

Cahill v Triborough Bridge & Tunnel Authority

2005 NY Slip Op 30380(U)

June 27, 2005

Supreme Court, New York County

Docket Number: 103774/00

Judge: Andrew P. O'Rourke

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DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, ~~PUTNAM~~ ^{New York} COUNTY

Present: HON. ANDREW P. O'ROURKE
Supreme Court Justice

SEP 012

-----X
TIMOTHY CAHILL,

Plaintiff, MOTION DATE: 5/13/05
INDEX NO. 103774/00

-against-

OK

TRIBOROUGH BRIDGE & TUNNEL AUTHORITY,
Defendant.

-----X

The following papers numbered 1 to 7 were read on this motion by defendant for an Order staying the trial of damages pending the hearing and determination of the post-trial motions that are being made, and the following papers numbered 1 to 6 were read on this motion by defendant for an Order pursuant to CPLR 4404, subdivision (a) setting aside the jury's verdict of liability against defendant, etc.¹

Papers Numbered

Order to Show Cause - Affidavit (Wiess) - Exhs. (A-B) 1-3

¹To the extent that defendant also is moving to "affirm" the verdict that there was no violation of Labor Law Section 240, subdivision (1), same is denied as not properly within the ambit of CPLR 4404.

Answering Affirmation (Marothy) - Exh.	4-5
Replying Affidavit (Rigby) - Exh.	6-7
Amended Notice of Motion - Affidavit (Rigby) - Exhs. (A-B) ..	1-3
Answering Affirmation (Marothy) - Exhs. (A-C) ..	4-5
Replying Affidavit (Rigby)	6

Upon the foregoing papers, it is Ordered that these motions are disposed of as follows:

Following a more than two-week long trial presided over by the undersigned, a jury ultimately found no liability against defendant under Labor Law Section 240, subdivision (1) and no liability against defendant under Labor Law Section 241, subdivision (6) based upon four specifically alleged Industrial Code violations. However, the jury found 80 percent liability against defendant under Labor Law Section 241, subdivision (6) for a violation of Industrial Code Rule 23-1.30: Illumination, and 50 percent liability against defendant under Labor Law Section 200 as to whether defendant had provided a safe place to work.

Defendant is now moving pursuant to CPLR 4404, subdivision (a), for an Order setting aside the jury's verdict with respect to the above findings of liability as a matter of law and entering judgment in defendant's favor thereon based upon insufficient evidence.²

Anent Section 200, defendant contends that the verdict must be

²At the close of plaintiff's case, defendant had moved for a directed verdict pursuant to CPLR 4401. The Court reserved decision thereon until after the jury's verdict.

set aside because the record demonstrates that defendant did not exercise sufficient direct supervision and/or control over plaintiff's work place, nor did it have legally sufficient notice to warrant imposition of liability. With respect to Labor Law Section 241, subdivision (6), defendant contends that the record is bereft of any evidence demonstrating that where the accident occurred there was insufficient illumination, as defined by the Regulation. Accordingly, it is defendant's contention that this Court must set aside the verdicts against defendant and enter judgment in its favor.

According to defendant, plaintiff's own testimony establishes that while it was "dark" to the left of the form, notwithstanding that he still could see well enough to walk, and the he chose to avoid the darkness by climbing with his positioning hook on the end at the backside of the form. Since plaintiff's own testimony establishes that the lighting where he fell was not poor or that it otherwise violated 12 N.Y.C.R.R. 23-1.30, and no other witness testified that the area where plaintiff fell was dark and the illumination was less than five-foot candles, defendant submits that, as a matter of law, said Code Regulation cannot be found to have been a substantial factor in causing plaintiff's accident. Rather, defendant insists that the sole cause of plaintiff's fall was his misplacement of or the popping out of his positioning hook

while his intentionally choosing not to wear the double safety harness furnished him.

