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Supreme Court, Appellate Division, Second
Department, New York.
Bobbie J. ELL, et al., Appellants-Respondents,
v.
S.E.T. LANDSCAPE DESIGN, INC., et al.,
Respondents,
Lesco, Inc., Respondent-Appellant.

Aug. 20, 2001.

Homeowners sued landscape firm and its employee, alleging that employee had negligently applied herbicide to their lawn, and employee and firm asserted third-party claim against manufacturer of herbicide. After manufacturer removed action to federal court, and employee's motion to remand was granted, 34 F.Supp.2d 188, summary judgment motions were brought. The Supreme Court, Orange County, Owen, J., granted motions. Appeals were taken. The Supreme Court, Appellate Division, held that: (1) fact issues as to whether employee negligently applied herbicide, and whether he was acting in scope of his employment at time of application, precluded summary judgment on claims against firm and employee, but (2) claims against manufacturer were preempted by Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

Affirmed as modified.

West Headnotes

[1] Judgment  **181(33)**


228k181(33) Most Cited Cases

Genuine issue of material fact as to whether employee of landscaping firm had negligently applied a herbicide to homeowners' lawn, causing personal injuries, precluded summary judgment in homeowners' suit against firm and employee.

[2] Judgment  **181(21)**


228k181(21) Most Cited Cases

Genuine issue of material fact as to whether employee of landscape firm was acting within scope of his employment when he applied herbicide to homeowners' lawn precluded summary judgment in homeowners' action against firm, in which they alleged that herbicide had been negligently applied.

[3] Appeal and Error  **151(5)**

30k151(5) Most Cited Cases

Herbicide manufacturer was not aggrieved by district court's failure to address its federal preemption defense in action in which landscape firm and its employee asserted third-party claims against, and thus, could not bring cross-appeal on that basis, where manufacturer obtained all the relief it sought, in that it was granted summary judgment dismissing the complaint insofar as asserted against it.

[4] Products Liability  **43.5**

313Ak43.5 Most Cited Cases

(Formerly 23k9.13)

[4] States  **18.65**

360k18.65 Most Cited Cases

Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempted claims which were asserted against manufacturer of herbicide by homeowners on whose lawn herbicide had allegedly been negligently applied by employee of landscape firm, and also preempted third-party claims asserted against manufacturer by firm and employee. Federal Insecticide, Fungicide, and Rodenticide Act, § 2 et seq., 7 U.S.C.A. § 136 et seq.

****515** Grogan & Souto, P.C., Goshen, N.Y. (Edward P. Souto of counsel), for appellants-respondents.

****516** Clemente Mueller & Tobia, P.A., New York, N.Y. (William F. Mueller and Lori Anne Fee of counsel), for respondent-appellant.

Robert P. Augello, Middletown, N.Y., for respondent S.E.T. Landscape Design, Inc.

Marc D. Orloff, P.C., Goshen, N.Y. (Anthony J. Perna, Jr., of counsel), for respondent Glenn Nixon.

DAVID S. RITTER, J.P., GABRIEL M. KRAUSMAN, HOWARD MILLER and NANCY E. SMITH, JJ.

***414** In an action to recover damages for personal injuries, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Orange County (Owen, J.), dated January 31, 2000, as granted those branches of the separate motions of the defendants which were for summary judgment dismissing the complaint insofar as asserted against

them, and the defendant LESCO, Inc., cross-appeals from so much of the same order as failed to address its Federal preemption claim.

ORDERED that the cross appeal is dismissed, without costs or disbursements, as the defendant LESCO, Inc., is not aggrieved by the order appealed from (*see, CPLR 5511*); and it is further,

ORDERED that the order is modified by deleting the provisions thereof granting those branches of the separate motions of the defendants Glenn Nixon and S.E.T. Landscape Design, Inc., which were for summary judgment dismissing the complaint insofar as asserted against them, and substituting therefor provisions denying those branches of the motions; as so modified, the order is affirmed insofar as appealed from; and it is further,

ORDERED that the plaintiffs are awarded one bill of costs payable by the respondents appearing separately and filing separate briefs.

[1] There is an issue of fact as to whether the defendant Glenn Nixon negligently applied a herbicide to the plaintiffs' lawn. The plaintiffs' motion papers alleged that (1) each of the plaintiffs suffered personal injury following the defendant Nixon's application of Turflon II to their lawn and no other factors intervened which would have caused the injuries; (2) the label on the Turflon II container warned against applying the product in a way that it would contact persons through drift; (3) the plaintiff Bobbie J. Ell observed the chemical coming out of the hose in a "mist"; (4) an expert opined that the defendant Nixon allowed the chemical to drift into the plaintiffs' home by *415 using excessive air pressure which caused the chemical to atomize and break into small airborne particles which drifted into the plaintiffs' home, and if it had been properly applied there would have been no drift; and (5) the plaintiffs' inhalation and ingestion of the chemical resulted in symptoms consistent with poisoning from the active ingredient sprayed by the defendant Nixon and no other possible cause of the injuries was stated. Thus, the Supreme Court erred in granting that branch of the motion of the defendant Nixon which was for summary judgment dismissing the complaint insofar as asserted against him.

[2] Furthermore, summary judgment dismissing the complaint insofar as asserted against Nixon's employer, the defendant S.E.T. Landscape Design, Inc., should not have been granted since questions of fact exist as to whether Nixon was acting within the

scope of his employment when he applied the chemical to the plaintiffs' lawn (*see, Zuckerman v. City of NY*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718).

**517 [3][4] The cross appeal by the defendant LESCO, Inc., must be dismissed, as that defendant is not aggrieved by the order appealed from since it obtained all the relief it sought, i.e., summary judgment dismissing the complaint insofar as asserted against it (*see, Parochial Bus Systems v. Board of Educ. of City of N.Y.*, 60 N.Y.2d 539, 470 N.Y.S.2d 564, 458 N.E.2d 1241). We note, however, that although not specifically set forth as a reason for the Supreme Court's grant of summary judgment in favor of that defendant, the Federal Insecticide, Fungicide, and Rodenticide Act (7 USC § 136 et seq.) preempts the plaintiffs and the codefendants' claims against LESCO, Inc. (*see, Warner v. American Fluoride Corp.*, 204 A.D.2d 1, 12, 616 N.Y.S.2d 534).

286 A.D.2d 414, 729 N.Y.S.2d 515, 2001 N.Y. Slip Op. 06747

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