

McCoy v Metropolitan Transp. Auth.

2007 NY Slip Op 33723(U)

October 30, 2007

Supreme Court, New York County

Docket Number: 0102384/2000

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 21

McCOY, CHARLES

INDEX No. 102384/00

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 004, 005

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion to vacate note of issue.

PAPERS NUMBERED

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

1 + 2

Answering Affidavits- Exhibits _____

3, 3A, 4

Replying Affidavits _____

5, 6, 7

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED
NOV 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/30/07

Donna M. Mills
J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

-----X
CHARLES McCOY and MARY ANN McCOY,

Index No.: 102384/00

Plaintiffs,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY,
METRO NORTH COMMUTER RAILROAD, MANHATTAN
AND BRONX SURFACE TRANSIT OPERATING
AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY
and THE CITY OF NEW YORK,

Defendants.
-----X

Hon. Donna Mills, J.S.C.:

Motion sequence numbers 004 and 005 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by an ironworker when he was run over by a large mobile hydraulic forklift, on February 1, 1999, while at a construction site located at the Park Avenue viaduct at 117th Street in Manhattan.

In motion sequence number 004, defendants Metropolitan Transportation Authority (MTA) and Metro North Commuter Railroad (Metro North) (collectively, defendants) move (a) pursuant to 22 NYCRR 202.21 (d) and CPLR 3122 and 3124, for an order compelling plaintiffs Charles McCoy and Mary Ann McCoy (plaintiff) to execute HIPAA-compliant authorizations for the release of medical records in response to defendants' August 15, 2007 letter demanding the same, and granting a brief stay of the proceedings until said authorizations can be processed; and (b) in the alternative, pursuant to CPLR 3126, for an order precluding plaintiff from introducing any evidence at trial with respect to his medical injuries, drug dependancies, or marital problems allegedly caused by his accident.

FILED
NOV 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

In motion sequence number 005, defendants move for an order (a) granting defendants' motion for a framed issue hearing to determine, as a matter of law, if the Gradall 534B rough terrain forklift (the Gradall) involved in plaintiff's accident is subject to the regulations contained in 12 NYCRR 23-8 of the New York State Industrial Code governing mobile cranes, tower cranes and derricks; and (b) staying the trial of this action pending the determination, as a matter of law, of said framed issue hearing.

BACKGROUND

Plaintiff, an ironworker, was employed by non-party NAB Construction Corporation (NAB) on the day of his accident. Defendant Metro North, owner of the Park Avenue viaduct, hired NAB to serve as general contractor for the Park Avenue viaduct project, which included replacing the viaduct, renovating the station and disassembling the false work.

On the day of plaintiff's accident, the Gradall was being used to transport a steel beam to a scrap heap. The steel beam was suspended from the boom of the Gradall by a steel cable and choker located at the midpoint of the beam. In order to hold the steel beam steady, plaintiff was positioned at the right end of the beam and another worker was positioned at the left end of the beam. As the Gradall stopped for a red light, plaintiff's end of the beam was caused to swing forward and then back again, causing plaintiff to be pushed backwards toward the Gradall. In order to brace himself, plaintiff took a step back with his left foot, at which time the Gradall's right front wheel ran over his left foot and leg, causing plaintiff injury.

DISCUSSION

DEFENDANTS' MOTION FOR A FRAMED ISSUE HEARING

Plaintiff commenced this action claiming that he was injured when he was run over by

[* 4]

the wheel of the Grandall while it was transporting a steel beam. Defendants are the only remaining defendants in this action. This court dismissed plaintiff's claims under Labor Law §§ 200 and 241. This court also dismissed several Industrial Code provision violations claimed by plaintiff under his Labor Law § 241 (6) claim and denied plaintiff's cross motion to amend his bill of particulars to include certain additional Industrial Code provision violations. However, this court did allow plaintiff to amend his bill of particulars to include claimed violations of Industrial Code 12 NYCRR 23-8.2 (d) (1) and 23-8.2 (d) (2).

In doing so, this court addressed, but did not decide, as to whether the Grandall involved in plaintiff's accident was to be considered a "mobile crane," and therefore subject to the Industrial Code regulations that plaintiff cited in support of his Labor Law § 241 (6) claim. Specifically, this court noted,

[t]he parties dispute whether a Gradall is a "mobile crane" or not. Assuming, without deciding, that it is, this court finds that the above sections may be applicable to the facts of this case. Therefore, plaintiffs' cross motion for leave to amend their bill of particulars is granted with respect to 12 NYCRR 23-8.2 (d) (1) and 23-8.2 (d) (2).

(Justice Robert D. Lippmann's Decision and Order of June 16, 2005, Defendants' Order to Show Cause, Exhibit A, at 9).

