

Clancy v Metropolitan Transp. Auth.

2018 NY Slip Op 30669(U)

April 16, 2018

Supreme Court, Queens County

Docket Number: 710940/2015

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

BRIAN CLANCY, Index No.: 710940/2015

Plaintiff, Motion Date: 3/15/18

- against - Motion No.: 33

THE METROPOLITAN TRANSPORTATION Motion Seq.: 1
AUTHORITY, and THE LONG ISLAND
RAILROAD d/b/a MTA LONG ISLAND
RAILROAD,

Defendants.

- - - - - x

The following electronically filed documents read on this motion
by plaintiff BRIAN CLANCY for an Order pursuant to CPLR 3212,
granting partial summary judgment to plaintiff as against
defendants, finding defendants were liable for the injuries
suffered by plaintiff as a matter of law pursuant to 45 USC 51,
and setting this case down for a trial on damages, only:

Notice of Motion-Affidavits-Exhibits.....EF 18 - 37
Affirmation in Opposition to Motion.....EF 63
Affirmation in Reply-Exhibits.....EF 66 - 68

In this negligence action, plaintiff seeks to recover
damages for personal injuries allegedly sustained as a result of
incident during which he suffered an electrical shock and severe
burns. Plaintiff, a Long Island Railroad (LIRR) employee, was
injured when a "stinger" dislodged from the box which housed it
and came into contact with either his person or the pipe he was
working on.

Plaintiff served a notice of claim with exhibits dated June
16, 2015. Plaintiff then commenced this action by filing a
summons and complaint on October 21, 2015. Defendants joined
issue by service of an answer dated November 12, 2015. Plaintiff

now moves for summary judgment on the issue of liability on the grounds that defendants failed to provide a safe work environment in that there were significant hazards present, resulting in plaintiff's injuries.

Plaintiff appeared for an examination before trial on July 15, 2016. He testified that he was employed by LIRR as an electric, light and power electrician since October 28, 2012. He was considered a building and bridges electrician as he worked inside the building, but was in the electric, light and power department. His job responsibilities included running wires, bending conduit, working with motors, and similar tasks. While working, he wore ANSI certified boots, safety glasses, and gloves. Prior to the date of his injury, he was never burned and never received an electrical shock. At the time of the incident, he was bending a pipe/electrical conduit within the Hillside facility at Building No. 2. He was using a pipe bending machine, which runs on electricity. The machine is approximately 3 feet wide and 3.5 feet high, weighs about 200 pounds, and is on wheels. The electrical outlet where the pipe bending machine was plugged in was located on a support wall in the middle of Building No. 2. On that same wall was the "stinger", a 750 volt DC wire that powers the third rail of the train tracks. The stinger is not something he was familiar with as its use had nothing to do with his job responsibilities. The stinger was housed in a red, wooden box. The tip was inside the box. Only the rubber casing was outside the box. The casing was approximately 4 inches in diameter, came out of the bottom of the box, and hung down, wrapping backwards to the wall behind it. Multiple train tracks were approximately 10 feet from where the pipe bender was situated. These tracks did not have third rails on the ground. Sometime between 10:00 and 11:00 a.m., a diesel train approached on those tracks. The bay door was open and a siren or other audible noise sounded. He stopped bending the pipe to prepare to pack up and clear the tracks. He let go of the trigger as the stinger fell down on him or on the pipe he was holding in his left hand. He saw something falling and experienced an explosion. The force of the current propelled him backwards onto his back on the ground. He heard loud booming sounds and smelled his own flesh burning.

Christopher D'Arpa, the LIRR Gang Foreman from the power department, appeared for an examination before trial on behalf of defendants on September 9, 2016. He testified that he was responsible for the Hillside Maintenance complex. His department performs all daily maintenance and any basic power improvements required in the building. He filled out an incident report, which is annexed to the motion papers. The incident report indicates

that plaintiff's co-employees advised him that crews were about to move equipment onto Track 12 and also energized the nearby stinger, which had fallen out of its wood holding device, striking/energizing the pipe bender that plaintiff was operating, and causing plaintiff's injuries. He obtained this information from Mr. Conroy, one of plaintiff's co-workers who observed the incident, was in distress over it, and relayed the information to him almost immediately after he arrived at the scene. Upon further investigation, he learned that the stinger came out of the box in which it was housed and struck plaintiff due to the movement of a train into the area. He also provided a statement as part of the internal investigation conducted by the LIRR, which is also annexed to the motion papers. The statement indicates that plaintiff was using the pipe bender in a safe location, that plaintiff's use of the pipe bender machine followed the normal procedures, that he observed plaintiff's safety/personal protective equipment in the area, and that by the burn marks on plaintiff's arms, it was evident that plaintiff was wearing gloves.

