LRL Atty. No.: 90242 File No.: 5454-25792

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PIOTR KRYCA, Plaintiff, v. SWIFT TRANSPORTATION and ROLLIN HILL, Defendants.	)	Case No.: 10 L 13151
SWIFT TRANSPORTATION and ROLLIN HILL, Third-Party Plaintiffs, v. BRIGHT SKY CLEANING GROUP, INC., and SERV MANAMGENT GROUP, INC. Third-Party Defendants.	)	

Third-Party Plaintiffs Swift Transportation and Rollin Hill's Response to Third-Party Defendants Serv Management Group, Inc. and Bright Sky Cleaning Group's Motion For Summary Judgment

Defendants/Third-Party Plaintiffs, SWIFT TRANSPORTATION and ROLLIN HILL, through their attorneys, l., responds to Third-Party Defendants, SERV MANAGEMENT GROUP, INC. and BRIGHT SKY CLEANING GROUP, INC.'S motion for Summary Judgment, and states as follows:

INTRODUCTION

A genuine issue of material fact exists: **Had Bright Sky Cleaning and Serv Management properly trained and supervised Piotr Kryca, and had proper procedures and policies in place, would Plaintiff have been standing at the front of the trailer when a yard hostler was in reverse?**

On February 2, 2012, Third-Party Plaintiffs filed a third-party complaint against Bright Sky Cleaning. The complaint alleges that Bright Sky Cleaning failed to: consider safety issues related to its work, establish sufficient safety procedures for its employees, adequately train its employees and adequately supervise its employees. (Ex. D to Third-Party Defendants' Motion for Summary Judgment). On January 17, 2013, Third-Party Plaintiffs filed a third-party complaint against Serv Management Group, made similar allegations as against Bright Sky Cleaning, and also alleged failure to: train the plaintiff to watch for and avoid any potential hazards related to working in a truck yard and yard hostler; to warn or instruct the plaintiff on how to perform his work, and to provide the Plaintiff with personal protective equipment in violation of Occupational Safety and Health Administration (OSHA), 29 CFR 1910.132. (Ex. H to Third-Party Defendants' Motion for Summary Judgment).

RELEVANT FACTS

A. Bright Sky/Serv Management Training

Naturally, those individuals who can testify to Bright Sky/Serv Management training, or lack thereof, would be their own employees, Piotr Kryca and Manuel Sandoval.

Plaintiff, Piotr Kryca, began working for Bright Sky Cleaning in November of 2008. (Ex. L to Third-Party Defendants' Motion for Summary Judgment, p. 18). The accident occurred on March 31, 2009. Accordingly, Kryca worked for Bright Sky for four months before the incident.

Manuel Sandoval began working for Bright Sky Cleaning in 1994. (Ex. A, Deposition Transcript of Manuel Sandoval, p. 7).

The Plaintiff received two forms of instruction concerning his job duties, technical training related to the chemicals used for cleaning operations, and on-the-job training from Manuel Sandoval. (Ex. L, p. 20-1; and Ex. A, p. 60). Kryca received no training manuals, and in fact no rules, policies or procedures were reduced to writing. (Ex. L, p. 20; 31). Costco did not receive written rules from Bright Sky concerning how Bright Sky employees were to conduct their job. (Ex. N to Third-Party Defendants' Motion for Summary Judgment, p. 68, 97).

The Plaintiff did not receive training on how to communicate with yard hostler drivers. (Ex. L, p. 24). Kryca further received no training specific to operations at the Costco facility. (Ex. A, p. 60). Bright Sky employees received no documents regarding policies for safety before the accident. (Ex. A, p. 33).

When asked whether a yard hostler was required to look at what he is backing into to ensure that the person removing the sticker was no longer there, Kryca replied, "I don't know". (Ex. L, p. 63). Indeed, the plaintiff did not know how to be safe on the Costco job site. He had no prior knowledge of yard hostler procedures and Costco operations. Bright Sky Cleaning/Serv Management negligently placed its employees in a busy truck yard without training them with respect to safety and avoidance of hazards.

B. Safety at Costco Facility

Bright Sky Cleaning/Serv Management provided truck and trailer washing services to various companies including: Fedex, Coca-Cola and Gate Gourmet. (Ex. L to Third-Party Defendants' Motion for Summary Judgment, p. 25). At the other facilities, upon completion of

cleaning the tractor/trailer, an individual of the respective company would get into the tractor and drive the vehicle away. (Ex. A, p. 16).