Thereafter, the Appellate Division, First Department, modified this court's decision to allow plaintiff to amend his bill of particulars to also include claims under Industrial Code 12 NYCRR 23-8.1 (f) (1) (iv), 23-8.1 (f) (2) (i) and 23-8.2 (c) (3). Specifically, in McCoy v Metropolitan Transportation Authority (38 AD3d 308, 309 [1st Dept 2007]), the Appellate Division held that this court

erred in limiting plaintiffs' amendment of their bill of particulars to the addition of claimed violations of Industrial Code (12 NYCRR) §§ 23-8.2 (d) (1) and (2) to

support their Labor Law § 241 (6) claim; the claims of violations of Industrial Code § 23-8.1 (f) (1) (iv), § 23-8.1 (f) (2) (i) and § 23-8.2 (c) (3) should have been permitted as well.

We disagree with the view that these other three proffered provisions of the Industrial Code are inapplicable to this claim as a matter of law. All three provisions apply to cranes hoisting loads ...

(Defendants' Order to Show Cause, Appellate Division, First Department Decision, Exhibit B, at 2).

Defendants assert that, as the Appellate Division did not specifically address whether the Gradall is a mobile crane, tower crane or derrick, in the interests of justice and judicial economy, a framed issue hearing is necessary to determine, as a matter of law, if the Gradall is subject to the regulations contained in Industrial Code 12 NYCRR 23-8. Defendants contend that by clarifying this sole issue, the resolution of this case will be greatly expedited. In support of their argument, defendants put forth various expert testimony to demonstrate that the Gradall is not a mobile crane within the meaning of Industrial Code 12 NYCRR 23-8.

However, in rendering its decision, the Appellate Division, First Department, has already properly considered and determined the issue for which defendants now seek a framed hearing. "The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court" (Messina v City of New York, 300 AD2d 121, 123 [1st Dept 2002]; Morris v Pavarini Construction, 9 NY3d 47, 51 [2007]; Szafranski v Niagara Frontier Transportation Authority, 5 AD3d 1111, 1113 [4th Dept 2004]; Penta v Related Companies, L.P., 286 AD2d 674, 674-675 [2d Dept 2001]). In Point III of plaintiff's appellate brief, plaintiff argued that the Gradall, as it was being used at the time of plaintiff's accident, was a mobile crane for the purposes of Industrial Code 12

NYCRR 23-8, noting that “the Gradall has wheels, an engine, and a boom,” and that “the wheels and engine make it mobile and that the retractable articulating boom and cable make it a crane” (Culhane Affirmation in Opposition, Plaintiffs’ Appellate Brief, Exhibit F, at 37-39).

Importantly, defendants did not address or dispute this point in their responding brief in any way, thus abandoning the issue.

In addition, that the Appellate Division did not write a sentence specifically stating that the Gradall constitutes a mobile crane is of no consequence. Many court decisions contain explicit holdings which are based on implicit holdings. It is evident that these implicit holdings, though not expressed, have been necessarily decided, because the express holding could not have been reached without doing so (see Promenade v Schindler Elevator Corporation, 43 AD3d 359, 361 [1st Dept 2007]; American Guarantee and Liability Insurance Company v CNA Reinsurance Company, 42 AD3d 338, 338 [1st Dept 2007]).

Defendants argue, in their sur-reply affirmation, that plaintiff waived the issue of whether the Gradall was a mobile crane, when he did not specifically identify this issue in his notice of appeal. However, as the determination of said issue was a necessary step in the court’s decision-making process regarding whether the additional proffered Industrial Code provisions were applicable to plaintiff’s Labor Law § 241 (6) claim, plaintiff’s appeal of the issue was implied. As such, defendants are not entitled to an order in their favor granting their motion for a framed issue hearing as to whether the Gradall is to be considered a mobile crane.

DEFENDANTS’ MOTION TO COMPEL PLAINTIFF TO EXECUTE MEDICAL AUTHORIZATIONS

Recent amendments to CPLR 3122 (a) affect the discovery of protected health information in the context of a subpoena duces tecum served upon a health care provider,

requiring that “[a] medical provider served with a subpoena duces tecum requesting the production of a patient’s medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient” (quoted in Teger v Healy, 4 Misc 3d 1025(A) [Sup Ct, Suffolk County 2004]; In re Carella, 2 Misc 3d 1007(A) [Sur Ct, Nassau County 2004]). As a result, medical providers require that authorizations, pursuant to CPLR 3122 (a), satisfy the requirements of Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 USC § 1320d, et seq.) before they will surrender a patient’s medical records.

Defendants seek an order compelling plaintiff to provide defendants with HIPAA compliant authorizations, so that they may obtain plaintiff’s medical records for use at trial. In the event that plaintiff refuses to provide said authorizations, defendants move to preclude plaintiff from presenting any evidence at trial regarding any of plaintiff’s physical injuries, drug dependencies or marital problems allegedly caused as a result of his accident.

On or around June 12, 2007, defendants’ present counsel (defendants’ counsel) was substituted for defendants’ former counsel. On or around August 2, 2007, for the first time, defendants’ counsel was able to review copies of the records of this case which had been subpoenaed by defendants’ former counsel. Defendants claim that, while reviewing these records, they learned that plaintiff was under the care of multiple medical providers for conditions relevant to his damages claim in the present action, for which plaintiff’s former counsel had never exchanged authorizations. The review of these records also informed them of the extent of plaintiff’s pre-incident marital counseling, substance abuse treatment, as well as significant orthopedic injuries which were the result of a separate workplace accident in which

plaintiff was involved on November 11, 1984.

