

Higgins v Consolidated Edison Co. of N.Y., Inc.

2010 NY Slip Op 32493(U)

September 13, 2010

Sup Ct, NY County

Docket Number: 109560/04

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCI
Justice

PART 10

Index Number : 109560/2004
HIGGINS, CHRISTOPHER
VS.
CONSOLIDATED EDISON
SEQUENCE NUMBER : 005
RENEWAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

on this 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

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED
SEP 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: SEP 13 2010

HON. JUDITH J. GISCI J.S.C.

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: PART 10

-----X
Christopher Higgins,

Plaintiff (s),

-against-

Consolidated Edison Company of
New York, Inc. and Case Contracting, Ltd.,

Defendant (s).

-----X
Consolidated Edison Company of
New York, Inc.,

Third-Party Plaintiff (s),

-against-

Case Contracting, Ltd. and Proven
Electrical Contracting, Inc.,

Third-Party Defendant (s)

-----X
Case Contracting, Ltd.,

2nd Third-Party Plaintiff (s)

-against-

Proven Electrical Contracting, Inc.,

2nd Third-Party Defendant (s)

-----X
*Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these)
motion(s):*

Papers	Numbered
Higgins n/m renewal w/GJC affirm, exhs	1
Con Ed opp w/ RES affirm, exh	2
Case opp w/SRL affirm, exhs	3
Higgins reply to Con Ed w/GJC affirm	4
Higgins reply to Case w/GJC affirm	5

DECISION AND ORDER

Index No.: 109560/04

Seq. No.: 005

Present:

Hon. Judith J. Gische

J.S.C.

T.P. Index No.:
590301/05

FILED
SEP 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

T.P. Index No.:
591278/05

Gische J.:

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for personal injuries allegedly sustained by plaintiff Christopher Higgins ("Higgins" or "plaintiff") on August 20, 2002 ("date of the accident"). Higgins claims his injuries were proximately caused by violations of the Labor Laws (sections 240, 241 [6] and 200]).

Previously Consolidated Edison Company of New York, Inc. ("Con Ed") and Case Contracting, Ltd. ("Case") each moved for summary judgment dismissing plaintiff's claims against them. The court granted Con Ed and Case's motions for summary judgment, dismissing all of plaintiff's claims for the reasons set forth in the court's prior decision and order dated August 26, 2009 ("prior order").

Plaintiff now seeks permission to renew those motions and his opposition thereto (only as to his Labor Law § 240 claim) in light of the Court of Appeals' decision in Runner v New York Stock Exch., Inc., 13 NY3d 599 [2009] ("Runner") which was decided in December 2009, after this court's prior order. Plaintiff argues that Runner, is controlling and decisive of the parties' dispute and, therefore, this court should reverse its decision granting defendants' summary judgment on his Labor Law § 240 claim. Although Con Ed and Case are not opposed to allowing plaintiff to renew the prior motions, they each claim that there has been no change in the law and that Runner does not affect the court's prior determination. Con Ed separately argues that if renewal is granted and the court reverses itself, then Con Ed's motion for summary judgment on its indemnification claims against Case should be reinstated and decided in its favor.

Since plaintiff has presented cogent arguments in support of its motion, the court permits renewal so it can consider whether there has been a change in the law that would affect its prior determination (CPLR § 2221 [e][2]). The facts of this case are detailed in the court's prior order; they will not be repeated here as that order is incorporated herein by reference. This decision will focus solely on whether the court should have made a different decision in light of Runner.

Discussion

In Runner, the Court of Appeals clarified that Labor Law § 240 was "designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (Runner v. New York Stock Exch., Inc., 13 NY3d at 604). The court also stated that the relevant inquiry is "whether the harm flows directly from the application of the force of gravity to the object" without respect to whether the object has actually hit the worker (id. at 604). However, the court also stated that the "the single dispositive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (id. at 603), adding that the elevation differential, under the facts of that case, were not de minimis, "given the weight of the object and the amount of force it was capable of generating" (id. at 605).

