

Williams v Kincaid

2010 NY Slip Op 31090(U)

May 4, 2010

Supreme Court, New York County

Docket Number: 109194/06

Judge: Carol R. Edmead

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5-6-10

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

HON. CAROL EDMEAD

PRESENT: _____

Justice

PART 35

CHRISTOPHER E. WILLIAMS

INDEX NO. 109194/06

MOTION DATE _____

MOTION SEQ. NO. 04

MOTION CAL. NO. _____

- v -

ADAM KINCAID et al.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

FILED

MAY 06 2010

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

NYS SUPREME COURT RECEIVED
MAY 06 2010
MOTION SUPPORT OFFICE

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of plaintiff's motion pursuant to CPLR 2221 (d) for leave to reargue this Court's order dated February 17, 2010 which granted the separate motions of defendants Adam Kincaid d/b/a Kincaid Construction, 307-9 Owners Corp., and Paul DeGennaro for summary judgment dismissing plaintiff's complaint, and denied plaintiff's cross-motion to deem its amended bill of particulars properly served, is granted; and it is further

ORDERED that the branch of plaintiff's motion requesting, upon reargument, that defendants' motions be denied, this case be restored to active status, and that plaintiff's cross-motion be granted, is denied; the Court adheres to its February 17, 2010 determination; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 5/4/10 _____
HON. CAROL EDMEAD J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
CHRISTOPHER E. WILLIAMS,

Index No. 109194/06

Plaintiff,

-against-

ADAM KINCAID d/b/a KINCAID CONSTRUCTION,
307-9 OWNERS CORP., and PAUL DeGENNARO,

Defendants.

-----X
HON. CAROL R. EDMEAD, J.S.C.

FILED
MAY 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this Labor Law action, plaintiff Christopher E. Williams (“plaintiff”) moves pursuant to CPLR 2221 (d) for leave to reargue this Court’s order dated February 17, 2010 which granted the separate motions of defendants Adam Kincaid d/b/a Kincaid Construction (“Kincaid”), 307-9 Owners Corp. (“307-9”), and Paul DeGennaro (“DeGennaro”) for summary judgment dismissing plaintiff’s complaint, and denied plaintiff’s cross-motion to deem its amended bill of particulars properly served, and upon reargument, that defendants’ motions be denied, this case be restored to active status, and that plaintiff’s cross-motion be granted.

Factual Background

Plaintiff was injured on January 2, 2006 when he was operating a saw while performing renovation work at a cooperatively owned apartment unit located at 307 West 20th Street in Manhattan (the “premises”). At the time of the accident, plaintiff was pushing the saw through some wood and a splinter flew out and hit Kincaid, his “boss,” in the eye. Thereafter, plaintiff became “distracted” and “startled.” At that point, the saw tilted a bit, which caused the saw to pinch the wood, the blade to stop rotating and the saw to kick back up over his thumb. Plaintiff

noted that no one was wearing goggles at the time of his accident. Kincaid supplied the saw that plaintiff was using at the time of the accident.

Defendants moved for summary judgment dismissing, *inter alia*, plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims, and plaintiff cross moved to have his amended bill of particulars deemed properly served.

In dismissing plaintiff's complaint and denying plaintiff's cross-motion, the Court stated:

While plaintiff may be entitled to leave to serve a supplemental bill of particulars alleging violations of Industrial Code 12 NYCRR 23-1.8 (a), as plaintiff's belated identification of this proposed Industrial Code violation merely expounds on plaintiff's Labor Law § 241 (6) cause of action, which was pleaded in plaintiff's first bill of particulars, said alleged violation does not apply to the facts of this case. Here, plaintiff suffered a thumb injury, and not an eye injury. As such, the lack of eye protection was not a proximate cause of plaintiff's accident.

In support of reargument, plaintiff argues that the eye protection rule found in NYS Industrial Code § 23-1.8 (a) is not intended merely to protect injuries to the eyes but also injuries to other body parts if the violation was the proximate cause of the injury. Plaintiff points out that the Court of Appeals broadly defines proximate cause, stating "to carry the burden of proving a *prima facie* case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury ... Plaintiff need not demonstrate, however, that the precise manner in which the accident happened, or the extent of injuries, was foreseeable." Neither the Court nor the defendants cited to any case law to support the contention that the violation of NYS Industrial Code § 23-1.8 (a) was not the proximate cause of plaintiff's injury. Caselaw indicates that it is foreseeable that a violation of an Industrial Code Rule requiring eye protection can cause injury to another body part and that a Labor Law § 241 (6) cause of action may be pleaded where the Industrial Code violation was intended to protect a

different person but caused injury to the plaintiff.

