

Morris v Pavarini Constr.
2010 NY Slip Op 33905(U)
March 8, 2010
Sup Ct, Bronx County
Docket Number: 23980/02
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT STATE OF NEW YORK

COUNTY OF BRONX TRIAL TERM- PART 15

Present: Honorable Mary Ann Brigantti-Hughes

GLENFORD MORRIS,

Plaintiff,

-against-

PAVARINI CONSTRUCTION and VORNADO
REALTY TRUST,

Defendants.

The following papers numbered 1 to 12 read on this Motion in Limine duly submitted on the Motion Calendar for a Frame Issue Hearing, Monday March 15, 2010 in Part 1A15

<u>Papers Submitted</u>
Order to Show Cause, Affirmation & Exhibits(Defendants)
Motion in Limine, Affirmation & Exhibit (Plaintiff)
Defendants Memoranda of Law
Plaintiff Memorandum of Law
Plaintiff Expert Disclosure, Affirmations/Affidavit
Defendants Expert Affidavit

<u>Numbered</u>
1, 2, 3
4, 5
6, 7
8
9, 10, 11
12

Upon the foregoing papers, Defendants Pavarini Construction and Vornado Realty move this Court for an Order precluding Plaintiff's (Glenford Morris) proposed expert witness Nicolas Bellizi, Civil Engineer from testifying as an expert witness in the within matter including testimony as regards 12 NYCRR 23-2.2(a), and precluding Plaintiff's expert witness Mr. Wojtaszek from testifying as an opinion expert witness in the within matter including testimony as regards 12 NYCRR 23-2.2(a).

Plaintiff moves this Court by Motion in Limine to exclude the testimony of Defendants' expert witness Benjamin Lavon, Professional Engineer.

After due deliberation it is ruled, for the reasons set forth below,

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ORDER

Index No.: 23980/02

Defendants' motion to preclude Plaintiff's expert Mr. Bellizi from testifying is denied with leave to renew at the framed issue hearing ordered by the Court of Appeals regarding Labor Law section 241(6) and 12 NYCRR 23-2.2(a) now scheduled for March 15, 2010.

Defendants' motion to preclude Plaintiff's expert Mr. Wojtaszek from testifying is granted to the extent of precluding Mr. Wojtaszek from testifying as an expert opinion witness and is otherwise denied,

Plaintiff's Motion in Limine, to exclude the testimony of defendants' expert Mr. Lavin is denied.

FACTS AND PROCEDURAL HISTORY

On June 4, 2002 Plaintiff, Glenwood Morris, was at the time of the accident a carpenter working at a construction site and was injured while constructing forms. An unfinished form shifted and crushed Plaintiff's hand against a steel beam. Plaintiff brought suit against Vornado Realty and Pavarini Construction the owner and general contractor respectively, seeking damages for his injuries.

Plaintiff's suit claims defendants violated Labor Law §§ 200, 240(1) and 241(6) and also were negligent and that such violations and negligence was the proximate cause of the plaintiff's injuries. As a result of prior motion practice this Court granted summary judgment in favor of defendants and dismissed plaintiff's claims against defendants for violation of Labor Law §200 and claims of negligence but denied summary judgment as to Plaintiff's Labor Law §241(6) claim.

On appeal the Appellate Division, First Department reversed that portion of the decision denying summary judgment as to Labor Law §241(6) and ordered that portion of the

Plaintiff's claim dismissed as well.

The matter then went before the Court of Appeals which reversed that portion of the Appellate Division's decision dismissing Plaintiff's Labor Law § 241(6) claim and remanded the matter to this court for further proceedings discussed below.

The Court of Appeals held that under Labor Law § 241(6) the Plaintiff can only recover if he shows a violation by the defendants of a regulatory requirement. The Plaintiff relied upon 12 NYCRR 23-2.2(a) which states in relevant part that "Forms...shall be structurally safe and shall be properly braced and tied together so as to maintain position and shape".

Defendants claim 12 NYCRR 23-2.2(a) and Labor Law § 241(6) do not apply here because the regulation and the Labor law do not apply to anything other than a completed form. Plaintiff asserts that the term "forms" refers to the object that injured Plaintiff and not necessarily just a completed form.

The Court of Appeals stated, "(i) t was premature for the Appellate Division to grant summary judgment on this record. The interpretation of a regulation is a question of law but the meaning of the specialized terms in such a regulation is a question on which a Court must sometimes hear evidence before making its determination (See, *Millard v. City of Ogdensburg*, 274 AD2d 953, 4th Dept., 2000). Here, a more complete record is necessary both as to the nature of the object that caused the injury and the opinions of those expert in the construction of concrete walls as to whether the words of the regulation can sensibly be applied to anything but completed forms".