The manner of using a yard hostler to move trailers was unique to the Costco facility. (Ex. A, p. 54). A yard hostler lined up trailers to be washed by Bright Sky. (Ex. N to Third-Party Defendants' Motion for Summary Judgment, p. 57). When a trailer was clean, the yard hostler would remove the trailer and bring a dirty one back to be washed out. (Ex. N, p. 57). Sandoval testified that employees did not set up cones around trailers, although Bright Sky Cleaning contends that safety cones were in place. (Ex. A, p. 38-9).

Before the accident, a Bright Sky employee would indicate that a trailer was clean by removing a sticker that was affixed to the front of the trailer. (Ex. A, p. 39-40). The sticker system was only used at the Costco facility. (Ex. A, p. 26). When a trailer was clean, and the sticker was ready to be removed, Manual Sandoval would send one of the Bright Sky employees to take the sticker off. (Ex. A, p. 55). Piotr Kryca took the sticker off the front of the trailer at the direction of Sandoval, Bright Sky employee. (Ex. A, p. 57-58). Piotr Kryca was injured while taking the sticker off the front of the trailer. (Ex. A, p. 65).

Bright Sky/Serv Management did not provide any training about safety at the Costco facility. (Ex. A, p. 32). Third-Party Defendants did not provide any instruction to its employees about safety concerns involved with going to the front of a trailer when a yard hostler was in reverse at the Costco facility. (Ex. A, p. 34). Employees would not notify a yard hostler before they went to the front of a trailer to take off the sticker. (Ex. A, p. 40). Bright Sky did not establish any signal, other than the sticker, to alert a yard hostler driver that the trailer was ready to be removed. (Ex. L to Third Party Defendants' Motion for Summary Judgment, p. 42).

Sandoval testified that he believed that the sticker system was dangerous because it required employees to take the sticker off the front of the trailer. (Ex. A, p. 55). He further indicated that it is dangerous to be in the front of the trailer, "and when you know that someone is going to hook up to the trailer, of course it is dangerous." (Ex. A, p. 55). However, walking to the front of the trailer was part of the job. (Ex. A, p. 55).

C. Supervision at Costco Facility

The plaintiff claims he was a supervisor for Bright Sky Cleaning. (Ex. L, p. 18). His job duties included, "making sure everything was functioning well, write down numbers, and to pull off a sticker that was in front of the trailer..." (Ex. L, p. 26). However, Sandoval testified that he was the person in charge at the time of the accident. (Ex. A, p. 45). In fact, Sandoval trained Kryca on how to work at the Costco facility. (Ex. A, p. 60). Accordingly, a genuine issue of material fact exists as to who was supervising the employees, and whether proper supervision would have prevented the injuries sustained by Kryca.

D. Proper Protective Equipment

OSHA Regulation 29 CFR 1910.132 provides that protective equipment includes "personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers", and shall be provided, used, and maintained "wherever it is necessary by reason of hazards of processes or environment."

Kryca testified that on March 31, 2009 he was wearing a hood on his head, and had limited vision. (Ex. L, p. 39). Manual Sandoval testified that Bright Sky employees were required to wear an orange vest and safety goggles on the job site. (Ex. A, pg. 32, 58-9). At the time of the incident, Pitor Kryca was not wearing safety goggles or an orange vest. (Ex. O to Third Party Defendant's Motion for Summary Judgment, p. 55). A genuine issue of material

facts exists: had the plaintiff been properly provided with protective equipment pursuant to OSHA regulation, and had Bright Sky Cleaning supervised and ordered Kryca to wear the required safety goggles and orange vest, would he have sustained the injuries complained.

STANDARD

Summary judgment is a drastic means of disposing of litigation. *Purtill v. Hess,* 111 Ill.2d 229, 240 (1986). Therefore, it is proper only when the resolution of the case hinges upon a question of law and the moving party's right to judgment is clear and free from doubt. *Lily Lake Rd. Defenders v. Cnty. Of McHenry*, 156 Ill.2d 1, 8 (1993). If the affidavits and other materials disclose a dispute as to any material issue of fact, summary judgment must be denied even if the court believes the movant will or should prevail at trial. *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 525 (1st Dist. 1995). Summary judgment procedure is not designed to try an issue of fact, but rather to determine if one exists. *Id.* The plaintiff need not prove his case at the summary judgment stage, but present some evidence which demonstrates the existence of a triable and genuine issue of fact. *Id.*

ARGUMENT

Contrary to Third-Party Defendants' allegation, this case is replete with issues of fact.

