

Brice v IDI Constr. Co., Inc.

2007 NY Slip Op 32733(U)

August 28, 2007

Supreme Court, New York County

Docket Number: 0122307/2003

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

Index Number : 122307/2003

BRICE, STEPHEN

INDEX NO. _____

vs
IDI CONSTRUCTION

MOTION DATE 4.26.2007

Sequence Number : 002

MOTION SEQ. NO. 02

REARGUMENT/RECONSIDERATION

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied as moot*
with the accompanying order and papers.

FILED
SEP 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/28/07

WALTER B. TOLUB

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 15

-----x
 STEVE BRICE and CAROLYN BRICE,

Plaintiffs,

Index No. 122307/03

Mtn Seq. 02

-against-

IDI CONSTRUCTION CO., INC., and TRUMP
 TOWER COMMERCIAL, LLC.,

Defendants.
 -----x

WALTER B. TOLUB, J.:

By this motion, plaintiffs move to reargue this court's January 30, 2007 decision which granted summary judgment in favor of defendants and dismissed plaintiff's complaint. The motion to reargue is granted and resolved in the following memorandum decision.

This action arose from an accident occurring in October, 2003. According to deposition testimony, plaintiff Steven Brice, was working as a glass installer for Schuldiner Glass on a construction project site located at 725 Fifth Avenue in Manhattan. Mr. Brice tripped while ascending a staircase, and the hard-hat which had been provided to him by his employer fell off of his head. Mr. Brice picked up his hat, continued up the stairs, and, before placing the hat back upon his head, struck an I-beam, thereby sustaining multiple injuries.

In January, 2007, this court issued a decision on defendant's motion for summary judgment wherein it was determined that the claims advanced by plaintiffs under Labor Law §240 were

inapplicable to the circumstances surrounding Mr. Brice's injuries, and that the claims advanced under Labor Law §§ 200 and 241(6) were to be dismissed, as the injuries sustained were not due to violation of Labor Law or other statutes, but due to Mr. Brice's own actions.

The instant motion brought by plaintiffs contends that this court overlooked or misapprehended matters of fact with respect to how Mr. Brice's injuries occurred. Plaintiffs also argue that it is a "misapprehension of law to conclude that Mr. Brice's actions were the sole proximate cause of his injuries" (Plaintiffs' Memorandum of Law in Support of Motion, p. 2), and further argue the existence of a question of fact with respect to the issue of whether the hard-hat would have prevented Mr. Brice's injuries to his forehead.

Discussion

As with any motion to reargue, success is predicated upon demonstrating that in arriving at its earlier decision, the court either overlooked or misapprehended the facts or the law or somehow mistakenly arrived at its conclusion (CPLR 2221 (d)(2); Foley v. Roche, 68 AD2d 558, 567 [1st Dept 1979]; Schneider v. Solowey, 141 AD2d 813 [2nd Dept 1988]; Pahl Equipment Corp. v. Kassis, 182 AD2d 22,27 [1st Dept 1992]). The inquiry is strictly limited to the papers presented in the motion being reargued. Contrary to plaintiffs' arguments however, it does not include the expert

testimony of Paul Bonfiglio. Mr. Bonfiglio's affidavit was excluded from review in this court's earlier decision, and it is excluded in the motion to reargue.

Contrary to plaintiffs' interpretations, both the First and Second Departments in this state agree that where an expert is not identified in pretrial disclosure, the affidavit of that expert witness may be properly excluded when offered solely to oppose a motion for summary judgment (Safrin v. DST Russian and Turkish Bath, Inc., 16 AD3d 656 [2nd Dept. 2005] (affidavit properly rejected where expert first revealed after filing of note of issue and certificate of readiness and in opposition to a motion for summary judgment); Herrera v. Persaud, 276 AD2d 304 [1st Dept. 2000] (plaintiff precluded from offering expert testimony where plaintiff failed to disclose expert witness until after filing note of issue and then only in their opposition to defendant's motion for summary judgment)).

Here, defendants made demands for expert disclosure in this matter on April 20, 2004 and February 17, 2005 (Notice of Motion for Summary Judgment (submitted January 11, 2007), Exhibit L) and this court directed the completion of outstanding discovery, which, even if not specifically delineated, would include responses to those demands, on no less than five discovery conferences held over a span of roughly one and one half years. Plaintiffs chose not to respond to these demands, and filed their note of issue on July 13,

2006. Only when faced with a summary judgment motion did plaintiffs offer expert testimony. It is therefore very difficult for this court to conclude that the plaintiffs' failure to disclose his expert witness not intentional, willful, or in bad faith (compare, Bockelmann v. New Paltz Golf Course, 284 AD2d 783 [3rd Dept. 2001]; Cela v. Goodyear Tire & Rubber Co., 286 AD2d 640 [1st Dept. 2001]).

