

Hurlburt v Noble Env'tl. Power LLC
2014 NY Slip Op 33045(U)
December 3, 2014
Supreme Court, Wyoming County
Docket Number: 42259
Judge: Michael M. Mohun
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At a term of the Supreme Court
held in and for the County of
Wyoming, at the Courthouse in
Warsaw, New York, on the 3rd day
of December, 2014.

PRESENT: **HONORABLE MICHAEL M. MOHUN**
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

**WAYNE F. HURLBURT and
MARSHA A. HURLBURT,**

Plaintiffs,

v.

DECISION AND ORDER
Index No. 42259

**NOBLE ENVIRONMENTAL POWER LLC;
NOBLE WETHERSFIELD WINDPARK, LLC;
DARLA DAWSON; and
FRANK MONTELEONE, d/b/a
FRANK MONTELEONE DUMP TRUCK & EXCAVATING;**

Defendants.

Defendants, Noble Environmental Power, LLC, Noble Wethersfield Windpark, LLC, and Darla Dawson [hereinafter collectively, "Noble"], by notice of motion dated January 25, 2014, having moved pursuant to CPLR §2221 for re-argument of that portion of their prior motion for summary judgment which had sought dismissal of the plaintiffs' Labor Law §241(6) claim against them, and for an order, upon re-argument, partially vacating the Court's Decision and Order of December 17, 2013, to the extent that it

had denied Noble's prior motion with respect to the Labor Law §241(6) claim and directing, instead, that Noble's prior motion should be granted and the plaintiff's Labor Law §241(6) claim dismissed, and said motion having duly come on to be heard.

NOW, upon reading the pleadings of the parties, and on reading and filing the notice of motion of Noble, supported by the affidavit of the Thomas W. Bender, Esq., attorney for Noble, sworn to on February 25, 2014, together with the attached exhibits and supporting memorandum of law, and the affirmations in opposition of Bradley P. Kammholz, Esq., Attorney for the plaintiffs, the first dated March 17, 2014, and the second dated March 18, 2014, together with the exhibits annexed to each; and the reply affidavit of Thomas W. Bender, Esq., dated March 24, 2014, and after hearing Thomas W. Bender, Esq., in support of the motion and Bradley P. Kammholz, Esq., in opposition thereto, due deliberation having been had, the following decision is rendered.

The plaintiffs base their Labor Law §241(6) claim upon the allegation that the accident resulted from a violation of Rule 23-9.7 of the New York State Industrial Code relating to "Motor Trucks" (12 NYCRR §23-9.7). The plaintiffs rely specifically on subsection (d) which states: "Trucks shall not be backed or dumped in places where persons are working nor backed into hazardous locations unless guided by a person so stationed that

he sees the truck driver and the spaces in back of the vehicles.” In moving for summary judgment, Noble argued that this Rule is inapplicable to the accident which occurred in this case because the plaintiff was struck by a bulldozer, not by a backing “motor truck.” Noble does not dispute that the plaintiff was signaling to a truck driver to back up a “motor truck” into the work area at the time of the accident. Nevertheless, Noble contends that the Rule still has no applicability under the circumstances because the truck in question had not yet begun to move.

In its prior ruling, the Court had denied Noble’s motion for summary judgment upon finding that “the plaintiffs have countered the defendants’ showing [of their prima facie entitlement to judgment as a matter on the Labor Law §241(6) claim] by submitting the affidavit of their own expert, John P. Coniglio.” The Court noted that, according to Coniglio, “Rule 23-9.7 is applicable, was not complied with and was implicated in causing the accident.” “Based upon this,” the Court concluded, “summary judgment is precluded with respect to the Labor Law §241(6) claim because the plaintiffs have shown that there are genuine issues of material fact that remain to be determined.”

Thus, the Court in its prior ruling treated the question of the applicability of Rule 23-9.7(d) to the circumstances of this case as a question of fact to be left for the jury. As Noble correctly points out upon this motion

to reargue, however, whether the Rule applies is a legal question which the Court alone must determine. The construction to be given to the language of the regulation is a matter of law (see, Morris v. Pavarini Constuction, 9 N.Y.3d 47, 51 [2007]), and it was error for the Court to defer to the opinion of the plaintiffs' expert on this issue (see, Marquart v. Yeshiva Machezikel Torah D'Chasidel Belz, 53 A.D.2d 688, 689 [2nd Dept., 1976]; Rodriguez v. New York City Housing Authority, 209 A.D.2d 260 [1st Dept., 1994]). In view of this error, the Court has granted re-argument and will now reconsider the issue of applicability.

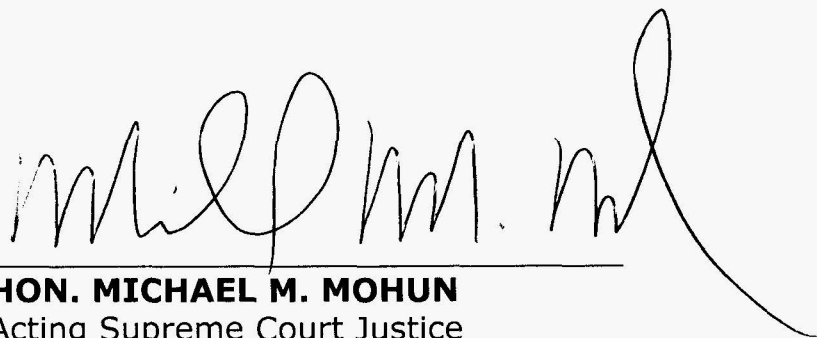
Upon review, the Court finds that Noble has not met its burden upon the motion to show that Rule 23-9.7(d) is inapplicable as a matter of law. Notwithstanding the fact that it was a bulldozer that struck the plaintiff, not a truck, and the fact that the truck that the plaintiff was signaling had not begun to move, it is clear that the work in which the plaintiff was engaged at the time involved the backing of motor trucks. The Rule, therefore, is applicable. The Court notes that because of the presence of motor trucks at the work site in this case, the case of Scott v. American Museum of Natural History (3 A.D.3d 442 [1st Dept., 2004]), cited by Noble, is factually distinguishable. In Scott, no motor trucks at all were involved in the "injury producing activity" (*id.*, 443), leading the Court in that case to find that Rule 23-9.7(d) had no applicability.

With respect to whether a violation of Rule 23-9.7(d) occurred in this case, and whether that violation was a proximate cause of the accident, the Court will adhere to its prior determination that the plaintiffs have successfully demonstrated that material questions of fact remain to be determined. Summary judgment must therefore be denied.

NOW, THEREFORE, it is hereby

ORDERED that, upon re-argument, Noble's motion for summary judgment dismissing the plaintiff's Labor Law §241(6) claim is denied.

Dated: December 3, 2014
Warsaw, New York



HON. MICHAEL M. MOHUN
Acting Supreme Court Justice