Issue of fact #1: Had Bright Sky Cleaning/Serv Management adequately considered safety issues related to its work, and trained its employees accordingly, a jury could reasonably conclude that Piotr Kryca would not have been injured.

An employer is bound to use ordinary and reasonable care to prevent injury to the employee in the course and scope of his or her employment, and if the employer fails to do so, and the employee is injured as a consequence thereof, the employer will be held liable for the damages resulting from such injury. *See Chaplin v. Geiser,* 79 Ill. App. 3d 435 (2d Dist. 1979); *Lester v. Hennessey*, 20 Ill. App. 2d 479 (3d Dist. 1959). The master in the performance of his duties is required to provide a reasonably safe place to work, and to inform and warn unskilled

servants of the danger of a situation. *Stone v. Guthrie*, 14 Ill. App. 2d 137, 149 (3d Dist. 1957). If the employee, while in the exercise of ordinary care, suffers an injury from a neglect of the employer as to such duty, the employer is liable. 17 Ill. Law and Prac. Employment § 154.

The evidence establishes that Bright Sky Cleaning/Serv Management failed to properly instruct Kryca in the operations of yard hostlers. His employer failed to warn him of the dangers of hostlers in reverse. Indeed, training and policies *may have* included instruction on the audible warning of a hostler in reverse, restriction of employees from walking to the front of a trailer when the hostler is in reverse, policies requiring employees to enter the field only when approved by the hostler driver, or proper training on communication between the Swift yard hostler driver and Bright Sky employee. Third-Party Defendants contend that Swift Transportation and Rollin Hill cannot identify what the training and operations of Bright Sky/Serv Management entailed. To that effect, Third-Party Defendants misleadingly only identify testimony of Swift employees, Rollin Hill, Mike Wood and Nathan Webb. It is of no consequence that Swift employees do not have knowledge of training and operations of Bright Sky/Serv Management. Bright Sky/Serv employees, Piotr Kryca and Manual Sandoval sufficiently testified to the lack of training by their employer.

Bright Sky Cleaning/Serv Management allowed its employees to work without any policies, procedures or rules to govern their safety. A jury could find that the employer's failure to have any procedures or training related to safety fell below the standard of ordinary and reasonable care.

Third-Party Defendant, Serv Management, contends in its affirmative defenses that Piotr Kryca assumed the risk of being struck by a backing yard hostler. (Ex. J of Third-Party Defendants' Motion for Summary Judgment). Whether or not the danger is appreciated is a

question for the jury. *Hinrichs v. Gummow*, 41 Ill. App. 2d 428, 435 (2d Dist. 1963). However, the question of assumed risk also involves the subsidiary question of whether the servant understood and appreciated the risks which he is alleged to have assumed. *Stone,* 14 Ill. App. 2d at 148. **This contention assumes a material fact that is in dispute, whether Bright Sky Cleaning/Serv Management properly trained him with respect to the dangers of yard hostlers in reverse at the Costco facility**. As is the case here, Plaintiff worked for Bright Sky/Serv Management for four months before the accident, and Costco was the only company which utilized yard hostlers to move trailers. It was the duty of his employer to properly train him concerning safety issues in the Costco workplace. An issue exists as to whether Bright Sky/Serv Management properly trained him such that he understood and appreciated the risks involved with moving yard hostlers. Whether the failure to train and supervise proximately caused or contributed to the plaintiff's injuries is an issue of fact which may be properly submitted to a jury.

Again, where an employer fails to train its employees concerning job site safety, it is highly foreseeable that such failure could lead to injuries such as those that occurred in this case. The evidence is sufficient to raise disputed factual issues regarding the negligence of Bright Sky Cleaning/Serv Management. A jury could reasonably conclude that had Piotr Kryca been properly trained concerning the dangers and operations of yard hostlers in the Costco facility, he would not have walked to the front of the trailer while the hostler was in reverse, and he would not have been injured as a result.

Issue of fact #2: Had Piotr Kryca been adequately supervised, would he have been allowed to stand in the front of the trailers while a yard hostler was in reverse.

Third-Party Defendants apply the incorrect analysis in determining adequate supervision. In fact, they contend that in order to establish negligent supervision, a plaintiff must prove the

factors addressed in *Helfers-Beitz v. Degelman*, including: knowledge that the employee had a particular unfitness for the position, and that such unfitness was known to the employer and was the proximate causation of the injury. 406 Ill. App. 3d 264 (3d Dist. 2010). Those factors analyze negligent hiring and retention.

