Klewinowski v City of New York

2012 NY Slip Op 30180(U)

January 19, 2012

Sup Ct, NY County

Docket Number: 110740-2008

Judge: Judith J. Gische

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SCANNED ON 1/26/2012

[* 1]

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

PRESENT: GISCHE Justice

PART 10

KLEWINOWSKI, ZENON, ET AL.

-v-

CITY OF NEW YORK, ET AL

INDEX NO. 110740/08.

MOTION DATE

MOTION SEQ. NO. 10

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read 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 IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Ready for trial

FILED

JAN 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

JAN 19 2012

Dated: Jan. 19, 2012

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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 10

---x

Zenon Klewinowski and Magorzata Klewinowski,

Plaintiff (s),

-against-

City of New York, Amman & Whitney Consulting Engineers, P.C., Welsbach Electric Corp., and Consolidated Edison Company of New York, Inc.,

Defendant (s).

---x

DECISION/ORDER
Index No.: 110740-2008
Seq. No.: 10

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED
JAN 26 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Papers	**Numbered**
Welsbach OSC (RR) w/AMK affid, exhs	1
A&W x/m (RR) w/RHP affirm, exhs	2
Klewinowski amended x/m (RR) w/BEO affid, exhs	3
Klewinowski opp to Welsbach w/BEO affid, exhs	4
Klewinowski partial opp to A&W w/BEO affid, exhs	5
Welsbach opp to Klewinowski w/AMK affid	6
Welsbach opp to A&W w/AMK affid, exh	7
A&W opp to Klewinowski (amend BOP) w/RHP affirm	8
A&W partial opp to Klewinowski ("Runner" args) w/RHP affirm	9
A&W further support/reply to Welsbach w/RHP affirm, exhs	10
Klewinowski further support/opp to Welsbach	11
Welsbach further support/reply to A&W and Klewinowski w/AMK affirm	12
City opp to Welsbach, A&W, Klewinowski w/TAP affirm	13

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

Gische J.;

Plaintiff and defendants the City of New York ("City"), Amman & Whitney Consulting Engineers, P.C. ("A&W"), and Welsbach Electric Corp. ("Welsbach") each

brought prior motions for summary judgment. In the court's prior decision and order dated September 13, 2011 ("prior order") those motions were decided. The court: 1) decided that Welsbach is not a statutory defendant under the Labor Laws; 2) dismissed the Labor Law §§ 240 [1], 241 [6] and 200 claims against Welsbach but allowed the common law negligence claims against Welsbach to continue to trial; 2) dismissed Klewinowski's Labor Law § 240 [1] claim in its entirety; 3) allowed Klewinowski's Labor Law § 241 [6] claim to proceed to trial, only insofar as it is based upon alleged violations of sections 23-8.1 (f) et seq and 23-8.2 (d) of the Industrial Code, but otherwise dismissed his Labor Law § 241 [6] claim; 4) dismissed Klewinowki's Labor Law § 200 and common law negligence claims against the City but; 5) allowed Klewinowski's claims under Labor Law § 200 and for common law negligence to proceed to trial against A&W. All the cross claims among the defendants remain to be decided at trial.

Presently, Welsbach moves to reargue its motion for summary judgment. A&W and Klewinowski have each cross moved to reargue their own motions for summary judgment. The court denied Welsbach's application for an order temporarily staying jury selection and the trial of this action. Consequently this case is scheduled for trial on February 7, 2012. Each of the defendants opposes the other defendants' motions either in whole or in part. Thus, Welsbach and A&W oppose each other's motions, but are united in seeking the dismissal of any of the plaintiffs remaining claims against them. In its cross motion, A&W seeks to have the claims against the City reinstated. The City opposes all the motions on the basis that the court did not misapprehend the facts or misapply the law.

