987), *appeal denied*, 517 Pa. 608, 536 A.2d 1332 (1987).

However, Plaintiff does not claim that the conduct here falls within either of these exceptions to the general rule. In fact, in his response to Defendants’ motion, Plaintiff explicitly denies relying on the above exceptions by stating that the “defendants’ argument is completely misplaced because the plaintiff has not, and does not plan to, characterize plaintiff’s work as involving a ‘special risk.’” (Pl.’s Resp. at 5.) Rather, Plaintiff claims that Defendants’ motion for summary judgment must be denied because the injury suffered by Plaintiff was caused by Defendants’ negligence in failing to warn Plaintiff of the danger posed by the wires and in failing to take reasonable precautions to make the workplace safe for Plaintiff. (See Pl.’s Resp. at 6.)

In order to prevail on a cause of action in negligence under Pennsylvania law, a plaintiff must establish a duty requiring the actor to conform to a certain standard of conduct, a failure to conform to that standard, a causal connection between the conduct and the resulting injury, and actual damage. See Morena v. South Hills Health Sys., 501 Pa. 634, 642, 462 A.2d 680, 684 (1983) (citing Prosser, Law of Torts § 30, at 143 (4th ed. 1971)). Therefore, “[b]efore a person may be subject to liability for failing to act in a given situation, it must be established that the person has a duty to act; if no care is due, it is meaningless to assert that a person failed to act with due care.” Wenrick v. Schloemann-Siemag Aktiengesellschaft, 523 Pa. 1, 8, 564 A.2d

has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor’s failure to take reasonable precautions against such danger.

1244, 1248 (1989). Whether a defendant owes a duty of care to a plaintiff is a question of law. See Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1366 (3d. Cir. 1993) (citations omitted).

Pennsylvania law has recognized that an “employer of an independent contractor has no duty to warn the [independent] contractor or his employees of a condition that is at least as obvious to them as it is to him.” Mentzer v. Ognibene, 408 Pa. Super. 578, 594, 597 A.2d 604, 612 (1991); Colloi v. Philadelphia Electric Co., 332 Pa. Super. 284, 292, 481 A.2d 616, 620 (1984). While it is undisputed that Defendants did not notify Plaintiff of the presence of the wires nor did they take any steps to make the wires safe, it is clear that under the law of Pennsylvania, as it relates to Plaintiff in his capacity as an independent contractor, there is no duty owed as Plaintiff claims. Absent a duty owed by Defendants to Plaintiff, there can be no cause of action for negligence.

Moreover, relying on Plaintiff’s description of the incident, even if there had been a duty owed, the failure to notify Plaintiff of the wires would not have been a substantial factor in causing the accident that injured him because Plaintiff readily admits that he discovered the wires and knew of their existence at all relevant times. There is no evidence of record in this case that permits a reasonable inference that the danger posed by the wires was more obvious to Defendants than Plaintiff. Because under the undisputed facts of this case, Pennsylvania courts would not hold that Defendants owed a duty to Plaintiff, Plaintiff’s allegations of negligence are without support, and I will grant Defendants’ motion on this basis.

Also, Plaintiff has cited no evidence of any express warranty provided to him in the contract nor is there anything in the contract that would permit one to infer an implied warranty; moreover, Plaintiff has cited no case or authority in Pennsylvania which creates such an implied

warranty. Finally, there is no evidence to support a claim for strict liability.³ Accordingly, summary judgment will be entered in favor of Defendants AMRE and Sears Siding and against Plaintiff upon resolution of the claims against Defendant Metropolitan Edison Company.

An appropriate order follows.

³In the instant motion, Defendants rely upon an alleged right to indemnity as an alternative defense and ground for summary judgment. Specifically, Defendants argue that even if there is a basis for liability, they are relieved from any claims brought by Plaintiff because the indemnity provisions in the Work Order for Subcontractors entitles them to complete indemnification from Plaintiff for all claims. Plaintiff argues against indemnification, claiming that because Defendants were negligent and because the indemnity provisions contained in the Work Order for Subcontractors do not explicitly provide that Plaintiff is to indemnify Defendants when the loss is occasioned by Defendants' own negligence, the indemnification provisions cannot be a basis for summary judgment.

However, in the instant matter, there is no evidence that supports the imposition of liability on Defendants. Defendants breached no duty to Plaintiff. Therefore, finding no basis upon which to impose liability on Defendants, there is no reason to address Defendants' defense of indemnity.

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AMRE, INC., SEARS SIDING, and	:	
METROPOLITAN EDISON,	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of May, 2002, upon consideration of Defendants American Remodeling, Inc., d/b/a AMRE, Inc.'s and Sears Siding's Motion for Summary Judgment, Plaintiff's Response, Defendants' Reply and Plaintiff's Sur-reply, **IT IS HEREBY ORDERED** that Defendants' motion is **GRANTED** and summary judgment shall be entered upon resolution of the claims against Defendant Metropolitan Edison Company, which remains a party to this action. **IT IS FURTHER ORDERED** that the Courtroom Deputy Clerk shall schedule a pre-trial conference as to Defendant Metropolitan Edison Company and Plaintiff.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.