

Valle v Port Auth. of N.Y. & N.J.

2016 NY Slip Op 32079(U)

July 29, 2016

Supreme Court, Queens County

Docket Number: 7877/2013

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

RICHARD VALLE, et ano.,
Plaintiff(s),

Index
No. 7877 2013

- against -

Motion
Date July 20, 2016

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY, et al.,
Defendant(s).

Motion
Cal. No. 168

Motion
Seq. No. 2

The following papers numbered 1 to 9 read on this motion by defendants The Port Authority of New York and New Jersey (Port Authority), T. Moriarty & Son, Inc. (T. Moriarty), and Unicorn Construction Enterprises, Inc. (Unicorn) (collectively defendants), for an order granting them leave to reargue their prior motion for summary judgment and, upon such reargument, for an order granting them summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	1-4
Answering Affirmation - Exhibits.....	5-7
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Upon the foregoing papers it is ordered that the motion is determined as follows:

On a motion for leave to reargue, the movant must demonstrate matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (CPLR2221 [d] [2]). A motion for leave to reargue is addressed to the sound discretion of the court (*see Deutsche Bank Nat. Trust Co. v Ramirez*, 117AD3d 674 [2014]; *HSBC Bank*

USA, N.A. v Halls, 98AD3d 718 [2014]). Nevertheless, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reassert or propound the same arguments previously advanced, or to present arguments different from those already presented (*see Ahmed v Pannone*, 116 AD3d 802 [2014]; *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819 [2011]).

To recapitulate defendants' arguments made on their initial motion for summary judgment with respect to plaintiffs' Labor Law § 200 and common-law negligence claims, defendants averred the following, by way of counsel's affirmation in support which can be found under the heading titled "Point II":

1. "The act of Plaintiff working inside a trench that became muddy from rain or naturally present groundwater is not a condition that was created by the Defendants." To that end, defendants argue that plaintiff and his employer were provided with their own tools and supplies to complete their work and did not receive instructions on how to complete their work from defendants.
2. "[T]here is simply no evidence suggesting that the Defendants had actual or constructive notice of a 'fluke' hole inside of the trench, particularly given that no complaints regarding the conditions of the trench were ever submitted to the Defendants prior to plaintiff's accident."
3. "Given that the Defendants did not exercise sufficient supervisory control over Plaintiff's work, Plaintiffs' Labor Law § 200 claims must be dismissed insofar as Plaintiff's claims relate to the means and methods of work employed by he and his foreman at the time of the accident" (relying on *Delahaye v Saint Anns School* [40 AD3d 679 (2007)] and *Hughes v Tishman Constr. Corp.* [40 AD3d 305 (2007)] to support this premise).

The analysis of plaintiff's Labor Law § 200 and common-law negligence claims and the branch of defendants' motion seeking dismissal of same began, in this court's March 30, 2016 order, with the identification of this injury as, not one which resulted from the means and methods of plaintiff's work but, rather, one which resulted from an alleged defective or dangerous condition of the premises where the work was performed. To that end, that defendants argued on their motion that plaintiff was unable to establish liability since defendants neither provided tools/supplies, nor gave instruction as to performance of the work, nor exercised sufficient supervisory control over plaintiff's work (*see* "1." and "3.," *supra*) was irrelevant for purposes of these causes of action (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1998]; *Baumann v Town of Islip*, 120 AD3d 603 [2014]). Indeed, the cases of *Delahaye* and *Hughes*, *supra*, upon which defendants relied in support of their motion, involved "means and methods" producing injuries and not injuries which came about as a result of an alleged dangerous condition. On this motion for reargument,

defendants fail to demonstrate (1) how their original arguments, codified herein in “1.” and 3.,” were applicable to this particular set of facts; and further (2) that the court should have otherwise granted them summary judgment on the ground that defendants did not provide plaintiff with tools/instructions or supervision.

As to argument “2.,” defendants took the position that there was no possible way that they could have had actual or constructive notice of a condition characterized by plaintiff as a “fluke.” They further claimed that there was no evidence that they received any complaints regarding the muddy condition. In its prior order, the court held that it was appropriate for a jury to decide, taking into account all the evidence and testimony presented, what plaintiff meant when he said “fluke,” rather than the court accepting either plaintiff’s or defendants’ interpretation of the word. Further, even acknowledging that defendants may have established that they had no actual knowledge of the condition,¹ they failed to present a witness who was able to testify as to when the last inspection, sufficiently close enough in time prior to plaintiff’s accident, was performed so as to demonstrate lack of constructive notice.

