

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

|                                      |   |              |
|--------------------------------------|---|--------------|
| JEFFERSON YOUNG,                     | : | CIVIL ACTION |
| VS.                                  | : |              |
| COMMERCIAL GROUP, INC. t/a ans d/b/a | : |              |
| COMMERCIAL CORING AND SAWING,        | : |              |
| and HOME DEPOT USA, INC.             | : |              |
| VS.                                  | : |              |
| MILRIC CONSTRUCTION CORP.            | : |              |
| VS.                                  | : | NO. 01-05074 |
| L.G.B. MECHANICAL                    | : |              |

MEMORANDUM AND ORDER

CHARLES B. SMITH  
UNITED STATES MAGISTRATE JUDGE

Plaintiff, Jefferson Young, brought the instant action against defendants, Commercial Group, Inc. t/a and d/b/a Commercial Coring and Sawing (“Commercial Group”) and Home Depot USA, Inc. (“Home Depot) for injuries he sustained on November 11, 1999, when he alleges he was struck by a metal beam, which was being worked on by a Commercial Group employee, while working at Home Depot’s premises. Plaintiff initially filed a Complaint in the Court of Common Pleas, Philadelphia County on September 6, 2001 and on October 5, 2001, the matter was moved to this Court. Defendant, Home Depot filed a Third-Party Complaint against Milric Construction Corp. (“Milric”) on or about December 12, 2002, based upon a contract between Home Depot and Milric, under which Home Depot hired Milric as a general contractor. On or about January 31, 2002, Milric filed a Third-Party Complaint against L.G.B. Mechanical (“L.G.B.”), plaintiff’s employer, who had been hired by Milric as a subcontractor. Defendant Home Depot and Third-Party Defendant Milric have both filed Motions for Summary Judgment. For the reasons which follow, Home Depot’s

motion will be granted and Milric's will be denied.

## **I. FACTS AND PROCEDURAL BACKGROUND**

On October 21, 1999 Home Depot entered into a contract and hired Milric as the General Contractor to construct a tool rental center at its store located at 4600 Roosevelt Blvd., Philadelphia, Pennsylvania. (Exhibit C- Milric's Motion). Milric subcontracted with Commercial Coring & Sawing for the construction of the Home Depot Tool Rental Center, but did not enter into a written contract until December 29, 1999. (Exhibit G- Milric's Motion). In January of 2000, the owner of Commercial Coring & Sawing incorporated defendant Commercial Group, Inc. and ceased operating Commercial Coring & Sawing. By contract dated October 21, 1999, Milric also subcontracted with L.G.B. to provide plumbing services for the project. (Exhibit D- Milric's Motion).

On November 11, 1999, plaintiff was working for L.G.B. on the Tool Rental Center project at the Home Depot located at Roosevelt Blvd. in Philadelphia. He was involved in core drilling activity which was taking place in the garden department section of the store. (Exhibit A, p.29). Plaintiff's job included obtaining water for a canister used in the core drilling process. According to plaintiff and his supervisor, David Wood, the manager of the Home Depot store directed the LGB supervisor to a water source located in a utility room in the far end of the building. (Exhibit A, pp. 30, 128, 129, Exhibit B, p. 14). In order to get to the water source, plaintiff walked through an archway connecting the interior of the store with the garden center, which was being demolished by Commercial Group. According to plaintiff, as he walked through the archway, unimpeded, the Commercial Group employee dropped the door frame beam, which he alleges landed on his head and shoulders, causing serious and permanent injuries. (Exhibit A, pp. 30, 31).

Defendant Home Depot asserts that it is entitled to summary judgment because it was not

involved in the incident and had no control over the manner in which the Commercial Group employees were removing the beam. In addition, Home Depot alleges that Commercial Group is obligated to indemnify Home Depot. Milric also argues that it is entitled to summary judgment because no Milric employees were identified as witnesses or involved in the incident and because they did not have control over the Commercial Group employees removing the beam. In addition, Milric asserts that Commercial Group and L.G.B. are obligated to indemnify Milric.

## II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) states that summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED R. CIV. P. 56(c); see also Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986); Williams v. Borough of West Chester, 891 F.2d 458, 463-464 (3d Cir. 1989). A factual dispute is “material” only if it might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). For there to be a “genuine” issue, a reasonable factfinder must be able to return a verdict (or render a decision) in favor of the non-moving party. Id.

On summary judgment, it is not the court’s role to weigh the disputed evidence and decide which is more probative, or to make credibility determinations. Boyle v. County of Allegheny, Pennsylvania, 139 F.3d 386, 393 (3d Cir. 1998). Rather, the court must consider the evidence, and all reasonable inferences which may be drawn from it, in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3d Cir. 1987). If a conflict arises between the evidence presented by both sides,

the court must accept as true the allegations of the non-moving party. See Anderson, 477 U.S. at 255.

