

Claar v Consolidated Edison Co. of N.Y., Inc.

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August 2, 2002

Sup Ct, NY County

Docket Number: 110223/00

Judge: Leland G. DeGrasse

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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25
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JOAN M. CLaar, Individually and as
Administratrix of the ESTATE OF STUART J.
CLaar

Plaintiff,

Index No. :
110223/00

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., and VILSMEIER AUCTION CO., INC.

Defendants.

SCANNED
'AUG 12 2002

DeGRASSE, J. : -----

In this wrongful death action, plaintiff moves for summary judgment on her claim brought under Labor Law §§ 240(1). Defendant Vilsmeier Auction Co., Inc. ("Vilsmeier") cross-moves for summary judgment dismissing the complaint and the cross-claims of defendant Con Edison Company of New York ("Con Edison"). Con Edison also cross-moves on its cross-claims against Vilsmeier.

FACTS

On May 27, 1999, plaintiff's decedent, John Claar, was mortally injured while he was painting a Con Edison van pursuant to an agreement between Con Edison and Vilsmeier. This agreement is embodied in two letters, one proposal letter from Vilsmeier, and one confirmatory letter from Con Edison. The letters set forth the terms by which Vilsmeier was to prepare Con Edison vehicles for

Plaintiff's papers include arguments that summary judgment should also be granted on plaintiff's Labor Law § 241(6) claim, but the Notice of Motion does not state that plaintiff is moving on that claim. In any event, as discussed below, § 241(6) does not apply to the facts of this case.

auction, known as "decommissioning" the vehicles, and to promote the auction among possible buyers. One of the tasks entailed in decommissioning was to paint the vehicles so that all visible Con Edison logos and other identifying information were obscured. Vilsmeier and Con Edison had allegedly entered into such agreements in the past.

The decommissioning work was performed at a site owned by Con Edison in Astoria Queens. Claar and the other workers were provided with equipment by Con Edison. His actions were apparently directed by Con Edison personnel at the site. No one from Vilsmeier was at the site to supervise the workers.

Vilsmeier was supplied with a ladder for painting the top of some of the Con Edison Trucks. Plaintiff alleges that this ladder was the bottom half of a ladder used by Con Edison personnel to descend into manholes. Plaintiff alleges that the ladder was wholly unsuited to the task in that there was no way to secure it to the side of a truck other than by simply leaning against the truck's side. Crucially, the ladder was missing one of its rubber feet. This defect meant that the ladder could not sit evenly on the ground, but rather listed inches to one side. Additionally, the side with no rubber foot did not grip the ground with the same consistency as the other side. It is unclear whether Claar placed the ladder with its uneven feet on the bottom, or if he turned it 180 degrees and placed the unpadded, but even, top of the ladder on the bottom.

While no one saw him fall, three co-workers heard a noise

and saw Claar lying on the ground with blood flowing from his head. Three of his co-workers have submitted affidavits that they observed parallel gouges on the side of the truck that appeared to be gouges made by the ladder as it slid down the truck. The ladder was still resting against the truck, while its bottom portion had wedged under an adjacent vehicle.

Claar was taken to the hospital, where it was discovered he had suffered fractures to his skull and spine. He was discharged from the hospital on June 6, 1999. He died of a cardiac arrest, allegedly a direct result of his injuries, on June 11, 1999.

DISCUSSION

A. Plaintiff's Motion for Summary Judgment

Labor Law § 240(1) requires "contractors and owners and their agents" to provide such safety devices as are necessary "to give proper protection" during the course of "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure... ." The Court of Appeals has limited the scope of § 240(1) to elevation-related injuries. (Rocovich v Consolidated Edison Co., 78 NY2d 509.) Plaintiff has demonstrated that Claar was engaged in an activity -- painting -- covered by the statute. (Cornacchione v Clark Concrete Co., 278 AD2d 800.)

Con Edison argues that a truck is not a "structure" within the meaning of the statute because to so hold would apply the statute beyond the legislature's intent. Con Edison does not

cite any apposite authority for this argument. While the First Department has apparently not ruled on this issue, both the Third and Fourth Departments have held that trucks and similar vehicles are structures for the purposes of Labor Law § 240(1). (See Hutchins v Finch, Pruyn & Co., 267 AD2d 809, 811, lv denied 94 NY2d 762; Moore v Shulman, 259 AD2d 975, lv dismissed 93 NY2d 998; see also Cornacchione, supra, 278 AD2d at 801.)

Here plaintiff has demonstrated as a matter of law that the ladder Claar was provided to do his work was defective, and was a proximate cause of his injuries and death. The ladder was missing a crucial part, one of its rubber feet, causing it not to function properly. It was not a free-standing A-frame ladder and therefore it should have been secured in some way to ensure it would not slip. The sworn statements of Claar's co-workers, and statements Claar made to his wife and daughter before he died, provide ample circumstantial evidence that the defective ladder was the proximate cause of Claar's fall. Such circumstantial evidence establishes a prima facie case in wrongful death actions. (See Brito v Manhattan and Bronx Surface Transit Operatins Auth., 188 AD2d 253, 254, appeal dismissed 81 NY2d 993.)

Con Edison attempts to create an issue of triable fact from some the deposition testimony of Claar's wife, plaintiff Joan M. Claar, in which she relates what Claar told her about the accident. At one point, she testified that Claar told her he put his foot out and the ladder wasn't there, causing his fall. She later seems to contradict this statement. Con Edison states that

this testimony conflicts with what Claar told his daughter and co-workers, which is that the ladder slipped while he was on it. Mrs. Claar's vague testimony on this point is not inconsistent with the remaining evidence. All the evidence indicates that the ladder slipped, which in turn caused Claar's accident.

For the reasons stated, plaintiff is entitled to summary judgment on her Labor Law § 240(1) claim against Con Edison only. Since Claar was an employee of Vilsmeier plaintiff may not assert any direct cause of action against that defendant. (See Workers' Compensation Law § 11.)

Plaintiff also argues in her papers that she is entitled to summary judgment on her Labor Law § 241(6) claim. Section 241 states in pertinent part:

All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements.

6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated, and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

As Claar was not engaged in "construction, excavation or demolition" work when he was injured, this statute does not apply.

B. Vilsmeier's and Con Edison's Motions for Summary Judgment

Vilsmeier's cross-motion for summary judgment dismissing

the complaint is granted without opposition from plaintiff. Plaintiff's suit against Claar's employer is barred by Workers' Compensation Law § 11.

Vilsmeier also moves for summary judgment dismissing Con Edison's three cross-claims, which sound in common law indemnification, contractual indemnification, and breach of contractual obligation to purchase insurance. Con Edison cross-moves for summary judgment on its common law indemnification and breach of contract claims.

Vilsmeier is correct that there is no basis for Con Edison's contractual indemnification claim, as the two letters constituting the parties' agreement do not contain any indemnification clause. There is no evidence of an oral contract concerning indemnification.

However, there are issues of triable fact concerning the parties' relative responsibilities to supervise the Vilsmeier workers at the Con Edison site. While Con Edison appears to have provided Claar with the defective ladder, it is unclear whether the parties had agreed that Vilsmeier should supply equipment for decommissioning, and whether the parties had an oral agreement that Vilsmeier would supervise its own employees. The letters are silent on these points. Con Edison and Vilsmeier had dealt with each other in the past but it is unclear if they had an oral agreement or established a practice concerning the provision of supplies or the supervision of Vilsmeier employees. Issues of fact concerning the parties' relative responsibilities at the worksite

precludes granting summary judgment to either party on Con Edison's common law indemnification claim.

Finally, Con Edison faults the insurance procured by Vilsmeier. While Con Edison is named as an additional insured on Vilsmeier's policy, the insurer has disclaimed coverage on the ground that injuries to Vilsmeier's employees are not covered by the policy.

Vilsmeier's agreement, if any, to procure insurance naming Con Edison as an additional insured is not embodied in the letters -- or in any writing. Con Edison alleges that the agreement to purchase insurance naming Con Edison as an additional insured was an oral one. Vilsmeier's president was equivocal at his deposition concerning whether Vilsmeier had agreed to purchase insurance naming Con Edison. The fact that Con Edison was named as an additional insured on Vilsmeier's policy is certainly some evidence of such an agreement. However, even assuming that there was an oral agreement, there is an issue of fact concerning the type and scope of insurance that the parties agreed Vilsmeier was to procure. Questions about the scope of the insurance Vilsmeier allegedly agreed to purchase distinguishes this case from the cases cited by Con Edison, where the coverage to be obtained was spelled out in written agreements. (Cf. Figueroa v New York City Housing Auth., 236 AD2d 154, 155, lv dismissed 92 NY2d 920; Murray v Wilbur Curtis Co., Inc., 189 AD2d 980, 982.)