The matter was then remanded to this Court for "proceedings consistent with this opinion." A framed issue hearing encompassing such proceedings is now scheduled before this court on March 15, 2010.

MOTION TO PRECLUDE PLAINTIFF'S EXPERT BELLIZI

Defendants' motion to preclude Mr. Bellizi is based on Defendants' contention that Mr. Bellizi has no qualifications or expertise in concrete construction where the case is focused and which the Court of Appeals identified as the area of expertise required ("...those expert in the construction of concrete walls...").

Defendants assert that the Curriculum Vitae of Mr. Bellizi shows an expertise in traffic engineering, accident reconstruction and the like and no expertise in the construction of concrete walls. Defendants state that a licensed engineer with no expertise in the area at issue should be precluded from testifying. (See, *Rosen v. Tanning* 17 AD3d 180, 2nd Dept., 2005; *Lessard v. Caterpillar* 291 AD2d 825, 4th Dept., 2002).

However a careful reading of Mr. Bellizi's Curriculum Vitae states that he has previously provided expert witness testimony and analysis in a number of areas different from traffic engineering and accident reconstruction including "Construction Areas."

Therefore Plaintiff's expert's lack of credentials is not as clear-cut as defendants assert. To preclude Mr. Bellizi at this time is not warranted. Defense counsel will have an opportunity to voir dire Mr. Bellizi at the time of the framed issue hearing. If it is so warranted the Defendants may renew their motion to preclude at that time.

MOTION TO PRECLUDE PLAINTIFF'S EXPERT WOJTASZECK

Defense counsel also seeks to preclude the testimony of Plaintiff's expert witness Mr. Wojtaszeck on the grounds that Mr. Wojtaszeck has no scientific or technical training so as to render an expert opinion. Mr. Wojtaszeck has 19 years of carpentry experience including experience with building forms such as those used in this accident.

However based upon documents put forth by Plaintiff's counsel Mr. Wojtaszeck will not render an expert *opinion* regarding 12 NYCRR 23-2.2(a) but will testify only as an expert *fact* witness. ((See, *Dougherty v. Milliken*, 163 NY 527, (1900); *Clark v. Iceland SS Co.*, 6 AD2d 544, (1st Dept., 1958)). Therefore Defendants' motion is granted to the extent that Mr. Wojtaszeck is precluded from testifying as an expert opinion witness and may testify only as an expert fact witness.

Motion in Limine

Plaintiff moves by Motion in Limine to preclude defendants' expert Mr. Lavon from testifying. Plaintiff's position is that Lavon's testimony usurps the Court's function to interpret the regulation, that such is a question of law and not of expert interpretation.

Plaintiff cites, *Rodriguez v NYCHA* 209 AD2d 260 (1st Dept., 1994) that it is error to prove negligence by expert testimony regarding the meaning of a statute imposing a standard of care, *Messina v. City of New York*, 300 AD2d 121 (1st Dept., 2002) and that the interpretation of a code, and whether the condition involved is within the regulation is a question of law.

Plaintiff also seeks to bar Mr. Lavon from testifying regarding the nature of the

object involved in the accident because the object involved was previously identified at Plaintiff's deposition of October 20, 2003.

First "Rodriguez" cannot apply as the issue of negligence was settled by this Court in granting that portion of defendants' motion for summary judgment dismissing plaintiff's claims of negligence.

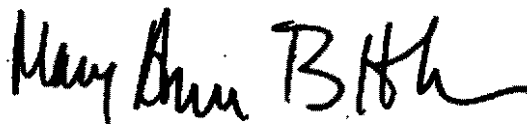
Further, the conclusion Plaintiff would have this Court reach would nullify the Court of Appeals directions. The Court of Appeals stated:

"Here a more complete record is necessary both as to the nature of the object that caused the injury and the opinions of those expert in the construction of concrete walls as to whether the words of the regulation can sensibly be applied to anything but completed forms".

Even though Plaintiff's counsel claims the nature of the object that caused the injury was settled in 2003, the Court of Appeals in 2007 sought a more complete record as to the nature of the object, as well as the application of the words of the regulation. The proposed testimony of Mr. Lavon is within the direction of the Court of Appeals. Plaintiff's motion to limit or preclude defense expert's testimony is therefore **denied**.

This constitutes the Decision and Order of this Court.

Dated: March 8, 2010



Hon. Mary Ann Brigantti- Hughes, J.S.C.