Once the movant has carried its initial burden, Rule 56(e) shifts the burden to the nonmoving party as follows:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

FED. R. CIV. P. 56(e). However, to raise a genuine issue of material fact "the [summary judgment] opponent need not match, item for item, each piece of evidence proffered by the movant,' but simply must exceed the 'mere scintilla' standard." Petruzzi's ICA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1230 (3d Cir.), cert. denied, 510 U.S. 994 (1993). Summary judgment may be granted only if, after viewing all evidence in the light most favorable to the non-movant, no jury could decide in that party's favor. Tigg Corp., 822 F.2d at 361.

### **III. DISCUSSION**

Home Depot:

Plaintiff alleges that Home Depot owed him, as a business invitee, a duty of care. Section 343 (1965) of the Restatement (Second) of Torts, which defines the liability of a possessor of land to an invitee particularly with respect to dangerous conditions known or discoverable by the possessor, provides as follows: "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees,

and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger." As to liability of the employer of an independent contractor, there is a general rule that the employer of an independent contractor is not liable for physical harm caused another by an act or omission of the contractor or his servants. Hader v. Coplay Cement Co., 410 Pa. 139, 150, 189 A.2d 271, 277 (1963). An owner of property is under "no duty to protect the employees of an independent contractor from risks arising from or intimately connected with defects or hazards which the contractor had undertaken to repair or which are created by the job contracted." Calender v. Allegheny County Sanitary Authority, 208 Pa. Super. 390, 394, 222 A.2d 461, 463 (1966).

There is however, an exception to this general rule of non-liability if the owner of the property retains control over the project. According to Section 414 of the Restatement (Second) of Torts "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Even considering the facts in the light most favorable to plaintiff, there is no evidence that Home Depot retained control of the manner in which the work was being performed which would justify sending this issue to a jury. There is no evidence whatsoever to indicate that Home Depot was controlling the manner in which Commercial Group was removing the door frame and there is not sufficient evidence that Home Depot retained control over the manner in which LGB was performing its work. Although plaintiff and the LGB supervisor, Mr. Woods claim that the Home Depot manager directed them to a water source in the far end of the building, there is absolutely no evidence that he directed them to travel through the archway where the accident occurred. In fact, Mr. Woods testified that the utility

room was inside the main store and that you could get to it by leaving the garden center and entering the front door of the store. (Exhibit B, p. 14). He testified that he informed plaintiff that work was being performed on the archway and that he could use a different door to get to the utility room. (Exhibit B, p. 16). In addition, plaintiff acknowledged that he could have gone a different way if he had known that there were risks going through the archway. (Exhibit A, p. 53). It appears that the Home Depot manager did nothing more than tell plaintiff's supervisor where the utility room was located. Plaintiff also testified that the Home Depot manager visited the work area on several occasions throughout the day to monitor the progress of the work and that he was present after plaintiff was injured. However, this is clearly not enough to indicate that Home Depot maintained control over the manner in which the work was being performed. Rather, it is precisely the scenario described in Comment (c) of the Restatement of Torts, Second, which provides as follows:

“In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such retention of a right of supervision that the contractor is not entirely free to do the work in his own way.” (emphasis supplied).

There is clearly no evidence that Home Depot retained such control in this case which would justify sending this issue to a jury.

As plaintiff argues, there are two additional exceptions to the general rule that a property owner is not liable to employees of independent contractors: the “superior knowledge doctrine” and the “peculiar risk doctrine”, which were endorsed by the Pennsylvania Supreme Court when it adopted

sections 416 and 427 of the Restatement (second) of Torts. See Philadelphia Electric Co v. James Julian, Inc., 425 Pa. 217, 228 A.2d 669 (1967). Sections 416 and 427 of the Restatement (second)

Torts provide as follows:

§ 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 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.

The Pennsylvania Superior Court first summarized the protections afforded by these sections of the Restatement in a two part test in the case of Ortiz v. Ra-El Development Corp., 365 Pa. Super. 48, 53, 528 A.2d 1355, 1358 (1987), alloc. denied, 517 Pa. 608, 536 A.2d 1332 (1987). The Court stated that a special danger or peculiar risk exists where: “(1) the risk is foreseeable to the employer of the independent contractor at the time the contract is executed, i.e., a reasonable person, in the position of the employer, would foresee the risk and recognize the need to take special measures; and (2) the risk is different from the usual and ordinary risk associated with the general type of work done, i.e., the specific project or task chosen by the employer involves circumstances that are substantially out-of-the-ordinary.” Lorah v. Lupold Roofing Co., Inc., 424 Pa. Super. 439, 622 A.2d 1383, (1993), citing Ortiz v. Ra-El Development Corp., 365 Pa. Super. at 53, 528 A.2d at 1358.