The facts of the case at bar are distinguishable from those in Runner, leading this court to find that the decision in Runner does not command a different result for this plaintiff, to wit: the reversal of the court's original summary judgment award to the

defendants.

Although the court observed in its prior order that Higgins was not struck by any object, the reel was not suspended over him, nor was plaintiff elevated in any way at the time of his accident, the court proceeded to consider other alternatives presented by plaintiff, including the manner in which the cable tugger was being used and what role, if any, the force of gravity played in the happening of plaintiff's accident (see, prior order p. 13 -14). The court's reasoning was not simply based on whether an object struck the plaintiff.

Plaintiff was instructed to grasp the reel and push it so that the cable wound on the spool would be slackened enough and the tugger could guide it into the conduit opening. As previously described in the court's prior order, plaintiff was performing an inch-worm like task, reaching down and pushing up the reel, helping it turn while it was suspended one or two inches off the ground on jacks. Plaintiff would allow the cable to gather a bit on the ground so the tugger could lift the loose end into the opening of the conduit. Although the conduit extended some 300 feet horizontally, the mouth or opening of the conduit where the cable was being fed into was approximately four (4) feet off the ground. The thickness of the cable itself was approximately 3 to 3 ¾ inches, consisting of three (3) light wires braided together. On prior occasions, a cable of approximately the same thickness had been pulled downwards (rather than upwards) manually, without the use of any kind of mechanical device. The original plan had been to do the same thing on this cable pull project, but the reel or spool the cable was wound onto was too big and heavy for the elevator so it was decided to pull the cable up instead of down.

Although Runner has clarified the "application of the force of gravity" to an object should be considered - even if nothing falls on the worker - Runner did not abrogate prior case law requiring that : 1) there be a significant height differential between the work being performed and the object being pulled, hoisted, etc.; 2) the size and weight of the object; and 3) whether the plaintiff's injuries were the direct consequence of defendant's failure to provide adequate protection against a risk arising from a physically significant elevation (Makarius v. Port Authority of New York and New Jersey, --- N.Y.S.2d ---, 2010 WL 3463488 [1st Dept 2010]; Runner v. New York Stock Exch., Inc., supra).

Unlike Runner, the reel was not being transported or moved, it remained on the same level where plaintiff was standing, propped up on jacks which allowed it to revolve. Granted, the reel itself was very large and heavy, but the cable itself was not. The tugger was being used to raise the cable and guide it into the conduit which was, at its entry point, only four (4) feet off the ground, in front of plaintiff. The nature of the task required that plaintiff let the cable drape to the ground so it could then be maneuvered and guided by the tugger up into the mouth of the conduit. The injury occurred when plaintiff, while on the upswing, was scrunched back because the reel resisted him. The tugger was not turning the reel or causing it to revolve - - the plaintiff himself was spinning the reel. Thus, even assuming the force of gravity caused the reel to stop or recoil, plaintiff's accident was not the direct consequence of a failure to provide adequate protection against a risk "arising from a physically significant elevation differential" (Runner v. New York Stock Exch., Inc., supra at 603; also, Makarius v. Port Authority of New York and New Jersey, supra). Runner did not abrogate the well

established rule that Labor Law § 240 does not apply to every situation where the unpredictable forces of gravity are involved. Plaintiff (then as now) failed to defeat defendants' motion by raising triable issues of fact that the his injury was not from routine workplace risks but from the pronounced risks arising from construction worksite height differentials (Runner v. New York Stock Exch., Inc., supra at 603 *citing* Rocovich v. Consolidated Edison, Co., 78 NY2d 509, 514 [1991] and supra at 604 *citing* Ross v. Curtis-Palmer Hydro-Elec., Co., 81 NY2d 494, 501 [1993]).

Conclusion


Although the court has allowed plaintiff to renew its opposition to the prior motions for summary judgment made by defendants, the court adheres to its prior decision for the reasons stated. The prior decision and order dated August 26, 2009 is unmodified and remains in effect.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court

Dated: New York, New York
 September 13, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.

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