

Chicas v Mill Rental Corp.

2010 NY Slip Op 31792(U)

July 16, 2010

Supreme Court, Suffolk County

Docket Number: 07-7969

Judge: John J.J. Jones

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

ORDERED that the motion (#003) by third-party defendant South Shore Materials, Inc. for summary judgment dismissing the complaint against it is granted; and it is further

ORDERED that the motion (#004) by defendant Mill Rental Corp. for summary judgment dismissing the complaint against it is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff David Chicas on March 29, 2004 while operating a pay loader during the course of his employment with third-party defendant South Shore Materials, Inc. Plaintiff alleges that defendant Mill Rental Corp., defendant H.O. Penn Leasing, LLC, and defendant H.O. Penn Machinery Company, Inc., had actual and constructive notice of the improper functioning braking mechanism of the subject pay loader truck which constituted a dangerous and defective condition. A derivative cause of action is asserted on behalf of plaintiff's wife, Yolanda Marquez. Defendant Mill Rental Corp. interposed a third-party complaint against third-party defendant South Shore Materials. Defendant Mill Rental also asserted a cross claim against the H.O. Penn defendants for indemnification and contribution.

Defendant Mill Rental Corp. now moves for summary judgment dismissing the complaint, arguing that plaintiff has failed to state a prima facie case of negligence against it. In support of its motion, Mill Rental submits a copy of the pleadings, an affidavit of Michael Carroll, and transcripts of the deposition testimony of plaintiff, Michael Carroll, and Joseph Seery. In his affidavit, Mr. Carroll states that he is employed as the assistant controller of Mill Rental, and that he searched the records for a period of six months prior to the subject accident and located only one invoice for repairs performed on the subject pay loader. He states that the invoice is dated January 31, 2004, and that it is the company's custom and practice to retain such complaints or requests for repair.

Defendants H.O. Penn Leasing, LLC, and H.O. Penn Machinery Company, Inc. (hereinafter collectively known as "the H.O. Penn defendants") also move for summary judgment dismissing the complaint, arguing that they did not control or maintain the subject pay loader and did not owe a duty of care to plaintiff. They also argue that plaintiff failed to state a prima facie case of negligence against them. In support, the H.O. Penn defendants submit a copy of the pleadings, an equipment transaction register maintained by the H.O. Penn defendants, and transcripts of the deposition testimony of Charles Johnson and Leonard LaRosa. They also submit a copy of an invoice from the H.O. Penn defendants to defendant South Shore Materials for services rendered, and copies of invoices issued to South Shore Materials for various parts

Third-party defendant South Shore Materials moves for summary judgment on the ground that the action against it is barred by virtue of the exclusivity of the Worker's Compensation Law. In support of its motion, it submits, among other things, a copy of the pleadings, copies of Worker's Compensation Form regarding plaintiff's claim, copies of medical records regarding plaintiff's injuries, and transcripts of the deposition testimony of Leonard LaRosa and of plaintiff.

Plaintiff opposes the motions for summary judgment by defendant Mill Rental and the H.O. Penn defendants, arguing that defendants failed to establish prima facie that no triable issues of fact exist as to their negligence. In opposition, plaintiff submits copies of repair orders by defendant Mill Rental, and a transcript of Michael Carroll's deposition testimony. Plaintiff does not oppose the motion by third-party

defendant South Shore Materials.

At his examination before trial, plaintiff testified that at the time of the accident he was employed by defendant South Shore Materials, which was in the business of mixing concrete, asphalt and dirt. He testified that on the day of the accident, he was operating a pay loader and using it to sift dirt up a very high pile of dirt. He testified that when he was about to make a turn at the top of the pile, the engine turned off and the pay loader flipped over backwards two times down the dirt pile. He testified that after he shifted the pay loader into reverse, the engine shut off and the brakes would not hold. He testified that prior to the accident, he had complained many times to his supervisors and the mechanic, who was employed by South Shore Materials, of brake problems with the pay loader he operated.

At his examination before trial, Leonard LaRosa testified that he was employed by South Shore Materials as the site manager and that he supervised plaintiff. He testified that plaintiff was operating a Caterpillar 966 pay loader at the time of the accident, and that plaintiff never complained of any problems with the machine. He testified that the subject pay loader was repaired a few months prior to the accident by defendant Mill Rental and that it was just maintenance for wear and tear of the machine. He testified that the pay loader was purchased used from the H.O. Penn defendants, and that Mr. Augustiewicz, one of the owners of South Shore Materials, would make repairs to it when necessary.