The evidence establishes that defendant had entered into a contract with Perini, plaintiff's employer, whereby Perini had agreed to provide general contracting work on the Bridge. CTE/GPI was the consultant and inspection engineer hired by defendant to administer the contract on its behalf. Defendant submits that the testimony establishes that only Perini foremen supervised the work performed by plaintiff during the course of the project and on the accident date, and that neither defendant nor CTE/GPI's inspectors directed the means and methods of the work performed by plaintiff. With respect to safety, defendant further submits that the evidence demonstrates that defendant TBTA delegated full responsibility to Perini for safety of its own employees, including plaintiff, and oversight of Perini's general contracting work and its implementation of a safety program for its employees to the consulting/inspection engineer CTE/GPI. Thus, defendant argues as a matter of law that no liability could be assessed against defendant.

Moreover, since the accident arose out of Perini's work and not a defect or condition on the TBTA's property, defendant argues that notice is a required element for a finding of Section 200 liability, which totally fails at bar. According to defendant,

defendant had neither actual nor constructive notice of any condition at the site which caused plaintiff's accident.

Alternatively, if this Court were to not find that the judgments must be set aside as a matter of law for legal insufficiency, defendant argues that the jury's verdicts on Labor Law Sections 241, subdivision (6) and 200 are against the weight of evidence and that a new trial on liability with respect to these two claims should be granted. Specifically, defendant urges that the evidence on the issues of supervisory control and notice, as well as whether plaintiff climbed in an inadequately illuminated area, so preponderated in favor of defendant that there is no valid line of reasoning or permissible inferences which possibly could have lead a rational jury to have found a violations of these Labor Law provisions and the liability verdicts on these two claims must be set aside and a new trial ordered.

Finally, defendant contends that the jury charge and verdict sheet were so inherently flawed on the claim of Labor Law Section 241, subdivision (6), and defendant's objections with respect to same were preserved, that the verdict against defendant thereon must be set aside and a new trial ordered.

Plaintiff opposes the motion in all respects, maintaining that the jury's verdict is "wholly supported by the evidence adduced at trial ..." Additionally, plaintiff argues that the motion is fatally

defective to the extent it is not supported by relevant trial transcripts.

Addressing first the Labor Law Section 241, subdivision (6) verdict, plaintiff argues that plaintiff testified that he "did not look to [his] right for a safety line because it was dark over there and the ground was covered with construction debris." Plaintiff's testimony that it was "dark" in the work area, he argues, is not only unrefuted but actually supported by Joseph Capporoso who had testified that he did not observe any lights in the area in which the ladder and the safety line were located, as well as by Gaby Anton, Perini's project manager, who had testified that it was somewhat dark in the area, and David Nolan. Further, plaintiff points to his expert's affidavit, offered into evidence at trial, wherein Mr. Wise stated that "[i]t would have been dangerous for Mr. Cahill to search for items in an area where he may trip on debris that he could not see due to poor illumination."

On the Labor Law Section 200 claim, plaintiff notes that Lloyd Drummond, defendant's assistant project manager, had testified that he would make site inspections and if he observed safety problems he would either immediately speak to Perini or speak with them at a later time concerning the safety issues. Plaintiff also points to defendant's project manager's testimony that he presided over a safety meeting called due the then recent high number of accidents.

However, defendant ultimately failed to implement protocol to insure that the general contractor did in fact provide safety training, as promised. It was plaintiff's expert Mr. Wise's opinion that safety training is an integral part of providing a safe place to work and defendant had failed to properly instruct plaintiff concerning available safety devices, which was causative of the accident. Indeed, Anthony Dellamorte, plaintiff's supervisor, had testified that he did not provide any safety training to plaintiff other than a past brief conversation concerning climbing and safety lines. In plaintiff's view, there is no basis to find that as a matter of law neither a Labor Law Section 241, subdivision (6) claim nor a Section 200 claim has been demonstrated.