Plaintiff also argues that Industrial Code § 23-1.8 (a) explicitly applies to "all persons," which includes not only the person doing the actual "welding, burning or cutting", but also those who are engaged in "any other operation." This broadly written rule clearly contemplates possible injuries not only to the welder, burner, or cutter, but to all persons in the vicinity, and their entire bodies.

Plaintiff was distracted when Kincaid abruptly covered his eye with his hand when the wood splinter flew into his eye. Plaintiff's startled reaction, causing the saw to bind and sever his thumb, was "spontaneous, reflexive and understandable" in the circumstances. Furthermore, plaintiff's injury was the "immediate consequence" of the defendants' violation of Industrial Code § 23-1.8 (a) by not wearing goggles. Thus, there is a question of fact whether the code violation was the proximate cause of plaintiff's injuries, precluding summary judgment in the defendants' favor.

In opposition, DeGennaro contends that as the Court determined, it did not breach any duty owed to plaintiff and that DeGennaro is clearly not a proper Labor Law defendant, and as plaintiff does not and cannot refute (or even addresses either of these determinations), plaintiff's instant motion to reargue, as to defendant DeGennaro must be denied. In any event, argues DeGennaro, it cited caselaw holding that the alleged predicate violation must also be established to have been causally related to the accident. DeGennaro also argues that the two cases cited by plaintiff are not supportive of the argument for which plaintiff attempts to use them, are not controlling in any way on the facts of this case or the law upon which the Court based its decision, and as neither of these cases, nor the arguments for which plaintiff cites to them, were

presented by plaintiff prior to the instant motion to reargue, they cannot be considered in any event.

Kincaid also argues that the Court neither overlooked the facts nor misapprehended the law. For the Court to have found that plaintiff's cutting of his thumb with the circular saw he was operating could have been proximately caused by the absence of eye protection on a third person, who made and presented no threat of contact whatsoever with either the plaintiff or the saw-would have strained logic well beyond reason and the controlling principles of law.

307-9 likewise argues that reargument is unwarranted; whether or not plaintiff was wearing goggles would not have prevented his thumb injury sustained by his operation of the saw. Kincaid was not the party injured, so his lack of goggles is irrelevant, and he is not making a claim of a 241 (6) violation personal to him.

In reply, plaintiff argues that defendants have again failed to cite any case law to support their argument that the lack of eye protection by Kincaid was not the proximate cause of plaintiff's injury. Yet, the two cases plaintiff cites clearly state that a Labor Law § 241 (6) cause of action may be pleaded where the Industrial Code violation was intended to protect a different person but caused injury to the plaintiff. Plaintiff states that the Court may have misapplied controlling principles of law to the facts in this case, and New York courts liberally define proximate cause in Labor Law 241 (6) cases, which is an issue to be determined by the trier of fact.

Discussion

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P.*

* 6]
Pahl Equipment Corp. v Kassis, 182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]).

Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661 [1st Dept 1994]) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *William P. Pahl Equipment Corp. v Kassis*, *supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Here, plaintiff argues that the Court misapplied the caselaw pertaining to NYS Industrial Code § 23-1.8 (a), and whether the Court can decide, as a matter of law, that defendants' violation of same was not a proximate cause of plaintiff's injury. Therefore, reargument is granted. However, upon reargument, the Court adheres to its earlier determination.

NYS Industrial Code § 23-1.8 (a) states:

Eye Protection. Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes.

Here, Kincaid's lack of eye protection was not a proximate cause of plaintiff's accident.

In other words, the alleged violation of NYS Industrial Code § 23-1.8 (a) in failing to provide Kincaid eye protection was not a proximate cause of plaintiff's injury to his thumb.