Ricardo Simpson appeared for an examination before trial on behalf of defendants on November 10, 2016. He testified that his position is a lineman cable splicer. His duties include constructing, maintaining, and repairing the 2,200 to 4,160 volt feeder systems as well as the manholes and duct bank system. The stingers are used to bring power down to the third rail to move the trains in and out of the Hillside Maintenance facility. This would be accomplished by energizing a system with a key through the interlock, removing the stinger from the housing, and applying the energized stinger to the third rail shoe to power up the train. The Maintenance of Equipment department is responsible for turning the key to energize the stinger. As part of his responsibilities, he inspected, maintained, and repaired the stingers. The stingers are housed in rectangular, wood boxes. The boxes open from the bottom. There is a metal latch that has to be opened, and then the bottom piece slides open while the weight of the stinger is being supported by the person retrieving the stinger from the box. Inspections of the stinger boxes were always documented. The inspections involved opening the box, removing the stinger, and looking inside to see if there was any deterioration beyond normal wear and tear. The condition of the box would be checked to ensure all parts were in good and proper working condition. When placing the stinger in the box, the stinger is rotated 90 degrees, put in place, rotated back, and then brought down into the notch. The slide is then closed and latched. When it is latched shut, it latches onto the stinger, but the stinger still runs through the hole in the bottom of the box. He personally filled out a Stinger System Inspection Form

for the subject box on May 12, 2015, which is annexed to the motion papers. In the Comments section of the Form, he wrote "Replace Box". He noted wear and tear to the box, but the box did not need to be taken out of service or immediately replaced. The condition of the box was from wear and tear rather than an incident causing damage to the box. The box was not broken because he did not tag the box or take it out of service. If the box was taken out of service, the power to it would be killed so no one could use it. He thought the box was safe for service. The actual replacement of the box would have taken under an hour.

Erron Jones, plaintiff's partner, appeared for an examination before trial on behalf of defendants on November 10, 2016. He testified that a co-employee placed the pipe bending machine close to Track 12 where it was used by plaintiff. The work they had been doing did not entail using the stinger or working with the stinger box. Plaintiff did not come into contact with the stinger while they were bending the pipe. Plaintiff was not even close to it. He did not see plaintiff get electrocuted. He heard the bang, saw plaintiff on the ground, and noted that the stinger was out of the box, on the floor. The stinger had been inside the box before he heard the bang.

Joseph Elco, plaintiff's supervisor, appeared for an examination before trial on behalf of defendants on January 4, 2017. He testified that plaintiff was a good worker, and he never had any problems with him. He provided a statement about the incident, which is annexed to the motion papers, and notes that the incident was caused by the stinger falling out of its holder, shocking plaintiff. Plaintiff had been wearing all of the required personal protection equipment. Plaintiff was not doing anything wrong by bending pipe in the manner and location where he was. Following his investigation, he found that the pipe bending machine could have been located at a better location; the operator should have only used the horn and strobe light because the train was being pushed into the shop by a shuttle wagon; formal training was needed for all movers; the holder in which the stinger is housed needed to be replaced a month before the incident; better communication and coordination was needed between the workforce when working on the shop floor; and the car movers should make sure the stinger is properly secured in the red box.

In support of the motion, plaintiff also submits an expert affidavit from Thomas J. D'Agostino, P.E. Although defendants take issue with Mr. D'Agostino's expert affidavit, contending that he lacks a familiarity with railroads, experience with railroads is not necessary for Mr. D'Agostino, a professional engineer, to observe and opine about the problems with the

subject wooden box, including, inter alia, the materials used, the wear and tear, and the condition of the box. Thus, the Court will consider the expert affidavit. Mr. D'Agostino opined that the improper construction and installation of the stinger box and excessive damage and deterioration of the stinger box coupled with an unidentified individual turning on the high-voltage rail caused the incident and plaintiff's injuries. The major safety components of the stinger box were deteriorated to the point that they were no longer suitable for their intended purpose. Additionally, inter alia, the excessive damage and deterioration of the box rendered the box essentially ineffective against external forces, which could loosen the stinger from the box.