Further, plaintiff maintains that defendant is not entitled to a new trial because it cannot be said that the evidence so preponderated in defendant's favor that the verdict against defendant could not have been reached on any fair interpretation of the evidence. Specifically, plaintiff argues that defendant's violation of Labor Law Section 241, subdivision (6) is made out by the undisputed evidence that the safety line and ladder available to plaintiff at the time of his accident were located in an area that was dark and covered with debris. Had plaintiff been able to see the ladder, the jury concluded he would have used same. Thus,

the jury fairly and rationally found, according to plaintiff, a violation of 12 N.Y.C.R.R. 23-1.30 to serve as a predicate for the Section 241, subdivision (6) claim.

According to plaintiff, a fair interpretation of the evidence also support the jury's finding that defendant violated Section 200 of the Labor Law by failing to provide and maintain a safe working place. Defendant's project manager William Neubauer was well aware of safety concerns at the work site, and indeed had called a meeting to address same, and defendant's assistant project manager, after observing safety problems, would notify Perini, the general contractor and plaintiff's employer. Plaintiff urges that defendant could have and should have realized that inadequate lighting created an unsafe work site and remedied the inadequate illumination and its attendant unsafe work environment.

Nor does plaintiff agree that a new trial is warranted because the Court's instructions were not confusing or incomplete, which plaintiff argues is the correct standard in such circumstance. Also, there was no inconsistency or misstatement and thus the verdict should stand, insists plaintiff. Plaintiff does not address defendant's complaints regarding the verdict sheet.

It is of course well settled that the Court's discretion to grant a motion pursuant to CPLR 4404, subdivision (a) to set aside the jury's verdict as against the weight of the evidence as a

matter of law and order a new trial must be exercised with "considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict," Pickering v. New York City Transit Authority, 299 A.D.2d 402, 403 (2nd Dept. 2002); see, also Teneriello v. Travelers Companies, 264 A.D.2d 772 (2nd Dept. 1994), and that the fact-finding function of a jury is to be accorded great deference by the trial Court. See Gamiel v. University Hospital, 216 A.D.2d 80 (1st Dept. 1995), lv. to app. dsmd. 87 N.Y.2d 911 (1996). Indeed, such a motion should properly not be granted unless the Court finds that "the jury's determination is palpably incorrect," Johnson v. New York City Health & Hospitals Corp., 246 A.D.2d 88 (1st Dept. 1998), and that the "evidence so preponderates in favor of the moving party that the verdict could not have been reached upon any fair interpretation of the evidence. (Citations omitted)." Pedone v. B & B Equipment Co., Inc., 239 A.D.2d 397, 398 (2nd Dept. 1997); see, also Aprea v. Franco, 292 A.D.2d 478 (2nd Dept. 2002); Bethell v. Stephens, 268 A.D.2d 451, 452 (2nd Dept. 2000); Hersh v. Diekmann, 264 A.D.2d 815 (2nd Dept. 1999); Yalkut v. City of New York, 162 A.D.2d 185, 188 (1st Dept. 1990).

Labor Law Section 241, subdivision (6) "imposes a nondelegable duty upon owners and contractors to provide reasonable

and adequate protection and safety to construction workers.' (Citation omitted)."
Brasch v. Yonkers Construction Company, A.D.3d (2nd Dept. 2004). A plaintiff must prove that an alleged regulation in the Code is applicable, that a violation occurred of a specific standard set forth in the Industrial Code and that the violation was the proximate cause of the plaintiff's injury. See Zimmer v. Chemung County Performing Arts, Inc., 102 A.D.2d 993 (3rd Dept. 1984), revd. on other grnds. 65 N.Y.2d 513 (1985). With respect to the specific standard requirement, it has been held that a plaintiff must plead, and therefore it is necessarily implied that a plaintiff must prove "concrete specifications imposing a duty on defendant." Comes v New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877 (1993). Moreover, with respect to the proximate cause requirement in the context of the "Illumination" regulation,³ it has been held that a violation is actionable only where the plaintiff establishes that he actually fell or tripped and thus the insufficient illumination at the place where the plaintiff was

³ 12 N.Y.C.R.R 23-1.30 states in pertinent part that:
 "Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than Ten foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing, or similar area where persons are required to pass."

working was a substantial factor in bringing about the accident. See Herman v. St. John's Espicopal Hospital, 242 A.D.2d 316 (2nd Dept. 1997); Duell v. Eastman Kodak Co., 224 A.D.2d 997 (4th Dept. 1996).