On this motion, defendants fail to demonstrate that the court overlooked or misapprehended any law or fact in this regard. Defendants urge that their interpretation of “fluke” should be accepted as a matter of law given the fact that inspections were performed daily by Mr. Santos and Mr. Lattanzio and no hazard was discovered; therefore, fluke must have meant a condition that could not have been discovered. As far as Mr. Santos’ testimony, same was specifically addressed by the court, and he specifically testified that, while he was on-site daily, no one was specifically assigned to inspect the trench on a daily basis. There was no subsurface investigation; there was no tamping down of the soil; there was no preparation performed to make the trench safe. Whether the performance of those activities would have constituted a reasonable inspection should be an issue left to the jury, particularly in light of plaintiff’s testimony as to the depth of the trench (another issue to be discussed, *infra*).

Further with respect to Mr. Santos’ testimony, his suggestion that, since plaintiff was not the only worker in the trench that day but was the only one to sustain an injury is, of course, insufficient to establish that the condition was not dangerous (or that it could not have been discovered) simply because no one else was injured. As to Mr. Lattanzio’s testimony, whether he, as plaintiff’s supervisor felt the trench was safe is irrelevant for purposes of establishing whether defendants performed reasonable inspections of the trench so as to

1. The court recognized, though, that plaintiff testified that he complained about the mud condition and that there may have been Port Authority or T. Moriarty present, but his testimony with respect to same was unclear.

absolve them of liability for the injury. Finally, defendants cannot now claim that a reasonable inspection was performed because defendants did not argue on their underlying motion that they performed a reasonable inspection of the premises (*see* points “1.” through “3.” above). Nor did they argue, for that matter, as they do on this motion, that the condition was not dangerous (*id.*). In any event, contrary to defendants’ contention, a mud condition may very well be considered a hazard requiring protection even when liability under Labor Law § 240 and 241 is not implicated (*see Zastenchik v Knollwood Country Club*, 101 AD3d 861 [2012]).

To the extent defendants argue that the court was confused as to the role of each defendant at the site, defendants misinterpret the court’s finding. The court stated: “it is noted that defendants fail to discern the different roles each of them played as they relate to the subject work site in relation to their discussion pursuant to Labor Law § 200 and common-law negligence.” The court did not have difficulty identifying the respective roles of defendants (having defined those roles in the introductory paragraph of the previous order); rather, the court was pointing out that defendants failed to – specifically in their analysis under Labor Law § 200 and common-law negligence – distinguish the different roles each of them played. It is not the court’s burden to *sua sponte* apply defendants’ recitation of the respective parties’ testimonies (which defendants indeed did on the underlying motion) to the law. Defendants may not attempt to remedy the failure to perform such an analysis now on their motion to reargue.

Defendants’ contention that a “means and methods” analysis was necessary to the extent plaintiff is alleging that the means and methods employed by Unicorn created the hazard, defendants misinterpret the facts. Plaintiff’s injury did not occur as a result of the means and methods employed by *him or his employer* (over which defendants had no control). In any event, defendants’ attempt to establish that neither Port Authority nor T. Moriarty had control over the manner in which Unicorn performed its work and, thus, should have been granted dismissal, is unavailing as they may not make these new arguments on this motion. This is precisely to what the court was referring in its prior order, to wit: that defendants made no attempt on the prior motion, in its *analysis* in support of dismissal, to make a distinction between any of the defendants; rather, they raised their argument collectively without reference to their respective roles.

To the extent defendants argue that the court overlooked the fact that there is no evidence that defendants created the alleged hazard, that fact is irrelevant if defendants were, in any event, unable to establish lack of notice. Further, to the extent defendants aver that the court overlook defendants’ witnesses regarding the actual depth of the trench as it is juxtaposed with plaintiff’s testimony, the latter of which they state could have only been based upon speculation, same is without merit. On the contrary, the court indeed considered

both the testimony of defendants' witnesses as well as plaintiff's testimony, and the contradictory statements found on both ends regarding the depth of the trench clearly presents an appropriate issue to be tried before a jury. Plaintiff's testimony was not speculative; though he may not have measured with precision the depth of the trench with a ruler, he was personally present in the trench and, thus, had personal knowledge of its depth by virtue of his observation thereof. Whether that observation is more or less accurate than the ones supplied by defendants is within the province of a jury, and not the court, to decide (*i.e.*, a matter of credibility or how much weight or veracity to afford the respective testimonies).

Accordingly, the motion is denied.

Dated: July 29, 2016

J.S.C.