Based on the submitted evidence, plaintiff's counsel contends that the incident and plaintiff's injuries were caused solely by defendants' negligence in failing to replace the stinger box. Counsel also contends that the hazard was reasonably foreseeable and that defendants were on notice of the hazard one month prior to the incident. Lastly, counsel contends that plaintiff was free from comparative negligence as he was wearing his required protective equipment.

In opposition, defendants' counsel contends that material issues of fact remain on the issue of notice as Mr. Simpson testified that were the stinger box in need of immediate replacement, he would have tagged it and taken it out of service. Counsel further contends that issues of credibility and comparative negligence preclude summary judgment.

The Federal Employers' Liability Act (FELA) provides, in relevant part, that every common carrier by railroad engaged in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier" (45 USC 51). The test to determine if there is an issue of fact for the jury is whether "the employer's negligence played any part, even the slightest, in producing the injury for which damages are sought" (Pidgeon v Metro-N. Commuter R.R., 248 AD2d 318, 318 [2d Dept. 1998]; see Grasso v Long Is. R.R., 306 AD2d 378 [2d Dept. 2003]; Consolidated Rail Corp. Vv Gottshall, 512 US 532 [1994]). The plaintiff must still show that the defendant had either actual or constructive notice of the alleged defective condition (see Pidgeon v Metro-N. Commuter R.R., 248 AD2d 318 [2d Dept. 1998]; Hyatt v Metro-North Commuter R.R., 16 AD3d 218 [1st Dept. 2005]).

Here, defendants offer no evidence to contradict Mr. D'Agostino's opinions that the incident and plaintiff's injuries

were caused by the improper construction, installation, excessive damage, and deterioration of the stinger box coupled with an unidentified individual turning on the high-voltage rail. Moreover, Mr. Simpson conceded that he detected wear and tear to the subject box and that he noted in his report "Replace Box". Defendants contend that Mr. Simpson's testimony that the subject box was not broken because he did not tag the box and take it out of service creates an issue of fact as to whether defendants were on notice of such condition. However, just because Mr. Simpson did not consider the wear and tear sufficient to take the box out of service immediately does not mean that defendants were not on notice of the condition of the box. Additionally, in the Accident/Injury Occurrence Form filled out by Mr. Elco, Mr. Elco noted that after a review of the incident and records, the "holder in which stinger is housed needed to be replace[d] a month before the incident". Thus, this Court finds that defendants were on notice of the defective condition of the box, which caused the incident.

Moreover, defendants failed to oppose that part of the motion which addresses the improper activation of the stinger. Plaintiff testified that the stinger would only be powered when needed to power the third rail. Mr. D'Arpa testified that a key activating switch was required to turn on the stinger. Mr. Simpson testified that each track that has a stinger has a control box that requires a key to energize the switch and turn it on to activate the third rail stinger. Additionally, after conducting an investigation, Mr. Elco found that immediately prior to the incident, there was a diesel operated wagon pulling in to the station, which did not require electric current to run. Based on the above testimony, as well as Mr. D'Agostino's opinion, plaintiff contends that someone inadvertently activated the flow of electricity to the stinger, causing the incident. Defendants failed to offer any evidence to contradict the above facts, and thus, defendants are deemed to have admitted such (see Kuehne & Nagel v Baiden, 36 NY2d 539 [1975]; Mascoli v Mascoli, 129 AD2d 778 [2d Dept. 1987]).

Lastly, a plaintiff moving for partial summary judgment on the issue of liability does not bear the burden of proving his or her own freedom from fault (see Rodriguez v City of New York, 2018 WL 1595656 [April 3, 2018]). Thus, any claim of comparative fault does not preclude the granting of partial summary judgment on the issue of liability.

Accordingly, and for the reasons stated above, it is hereby,

ORDERED, that plaintiff BRIAN CLANCY's motion is granted, plaintiff BRIAN CLANCY shall have partial summary judgment on the

issue of liability against defendants, and the Clerk of the Court is authorized to enter judgment accordingly; and it is further

ORDERED, that upon completion of discovery on the issue of damages, filing a Note of Issue, and compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for a trial on damages.

Dated: April 16, 2018
Long Island City, N.Y.

ROBERT J. McDONALD
J.S.C.