While case law establishes that 12 N.Y.C.R.R 23-1.30 serves as a valid predicate for liability under Labor Law Section 241, subdivision (6), see McDonagh v. Victoria's Secret, Inc., 9 A.D.3d 395, 396 (2nd Dept. 2004); Herman v. St. John's Episcopal Hosp., 242 A.D.2d 316 (2nd Dept. 1997), the inescapable conclusion here is that the record includes only the most minimal evidence relating to the issue of illumination at plaintiff's work site. Indeed, the evidence presented amounts to nothing more than several witnesses' statements that the work area where the accident occurred was "dark." There simply is nothing in the record establishing that the lighting in the area where plaintiff was working was insufficient to meet the standard set forth in 12 NYCRR 23-1.30. Cf. Duell v Eastman Kodak Co., 224 A.D.2d 997 (4th Dept. 1996).

Moreover, given that 12 NYCRR 23-1.30 had not been read to the jury, and further the Court agrees that verdict sheet question 4(c) improperly presupposed a finding of a violation of 12 NYCRR 23-1.30, the Court finds that the jury could not have reached their verdict upon any fair interpretation of the evidence; thus the jury's finding of liability on the Section 241, subdivision (6)

claim must be set aside and a new trial is hereby Ordered with respect thereto.

Regarding Labor Law Section 200, entitled "General Duty to Protect the Health and Safety of Employees, said statute provides in relevant part that:

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed there in or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protection to all such persons.

In order for plaintiff to prove liability against defendant premised upon Labor Law Section 200, he must prove that the TBTA exercised direct supervisory control over the injury-producing work such that defendant had authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition, or had prior notice of the condition which allegedly caused the accident. See Bond v. York Hunter Construction, Inc., 95 N.Y.2d 883 (2000); Rizzuto v. L.A. Wenger Construction Co., Inc., 91 N.Y.2d 343 (1998); Ross v. Curtis-Palmer Hydro-Electric Company, 81 N.Y.2d 494 (1993); O'Brien v. Triborough Bridge and Tunnel Authority, 17 A.D.3d 105 (1st Dept. 2005); Perri v. Gilbert Johnson Enterprises, Ltd., 14 A.D.3d 681 (2nd Dept. 2005); Paladino

v. Society of New York Hosp., 307 A.D.2d 343, 344 (2nd Dept. 2003).

"General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200 (citations omitted)." Perri v. Gilbert Johnson Enterprises, Ltd., supra.

On the record before this Court, the Court finds that the jury's finding that plaintiff worked at an unsafe work site where, although various safety devices were available to plaintiff while working on the form they were not readily and safely accessible, that defendant did have the authority to control the manner in which plaintiff performed his work given testimony that its assistant project manager testified that he would make inspections and, if he observed a safety problem, would address it by speaking to Perini, and/or that defendant was on notice that there existed an unsafe work site given the number of then recent accidents on the job and its conducting of a safety meeting which it knew or should have known did not result in the implementation of safety training by Perini, was reached upon a fair interpretation of the evidence submitted, or the inferences to be drawn from the evidence.

This matter is respectfully referred back to the Trial Assignment Part for the scheduling of a new trial on the issue of

liability only with respect to Labor Law Section 241, subdivision (6).

In light of the Court's determination herein, defendant's May 3, 2005, Order to Show Cause for an Order staying the trial of damages "pending the hearing and determination of the post-trial motions that are being made ..." is granted.

Dated: June 27, 2005
2005/06/27
Carmel, New York



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