We do not find that the work in this case satisfies the second prong of this two part test. The

work that was to be performed, i.e., the removal of a doorway, does not involve a risk that is substantially out of the ordinary on a construction site. As was the case in Lorah v. Lupold Roofing, it is the manner in which it was performed, or the failure of the subcontractor to take adequate precautions which increased the risk associated with the task. Lorah, 424 Pa. Super. at 446, 622 A.2d at 1387. The general contractor hired by Home Depot and the subcontractor hired by Milric were in the business of performing such work and therefore were in a better position than Home Depot to know of the dangers associated with the work. The Court has held that a peculiar risk exists in cases where the danger encountered is different than that typically associated with the general type of work performed. Peffer v. Penn 21 Associates, 406 Pa. Super. 460, 465, 594 A.2d 711, 713 (1991). Here, we do not find that to be the case. There is no evidence of anything unusual about the removal of the doorway. According to plaintiff's testimony, which is in dispute, he had discussions after the accident regarding the fact that a lift was not used to remove the beam. However, even accepting plaintiff's testimony and if a lift is ordinarily used, there is no evidence that Home Depot contemplated that the work would be performed differently in this case. Furthermore, contrary to plaintiff's contentions regarding the store remaining open during the construction, it is undisputed that this activity was being performed in an area that was not open to the public and the garden section of the store was sectioned off from the area in which the public was permitted. There was no peculiar risk or special danger created by the removal of the doorway.

We therefore do not find any of the exceptions to the general rule of owner non-liability to apply to this case and will accordingly grant Home Depot's motion for summary judgment.

Milric:

Milric, the general contractor hired by Home Depot, alleges that it should also be dismissed

because none of its employees were present or involved in the accident. As plaintiff argues, Milric agreed in its contract with Home Depot “(a) to be at all times represented at the Work in person or by superintendent satisfactory to Home Depot; ... (c) take all measures to prevent injury and loss to persons or property; ... (e) be responsible for all damages to persons or property in connection with the Work...” A party to a contract has two duties: a contractual duty and a legal duty to act without negligence towards both the other party to the contract and third parties. See Prost v. Caldwell Store, Inc., 409 Pa. 421, 425, 187 A.2d 273, 277 (1963); Bisson v. John B. Kelly, Inc., 314 Pa. 99, 110, 170 A. 139, 143 (1934); St. Clair v. B & L Paving Co., 270 Pa. Super. 277, 279, 411 A.2d 525, 526 (1979). In this case, Milric argues that it cannot be liable to plaintiff because it had no employees present at the time of the accident, even though it had contractually agreed to be present and to take measures to protect against injuries. Milric also agreed to be responsible for damages which occurred at the site.

The terms of the contract between Milric and Home Depot creates issues of material fact regarding Milric’s actions or inactions at the time of the accident. In this case, unlike Leonard v. Comm. Dept. of Transportation, 723 A.2d 735 (Pa. Cmwlth. 1998), which is cited by Milric, there was no clear delegation of the duty to provide safety precautions and to supervise the work being performed. It is not clear that Milric delegated its responsibilities under its contract with Home Depot to CCS in their oral contract which existed at the time of the accident or to anyone else on site. While the written contract between Milric and Home Depot, which was signed after the accident, contained the same language as that in the contract between Milric and Home Depot, there are factual issues regarding whether the contract was intended to apply to the time of the accident and whether it was intended to be a delegation of Milric’s duties under its contract with Home Depot. Given the terms of the contract and considering all facts in favor of the plaintiff, it would be possible for a jury to find

that as part of its responsibilities under the contract with Home Depot, as general contractor Milric was responsible for coordinating the work of its two subcontractors, for supervising, and for taking precautions to protect safety, by at a minimum making sure that the employees were aware of the other work being performed. When considering all of the facts in favor of the non-moving party, we must therefore deny Milric's motion. Since Milric contractually agreed to be present at the site and to take safety precautions, thereby retaining control, we will not dismiss them at this time.

Finally, Milric contends that if it is to remain a defendant in this case, that pursuant to its contracts with Commercial Group and L.G.B., it is entitled to indemnification. There are several issues to be resolved prior to determining whether the indemnification provisions apply. However, an obligation to indemnify arises from the ultimate basis for liability in the underlying case. C.H. Heist Cribbe Corp.v. American Home Assurance Co., 640 F.2d 479, 483 (3d Cir. 1981). Given that liability has not yet been determined, any determinations as to indemnification to be premature at this time. See Nationwide Insurance Co. v. Glynn, 2003 WL 21116933 (E.D. Pa. May 14, 2003) at \*6; Ohio Casualty Insurance Co. v. Spra-Fin Inc., 1996 WL 4118 (E.D. Pa. Jan 4, 1996) at \*4, FN 2. We will therefore refrain from making any further findings.

An appropriate Order follows.

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| L.G.B. MECHANICAL                    | : |              |

CHARLES B. SMITH  
UNITED STATES MAGISTRATE JUDGE

ORDER

AND NOW, this        day of March, 2005, upon consideration of Defendant Home Depot's Motion for Summary Judgment (Document #44) and Defendant Milric's Motion for Summary Judgment (Document #45), as well as the responses thereto, it is hereby ORDERED that Defendant Home Depot's Motion is GRANTED and Defendant Milric's Motion is DENIED.

It is so ORDERED.

BY THE COURT:

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CHARLES B. SMITH  
UNITED STATES MAGISTRATE JUDGE