A motion for leave to reargue pursuant to CPLR § 2221 is addressed to the court's discretion (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]). It 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. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22 [1st Dept 1992]). It is not a vehicle to permit a party to argue again the very questions previously decided (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]; *see also* Frisenda v. X Large Enterprises Inc., 280 A.D.2d 514 [2nd Dept. 2001] and Rodney v. New York Pyrotechnic Products Co., Inc., 112 A.D.2d 410 [2d Dept. 1985]) or to offer an unsuccessful party successive opportunities to present arguments not previously advanced (Giovanniello v. Carolina Wholesale Office Mach. Co., Inc., 29 A.D.3d 737 [2nd Dept. 2006]).

Although the court will allow each movant to reargue aspects of their motion, upon reargument the court adheres to its original decision because none of the movants have proved the court misapprehended any of the facts or misapplied the law.

Welsbach's Motion

Welsbach contends the court misapplied the law because it gave equal weight to the sworn affidavit of plaintiff's expert, Herbert Heller, Jr., an engineer, and the sworn affidavit by Welsbach's employee, lead man/electrician, Peter Tuozzolo. According to Welsbach, Heller does not have personal knowledge about how the wire was attached to the temporary pole and cannot opine it was improperly connected. On the other hand, Welsbach claims that Tuozzolo knows how the installation was done because he did it himself.

In support of plaintiff's underlying motion, Heller opined that the temporary light pole was improperly wired. He stated that the wire between the temporary light pole and the permanent pole should have been, but was not attached by, an insulator. He expressed the opinion that the wire been properly attached, the temporary pole would have not toppled over as it did when the overhead wire was struck. Heller's opinion was based on his review of various documents, including the EBT testimony of various witnesses. He also stated that he examined photographs of the accident scene taken soon after the accident occurred.

Tuozzolo was not deposed, but provided his sworn affidavit. In his affidavit, Tuozzolo stated that he personally installed a temporary traffic pole and overhead cable at the intersection of Houston and Crosby on January 12, 2008. According to Tuozzolo, "porcelain insulators built into metal clevis" were, in fact, used in that installation. In preparing his statement, Tuozzolo contends he examined the same photographs that Heller did.

The photographs both men refer to are very dark, black and white *photocopies* of a photograph of the accident scene. They photographs show what appears to be a light pole lying flat on the street. According to Tuozzolo the insulator would otherwise be visible in the photograph had it not been for "a man standing in the way." Tuozollo also stated that "I know from my own personal recollection that all of the installations I performed at the jobsite used the insulator and clevis to attach the cable to both poles."

The party seeking summary judgment has the burden of tendering evidentiary proof in a form admissible at trial to show that it is entitled to summary judgment as a

matter of law (Friends of Animals v. Association of Fur Manufacturers, 46 NY2d 1065 (1979). Upon establishing a prima facie entitlement to summary judgment, the burden then shifts to the opposing party to demonstrate by evidentiary facts that genuine issues of fact exist to preclude summary judgment (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]); Zuckerman v. City of New York, 49 NY2d 557 [1980]). Generally, negligence actions do not lend themselves to disposition by summary judgment because the issue of whether a defendant was negligent is essentially one of fact, not of law (Haider v. G&G Moderns, Inc., 13 AD2d 651 [1st Dept. 1961]).

Welsbach did not meet its burden of proving, as a matter of law, there was an insulator on the pole. Even if did, there are disputed issues of fact. The photograph is inconclusive and although Tuozzolo recalled installing an insulator, this fact is contradicted by Heller who opines that had the wire been attached in the manner described by Tuozzolo the pole would not have fallen over. Tuozzolo stated that other poles were installed the same way and Heller points out that there had been other incidents of temporary light poles toppling over at this project, prior to the date of the accident.

An expert's affidavit which contains bare conclusory allegations is insufficient to defeat summary judgment (Amatulli by Amatulli v. Delhi Const. Corp., 77 N.Y.2d 525 [1991]) and an expert cannot assume material facts that are not supported by the evidence to sustain his conclusions (Cillo v. Resjefal Corp.16 A.D.3d 339 [1st Dept 2005]). Heller's opinion is based upon fact that are in the record, including the photograph which Tuozollo admits does not clearly depict an insulator. Tuozollo's

factual statement and Heller's expert opinion are irreconcilable. Therefore, it is for the jury to decide what the correct facts are and to disregard the expert's opinion, if that is what the jury chooses to do. The court neither misapprehended the relevant facts nor misapplied the law in denying Welsbach's motion for summary judgment dismissing the common law negligence claims, and related cross claim, against it. The court adheres to its prior decision denying this branch of Welsbach's motion.