Thus, upon completion of defendants' review of the records, in a letter dated August 15, 2007, defendants served plaintiff with a formal demand for the additional authorizations. In a follow-up letter, dated August 31, 2007, defendants reiterated the authorization request and documented a phone call to plaintiff, wherein plaintiff refused to produce the authorizations on the ground that the request was untimely. In a letter, dated September 4, 2007, plaintiff again refused to provide the authorizations, noting that numerous conferences had been held wherein no request for further discovery had been made, and that the time for jury selection was approaching soon.

Here, in justifying his refusal to provide the authorizations at issue, plaintiff maintains that, as the authorizations have already been produced, they need not be produced again. However, a review of the record indicates that the only authorization that plaintiff may have provided previously was one for a marriage counselor, Dr. Zweig, and there is no evidence in the record that said authorization was, in fact, produced.

In addition, plaintiff maintains that, as the records in this case have been available since the start of the action, defendants' counsel had ample opportunity to review them before they were substituted as defendants' counsel. However, plaintiff's argument is disingenuous, as defendants' counsel would have had no reason to review said documents before actually becoming associated with the case.

Further, plaintiff attests that the authorizations requested in regard to medical records pertaining to plaintiff's 1984 accident are irrelevant, due to the fact that the accident happened 15 years ago, and the fact that plaintiff testified in a deposition that those injuries were not the

same as the injuries at issue in the instant case. Specifically, plaintiff had replied, "No," when asked whether, prior to the subject accident, he had ever injured his "left or right leg," received any "treatment for depression," received any "treatment for any inability with [his] sexual life" or had "[a]ny injuries to [his] testicles or to [his] penis prior to this accident" (Defendants' Order to Show Cause, Exhibit D, McCoy Deposition, at 112-113)

However, in plaintiff's supplemental bill of particulars, plaintiff claims permanent and serious injuries to not only his legs, but to many other parts of his body, as well. Moreover, plaintiff has submitted no evidence to identify what injuries he suffered in the 1984 accident, or what residual effects, if any, that the 1984 accident has had on his health and well-being.

On the other hand, defendants have demonstrated that the damages portion of their defense will be prejudiced without the requested authorizations at issue, as it is possible that some of plaintiff's claimed medical injuries, drug dependencies and marital problems existed before the subject accident, and as such, the authorizations are necessary in order to fairly evaluate the damages portion of plaintiff's claim. "There is a distinction between pretrial discovery and the marshaling of evidence for trial by the use of a subpoena duces tecum. Certainly, the defendant's absolute legal right to submit proof in mitigation of the damages allegedly sustained by the plaintiff [] would be substantially impaired if the defendant was deprived of the opportunity to subpoena the plaintiff's relevant medical records for use at the damages inquest [internal quotations and citations omitted]" (Singh v Friedson, 36 AD3d 605, 606 [2d Dept 2007]).

Under 22 NYCRR 202.21 (d):

Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial

proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.

Defendants, by this motion, utilized the only device available to them to ensure compliance with the Health Insurance Portability and Accountability Act of 1996 (see Singh v Freidson, 36 AD3d at 606). Absent a showing of prejudice by the plaintiff, we conclude that plaintiff is to provide defendants with said HIPAA-compliant authorizations.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants Metropolitan Transportation Authority (MTA) and Metro North Commuter Railroad's (Metro North) (collectively, defendants) motion (a) pursuant to 22 NYCRR 202.21 (d) and CPLR 3122 and 3124, compelling plaintiffs Charles McCoy and Mary Ann McCoy (plaintiff) to execute HIPAA-compliant authorizations for the release of medical records in response to defendants' August 15, 2007 letter demanding the same, and granting a brief stay of the proceedings until said authorizations can be processed is granted; and it is further

ORDERED that plaintiff is to provide defendants with said authorizations within 14 days of the entry date of this order. In the event that plaintiff fails to comply with said directive, plaintiff will be precluded from presenting any evidence at trial with respect to his medical injuries, drug dependencies or marriage problems allegedly caused as a result of his accident; and it is further

ORDERED that, upon receipt of said authorizations, defendants have 90 days in which to subpoena said medical records and process them; and it is further

ORDERED that defendants' motion for a framed issue hearing to determine, as a matter

of law, if the Gradall 534B rough terrain forklift involved in plaintiff's accident is subject to the regulations contained in 12 NYCRR 23-8 of the New York State Industrial Code governing mobile cranes, tower cranes and derricks; and (b) staying the trial of this action pending the determination, as a matter of law, of said framed issue hearing, is denied.

DATED: 10/30/07

ENTER:

Donna Mills
J.S.C.

DONNA M. MILLS, J.S.C.

FILED
NOV 20 2007
NEW YORK
COUNTY CLERK'S OFFICE