Moreover, even if this court were to consider the opinions of Mr. Bonfiglio,¹ the affidavit would still be properly excluded from consideration on a motion for summary judgment because the statements the affidavit contains, based solely on deposition testimony and unidentified "case materials" (Notice of Motion Exhibit D), are conclusory and speculative (see, Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). Moreover, Mr. Bonfiglio's opinions as to the applicability of the statutory provisions of the Industrial Code constitute an improper attempt to usurp this court's function as the sole determiner of law (Buchholz v. Trump 767 Fifth Ave., LLC, 5 NY3d 1 [2005]).

In reaching its earlier decision, this court scrutinized the deposition testimony of Mr. Brice, so as to be able to determine the nature of the circumstances leading up to his accident. This court summarized those facts as follows:

¹No CV detailing Mr. Bonfiglio's credentials was included with the original motion papers.

As plaintiff was walking from the first floor to the landing, on the second or third floor he tripped. As a result of the trip, Plaintiff's hard hat came off his head. Then, as he began to walk from the landing to the second floor, and while in the process of placing the hat back on his head, Plaintiff hit an I-beam over the stairwell and injured his head. (Decision Dated January 30, 2007).

The court concedes that the description of these events, as previously written, may not have been as clear as it had intended. However, it does not agree with plaintiffs' assessment that this characterization warrants reversal of the decision granting summary judgment.

Mr. Brice testified at his deposition that while working on the job site, he had to utilize stairs which, although permanent to the structure, were, in his opinion, poorly lit.² He tripped, for an unknown reason³ while walking up this staircase, and knocked his

² In pertinent part, Mr. Brice testified as follows:
 Q: As you were climbing from the first floor to the landing, did you have any difficulty seeing what was on the steps?
 A: Yes, ma'am.
 Q: Can you tell me why that was?
 A: From poor lighting.
 (Deposition of Stephen Brice, p. 35).

³ In pertinent part, Mr. Brice testified as follows:
 Q: As you were walking from the first floor to the landing, what did you feel beneath your feet?
 A: I don't know. [...] (Deposition of Stephen Brice, p. 35)
 Q: Now, do you know what you tripped on?
 A: No, ma'am
 Q: Were you in the process of stepping from one step to the next as you tripped?
 A: Yes, ma'am.
 Q: Did you get your foot all the way up to the next step before

hard hat off of his head.⁴ Mr. Brice then picked up his hard hat, continued up the stairs, and, before he placed his hard hat back upon his head,⁵ hit an exposed I-beam located over the stairwell.⁶

you tripped?

A: I don't know ma'am, I'm sorry.

Q: When you tripped, did you feel anything beneath your foot move?

A: Not to my knowledge.

Q: Did you see anything under your foot as you tripped?

A: Not that I remember.

(Deposition of Stephen Brice, p. 36).

⁴ In pertinent part, Mr. Brice testified as follows:

Q: Approximately how many steps up did you take before something happened?

A: I would have to estimate two or three

Q: What happened when you got on the second or third step?

A: I tripped.

(Deposition of Stephen Brice, p. 36).

⁵ In pertinent part, Mr. Brice testified as follows:

Q: Did anything happen after you put out your hand?

A: My hard-hat fell off.

[...]

Q: What happened immediately after that?

A: I grabbed my hard-hat, and I continued up the stairs, and I hit - I hit an I-beam that was coming across the stairwell.

(Deposition of Stephen Brice, p. 39-40).

⁶ In pertinent part, Mr. Brice testified as follows:

Q: Sir, when your hard-hat came off, did you have an opportunity to put it back on before you continued up the stairway?

A: I really don't know, I just grabbed it and kept going and hit the I-beam (indicating).

Q: Were you in the process of putting it back on at the time you hit the I-beam?

A: Yes, sir. I had it in my hand.

Q: Was it your intention -

A: Right.

Q: - to put your hand and the hard-hat to your head -

A: Yes.

Q: - as you continued walking up the steps?

A: Yes, sir, that's exactly how it was.


(Deposition of Stephen Brice, p. 83-84).

The court is not insensitive as to Mr. Brice's injuries. However, merely sustaining an injury, however serious, does not obviate the requirement that when asserting claims under Labor Law §§ 240 and 241(6), a plaintiff must establish that his injuries are the result of a violation of those sections (Blake v. Neighborhood Housing Services, 1 NY3d 280 [2003]). Plaintiffs in this case have not met that burden. What plaintiffs have established, is that Mr. Brice injured his head when he was not wearing his hard hat, something which he knew had to be worn at all times on the construction site. His negligence, however brief, was the sole proximate cause of his injuries, and liability under the Labor Law cannot attach (Blake, 1 NY3d 280; Weininger v. Hagedorn & Company, 91 NY2d 958 [1998]; Zimmer v. Chemung County Performing Arts, 65 NY2d 513 [1985]). Accordingly, it is

ORDERED that plaintiffs' motion to reargue this Court's decision dated January 30, 2007 is granted and upon reargument, this court stands by its original decision granting summary judgment in favor of defendants and dismissing plaintiffs' complaint.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/28/07


HON. WALTER B. TOLUB, J.S.C.

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