The courts have held that negligent supervision and negligent retention are distinct torts. *Vancura v. Katris,* 391 Ill. App. 3d 350, 368 (1st Dist. 2008). An analysis of the employee's fitness for the job is irrelevant to the issues before this court. What is relevant is whether the plaintiff was properly supervised on the job site.

Further, there is contradictory testimony as to who was the supervisor at the Costco facility on March 31, 2009. Both Kryca and Sandoval claim to be in charge. The mere fact that confusion exists as to supervision is a material issue of fact as to whether there was proper supervision at the Costco facility, and whether proper supervision would have prevented the plaintiff's injuries. Again, a jury could reasonable conclude that Piotr Kryca would not have been injured while standing at the front of a trailer when a hostler was in reverse, had he been adequately supervised.

Issue of fact #3: Was failure to train and supervise the proximate cause of Piotr Kryca's injuries.

Issues of negligence, contributory negligence and proximate cause are matters of fact to be submitted to and resolved by the trier of fact. *Ellis v. Howard*, 4 Ill. App. 3d 852, 854 (3d Dist. 1972). Swift Transportation and Hill contend that had Kryca's employer properly trained him, he would not have stood in front of the trailer.

The evidence on this issue establishes a relationship between the alleged negligence and the proximate cause of the plaintiff's injury. Manuel Sandoval instructed Kryca to walk to the front of the trailer to take the sticker off. (Ex. A, p. 55). As such, the plaintiff was working at the

direction of Bright Sky Cleaning when he was subsequently injured. Kryca received no training concerning Costco yard hostler operations, and stood at the front of the trailer at the direction of a Bright Sky employee. **The proximate causation of Kryca's injuries was his employer's failure to train, implement safety procedures, and adequately supervise employees.**

Third-Party Defendants further attempt to confuse the courts by making allegations of "some defective or dangerous power washing service". Third-Party Plaintiffs do not make allegations that the power washing service was defective or that power washing in itself is dangerous. (See Ex. H and D of Third-Party Defendants' Motion for Summary Judgment). Instead, Third-Party Plaintiffs contend that the lack of safety policies, training, and supervision was the proximate cause of Kryca's injuries.

Third-Party Defendants' citation to *Cochran v. George Sollitt Const. Co.* is also inapplicable to the case at bar. Indeed, *Cochran* involved issues of third-party liability to a general contractor for an independent contractor's injury in a construction site context. 358 Ill.App.3d 865 (1st Dist. 2005). A contractor's knowledge of dangerous conditions in the context of independent contractor liability is irrelevant to the issue before this court. Here, Piotr Kryca was an employee of Serv Management, not an independent contractor. Accordingly, issues concerning 'retained control' and other independent contractor analysis is irrelevant to the case at hand.

Issue of Fact Number 4: Whether Bright Sky/Serv Management failed to exercise reasonable care by violating OHSA regulations, and whether such violation was the proximate cause of the Plaintiff's injuries.

Bright Sky Cleaning and Serv Management had the duty to ensure that work was being done in a safe manner. Piotr Kryca, as the Third-Party Defendants' employee, performed his job duties at their discretion. Pursuant to OSHA Regulation 1910.132(a), protective equipment

designed to protect the face and head may have prevented Kryca from injuring his mouth. Further, Kryca testified that he was wearing a hood over his head (Ex. L to Third Party Defendants' motion, pg, 30 and 39); although Bright Sky required employees to wear a yellow vest. (Ex. A, pg. 58-9). A question of material fact exists as to whether the injury would have occurred if Kryca had been properly supervised and instructed to wear bright clothing which would have warned a backing hostler of his presence. A violation of OSHA regulations may be evidence of failure to exercise reasonable care. *Recio v. GR-MHA Corp.*, 366 Ill. App. 3d 48, 58 (1st Dist. 2006).

Conformance with OSHA regulations, including requiring that employees wear proper protective equipment on a job site, is relevant both to an analysis of whether Bright Sky/Serv exercised due care, and whether the violation was the proximate cause of claimant's injuries. Had Kryca worn the proper protective gear, would he have sustained the injuries complained of? Such is a genuine issue of material fact which should be presented to a jury.

CONCLUSION

As indicated above, this case is replete with questions of fact concerning Third Party Defendants, Bright Sky Cleaning and Serv Management Group's negligence in causing the injuries complained of by Plaintiff, Piotr Kryca. A genuine issue of material fact exists concerning Third-Party Defendant's failure to adequately consider safety issues, establish sufficient safety procedures, train the plaintiff, provide warning to the plaintiff to avoid potential hazards, supervise its employees and provide proper protective equipment. For the foregoing reasons, the motion for summary judgment should be denied.