A&W's Cross Motion

A&W seeks to reargue that part of the court's decision which denied its motion for summary judgment dismissing plaintiff's Labor Law § 200 and negligence claims against it, as well as its cross motion for summary judgment dismissing the cross claims against it for indemnification. The motion is predicated on A&W's claim that the accident was proximately caused by the defective designs and specifications provided by the City, not any negligence on A&W's part. Specifically, A&W now maintains that the City did not require the wires to be strung at a proper height or that the temporary light poles be secured to the ground. This is a new argument, improperly raised for the first time in this motion for reargument. In any event, A&W has not identified the allegedly defective designs it relied on or in what ways the designs were defective. As evident in section 6.1.2 and other sections of its contract, A&W had a wide range of responsibilities for this project, encompassing the review and approval all shop drawings for the project, including temporary and permanent structures (6.3.1, A&W contract).

Having failed to identify any facts the court misapprehended, A&W's motion for

reargument must be and hereby is denied.

Klewinowski's Motion

Klewinowski contends that the recent Court of Appeals decision in Wilinksi v. 334 East 92nd Street Housing Development Fund Corp., 18 N.Y.3d 1 [2011] ("Wilinski") requires that this court reconsider its decision, denying him summary judgment and granting the defendants' motion for summary judgment instead, dismissing his Labor Law § 240 [1] claim. The court disagrees.

Wilinski involved a plaintiff who, while demolishing brick walls at a vacant warehouse, was struck by two unsecured metal, vertical plumbing pipes that fell onto him. On appeal, the Appellate Division, First Department, in dismissing Wilinski's Labor Law § 240 [1] claim, stated it did so "[s]ince both the pipes and plaintiff were at the same level at the time of the collapse the incident was not sufficiently attributable to elevation differentials to warrant imposition of liability" (Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 71 AD3d 538, 539 [1st Dept 2010]). The Court of Appeals reversed the appellate court, holding that plaintiff was not precluded from recovery under Labor Law § 240 (1) "simply because he and the pipes that struck him were on the same level." (Wilinksi v. 334 East 92nd Street Housing Development Fund Corp., 18 N.Y.3d at 1-2). Thus, in Wilinksi the Court of Appeals clarified an area of the law which it perceived had been improperly dealt with by the appellate courts in the four departments.

This court did not dismiss plaintiff's Labor Law § 240 [1] claim based upon the location of the temporary pole relative to where Klewinowski was standing when the

accident occurred. The court denied Klewinowski's motion and granted defendants' motion for summary judgment because the work Klewinowski was performing when the incident occurred was wholly unrelated to an elevation-related hazard and, therefore, not within the purview of Labor Law § 240 [1] (See prior order pp 9-12). Significantly, Klewinowski failed to identify any safety device that defendants failed to provide him with that would have prevented his accident. The decision in Wilinski is not a change in the law affecting this court's prior decision, nor did this court misapply the law in dismissing plaintiff's Labor Law § 240 [1] claim. Therefore, Klewinowski's motion for reargument of its motion and the defendants' motion for summary judgment on his Labor Law § 240 [1] claim is denied.

Conclusion

Although allowing the parties to reargue certain aspects of their underlying motions (or opposition thereto), the court adheres to its prior order in all respects because none of the movants have shown the court misapprehended the facts, misapplied the law or now raise arguments that were previously raised (or could have been raised), but were not considered by the court. Any arguments not specifically addressed herein have nonetheless been considered. Any relief requested but not specifically addressed *supra* is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
January 19, 2012

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JAN 26 2012
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So Ordered:

Hon. Judith J. Gische, JSC