Plaintiff's claim that NYS Industrial Code § 23-1.8 (a) applies to his accident is unsupported by the facts and caselaw (*see Torres v City of New York*, 21 Misc 3d 1109, 873

NYS2d 238 [Sup Ct 2008] (“Whether an activity is protected by 12 N.Y.C.R.R. 23-1.8(a) of the Industrial Code . . . has been held to present an issue which turns on whether the particular activity involves a foreseeable risk of an *eye injury*”; plaintiff’s work demonstrates “potential danger to [his] eyes which is precisely what 12 N.Y.C.R.R. 23-1.8(a) was intended to prevent); *Cruz v Seven Park Ave. Corp.*, 5 Misc 3d 1018, 799 NYS2d 159 [Sup Ct Kings County 2004] (“inasmuch as plaintiff was not wearing eye protection at the time of the accident, plaintiff’s work posed a foreseeable danger to his eyes, and plaintiff did in fact sustain injuries to his eye, this regulation is applicable in this case”).

Plaintiff’s reliance on *Brady v City of New York* (52 AD3d 331, 859 NYS2d 193 [1st Dept 2008]) is misplaced. In *Brady*, the plaintiff, who was wearing goggles, was engaged in burning steel when a piece of hot metal slag flew out and injured his ear. The plaintiff filed a Labor Law 241 (6) cause of action based on Industrial Code § 23-1.25 (d) which requires that all persons engaged in flame cutting must “be provided with approved eye protection suitable for the work involved and appropriate protective apparel.” The plaintiff argued that in addition to the goggles, he should have been provided with a face shield which would have prevented his ear injury. The First Department upheld the 241 (6) cause of action. The First Department continued: “Virtually all the testimony and affidavits show that a face shield does protect a worker’s ears *and is sometimes provided to workers engaged in welding and burning steel*; in addition, on this record, it certainly cannot be said as a matter of law that *a face shield is not a form of approved eye protection considered suitable for the type of work plaintiff was performing.*” (*Emphasis added*). *Brady*, however, does not address whether the failure to provide a worker the required safety device was a proximate cause of plaintiff’s injury, but rather, whether a certain protective device

was required to be provided to the plaintiff in light of the work being performed such that a failure to provide such a device applies to plaintiff's 241 (6) claim. Furthermore, the First Department's holding that a regulation protecting a worker's eyes from injury applies where the worker suffers an injury to a different part of the worker's body under the circumstances presented in *Brady* does not extend to the plaintiff's case herein. There is no indication that plaintiff's injury to his thumb would have been prevented even if Kincaid was provided eye protection or other protective devices to prevent injury to Kincaid's eye.

Plaintiff's reliance on *Butler v County of Chautauqua* (261 AD2d 855, 689 NYS2d 577 [4th Dept 1999]) and *Senulveda v Consolidated Edison Company of New York*, 2007 WL 2176461 [Sup Ct New York County 2007]) that a Labor Law § 241(6) cause of action may be pleaded where the Industrial Code violation was intended to protect a different person but caused injury to the plaintiff is also misplaced; such cases are factually and legally distinguishable. Also, plaintiff was not injured as a result of attempting to protect his coworker from the injury the regulation was designed to protect against and plaintiff was not injured by the alleged insufficient safety device itself.

There being no issue of fact as to whether plaintiff's injury is attributable to a violation of 12 NYCRR 23-1.8(a), dismissal of plaintiff's Labor Law 241(6) claim and denial of plaintiff's cross-motion is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion pursuant to CPLR 2221 (d) for leave to reargue this Court's order dated February 17, 2010 which granted the separate motions of

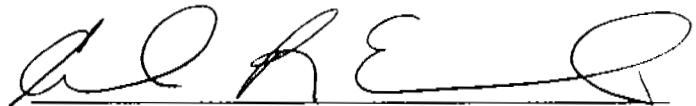
defendants Adam Kincaid d/b/a Kincaid Construction, 307-9 Owners Corp., and Paul DeGennaro for summary judgment dismissing plaintiff's complaint, and denied plaintiff's cross-motion to deem its amended bill of particulars properly served, is granted; and it is further

ORDERED that the branch of plaintiff's motion requesting, upon reargument, that defendants' motions be denied, this case be restored to active status, and that plaintiff's cross-motion be granted, is denied; the Court adheres to its February 17, 2010 determination; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 4, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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