At his examination before trial, Charles Johnson testified that he is employed as a sales manager by the H.O. Penn defendants, which are in the business of selling heavy construction equipment. He testified that the H.O. Penn defendants purchased the subject pay loader used from Best Tractor in November 1994 and then sold the used pay loader to A.G. Augustiewicz Inc., in June 1995. He also testified that according to the documents, the H.O. Penn defendants repaired the center pin of the subject pay loader on April 28, 2003. When asked technical questions regarding the pay loader, he testified that he is not a mechanic and only has general knowledge of the machine. When asked about repair work done to the center pin, he testified that he was not involved in this transaction, and that the service department was involved in the transaction. He testified that the pay loader has two frames which are held together by two pins, and that the pins become worn over time and need to be replaced. He further testified that he does not know if the braking system had to be deactivated in order to perform the subject repair. He also testified that he did not know if the H.O. Penn defendants did any other repair work to the pay loader.

At his examination before trial, Michael Carroll testified that he is employed as an assistant controller for Peter Scalmandre & Sons, Inc., and that defendant Mill Rental is a part of that corporation, which owns the equipment and vehicles that Peter Scalmandre & Son uses in its construction business. He also testified that Mill Rental normally only repairs its own equipment, but may have repaired the equipment from South Shore Materials because the owners know each other. When asked about the repair work done listed on the repair invoice, Mr. Carroll testified that he is not a mechanic and could not explain what work was done.

At his examination before trial, Joseph Seery testified that he is employed as a mechanic and foreman for defendant Mill Rental. He testified that he does not know if he ever serviced a pay loader for defendant South Shore Materials, or if any of the other mechanics at Mill Rental serviced equipment for

South Shore Materials. When Mr. Seery was shown the repair order dated January 31, 2004, he testified he did not know who made the repairs stated on the invoice.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

Based upon the evidence submitted by the H.O. Penn defendants, they have failed to establish their entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, *supra*). The deposition testimony of Mr. Johnson, a sales manager, who has no knowledge of the subject repair and also testified that he is not a mechanic and has only general knowledge regarding the subject pay loader is insufficient to demonstrate that employees of the H.O. Penn defendants did not negligently repair the pay loader or that the repair to the center pin was unrelated to the accident. Furthermore, in view of plaintiff's testimony that the engine of the pay loader shut off and the brakes did not work at the time of the accident, the testimony of plaintiff's supervisor that the center pin is not related to the brakes is insufficient to shift the burden to plaintiff.

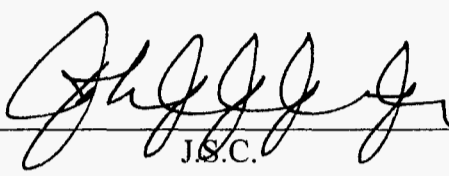
Similarly, defendant Mill Rental has failed to demonstrate that its repair of the subject pay loader's brakes, among other things, prior to the subject accident was done properly and did not cause the subject accident (*see Royal v Brooklyn Union Gas Co.*, 122 AD2d 132, 504 NYS2d 519 [1986]; *cf.*, *Tufano v Nor-Hgts. Serv. Ctr.*, 15 AD3d 470, 790 NYS2d 486 [2005]; *Breslin v Rij*, 259 AD2d 458, 686 NYS2d 91 [1999]). The testimony of defendant Mill Rental's employees Mr. Carroll and Mr. Seery were insufficient to establish its entitlement to judgment as a matter of law. Mr. Carroll, who is employed as an assistant comptroller, testified that he is not a mechanic and could not explain the repair that was done to the subject pay loader. While Mr. Seery, a mechanic, was able to testify about the technical aspects of some of the repairs made to the pay loader which were listed on the repair order, he testified that he does not recall repairing the pay loader. He also testified that he does not know who actually made the repairs to the pay loader, and that he could not explain certain portions of the repair order as it was generated by another mechanic.

Accordingly, the motions for summary judgment by the H.O. Penn defendants and defendant Mill Rental are denied.

As to third-party defendant South Shore Material's motion for summary judgment, New York Workers' Compensation Law § 11 shields employers from third-party actions seeking contribution or

indemnification (see *Schramm v Cold Spring Harbor Lab.*, 17 AD3d 661, 793 NYS2d 530 [2005]). The statute allows a third party claim against an injured worker's employer in only two circumstances: where the injured worker has suffered a "grave injury" or the employer has agreed to indemnification pursuant to a written contract (see *Rodrigues v N & S Bldg. Contrs.*, 5 NY3d 427, 805 NYS2d 299 [2005]; *Flores v Lower East Side Serv. Ctr.*, 4 NY3d 363, 795 NYS2d 491 [2005], *rearg. den.* 5 NY3d 746 [2005]). Here, none of the injuries claimed by plaintiff in his bill of particulars, and nothing described in his deposition testimony fall within the ambit of a "grave injury." Defendant's evidence also establishes that plaintiff received workers' compensation benefits through his employer, South Shore Material. Moreover, it is not disputed that there is no contract for indemnification between third-party defendant South Shore Material with third-party plaintiff Mill Rental. Thus, the unopposed motion by third-party defendant South Shore Material for summary judgment dismissing the third-party complaint is granted.

Dated: 16 July 2010



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION