Combes v Suit-Kote Corp.
2019 NY Slip Op 33336(U)
March 28, 2019
Supreme Court, Cortland County
Docket Number: EF14-383
Judge: Ferris D. Lebous

At a Trial Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District on August 27-30, 2018.

PRESENT: HON. FERRIS D. LEBOUS
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT: : CORTLAND COUNTY

DOUGLAS J. COMBES,

Plaintiff,

-vs-

SUIT-KOTE CORPORATION,

Defendant.

AMENDED
DECISION

Index No. EF14-383
RJI No. 2015-0203

APPEARANCES:

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FERRIS D. LEBOUS, J.S.C.

This Decision addresses a non-jury trial held on August 27 through August 30, 2018 on plaintiff's Labor Law §241(6) cause of action relying on violations of §§ 23-1.5 (c) (3) and 9.2 (a) only.

The following background is based upon the proof and testimony presented at trial.

BACKGROUND

In 2011, the New York State Department of Transportation awarded defendant Suit-Kote Corporation (Suit-Kote) a contract as general contractor on five construction projects in Syracuse, including the Bridge Street Project. Hayward Baker, Inc. (HBI) was hired as a subcontractor by Suit-Kote to build a soil nail wall into the side of an underpass of Interstate 690 on the Bridge Street Project. A soil nail wall is a retaining wall where soil nails are drilled into the wall and then fabric and a Shotcrete facing are installed thereafter.

HBI owned a specialized drill rig called a "Davey Drill" (Model DK625) which is operated by three individuals including two so-called chuck tenders to load casings onto the drill steel, as well as a drill operator.

It was undisputed at trial that on September 27, 2011, prior to this accident, that this Davey Drill was found to have a condition of "bent tooling". It was further undisputed that

Kevin Daly, a HBI superintendent, completed a Daily Site Report describing an attempted repair by using a forklift to bend the drill steel back into position (Plaintiff's Trial Exhibits 15 & 34).[1]

This accident occurred on October 26, 2011. Plaintiff Douglas Combes, an HBI employee, was working as one of the two chuck tenders attempting to load a 5-foot section of casing onto the drill steel. The details of the accident will be set forth below, but plaintiff's right thumb was crushed in a pinch point. Surgical attempts to save the thumb were unsuccessful and plaintiff's thumb was ultimately amputated about a year after the accident. Plaintiff is right-hand dominant.

On August 5, 2014, this claim was commenced by the filing of a summons and complaint alleging three causes of action based upon: (1) Labor Law § 200; (2) negligence; and (3) Labor Law § 241 6). The parties engaged in discovery and motion practice for over three years while the case was assigned to the Hon. Phillip R. Rumsey. The case was reassigned to this court in September 2017. In October 2017, defendant moved for summary judgment seeking to dismiss the action in its entirety. In response to said motion, plaintiff did not oppose the dismissal of his negligence and Labor Law § 200 causes of action and select portions of his Labor law § 241 (6) cause of action. By Decision & Order dated February 21, 2018, this court denied defendant's motion for summary judgment seeking dismissal of plaintiff's third cause of action on Labor Law § 241 (6) involving State Industrial Code 12 NYCRR §§ 23-1.5 (c) (3), 1.12 (a), 9.2 (a) and 9.2 (d) and found those sections sufficiently specific to support said cause of action. At trial,

[1]The parties agreed to the admission of the complete deposition transcript of Kevin Daly (Pl Ex 34).

plaintiff elected to proceed by relying on violations of sections 23-1.5 (c) (3) and 9.2 (a) only. As noted above, the non-jury trial was held August 27-30, 2018 and post-trial submissions were submitted thereafter.

DISCUSSION

I. LIABILITY

Labor Law § 241 (6) imposes a nondelegable duty on owners and general contractors to provide reasonable and adequate protection and safety to construction workers by requiring owners and contractors to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). The Commissioner's rules, known as the State Industrial Code, are contained in Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR"). In order to establish a claim under Labor Law § 241 (6), "[a] plaintiff must show the applicability of a specific provision of the Industrial Code to the relevant work, a violation of the regulation, and that such violation constituted causally related negligence [citations omitted]" (*Copp v City of Elmira*, 31 AD3d 899 [3d Dept 2006]). Finally, Labor Law § 241 (6) imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision of the work site and without regard to fault (*Rizzuto v L.A. Wenger Contr. Co.* Inc., 91 NY2d 343, 350 [1998]). As such, in this case, defendant Suit-Kote, as general contractor, is responsible for the negligence, if any, of plaintiff's employer HBI.

As set forth above, at trial plaintiff elected to proceed on only two of the four originally pled Industrial Code provisions, specifically 12 NYCRR § 23-1.5 (c) (3) and § 9.2 (a) which state as follows:

12 NYCRR § 23-1.5 (c) (3)

(c) Condition of equipment and safeguards.

(1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.
(2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon.
(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

12 NYCRR § 23-9.2 (a)

General requirements

(a) Maintenance. All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest.

Based upon the proof presented at trial, the court must determine whether plaintiff established a violation of said regulations and whether said violations were a proximate cause of plaintiff's injuries.

With respect to a violation of said regulations, the record supports a finding that both 12 NYCRR § 23-1.5 (c) (3) and § 9.2 (a) are applicable to this case and were violated. More specifically, with regard to proof the equipment was faulty, the proof at trial established that on September 27, 2011, prior to this accident, Kevin Daly, the onsite HBI superintendent, filled out a Daily Site Report stating in part "Bent tooling on rig required forklift to bend tooling back into jaws" and "Bent drill steel explaining why they were having trouble loading" (Pl Ex 15). The

testimony of plaintiff and deposition testimony of Kevin Daly, further established that even after the September 27, 2011 repair of this particular drill, the drill was still operating improperly. Although the bent drill tool had allegedly been "repaired" by bending the steel back with a forklift, the drill casings still failed to insert over the drill steel as they should have. This necessitated plaintiff to assist the drill operator by holding onto the casing while the operator "toggled" the drill rod in order to wiggle the casing onto the drill steel – an action that would not have been necessary had the drill been in proper operating condition at the time.

The net effect of this resulted in plaintiff's hand being unnecessarily placed near the very pinch point that would ultimately damage his thumb. Moreover, as plaintiff credibly testified at trial, the fact that he had been instructed on the job to insert the casing in this manner on this particular drill, in no way negates the fact that the contact would have been unnecessary if the drill had been properly repaired on September 27, 2011 or was in proper working order - the failure of which were violations of 12 NYCRR §§ 23-1.5 (c) (3) and 9.2 (a), respectively. This conclusion is further bolstered by the testimony of plaintiff's expert, Patrick Doherty, which the court found consistently more credible than the defendant's industrial expert, Tim Jur (*Caprara v Chrysler Corp.*, 52 NY2d 114, 121-122 [1981]).

With respect to causation, defendant argues that plaintiff's own actions were the sole proximate cause obviating any liability on its part. This court's determination that defendant violated Industrial Codes 12 NYCRR § 23-1.5 (c) (3) and § 9.2 (a) - which violations were a proximate cause of this accident - precludes the possibility that plaintiff could have been the sole proximate cause of this accident. In other words, "[i]f a statutory violation is a proximate cause

of an injury, the plaintiff cannot be solely to blame for it" (*Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 290 [2003]; *Fabiano v State*, 123 AD3d 1262 [3d Dept 2014], *lv dismissed* 25 NY3d 957 [2015]; *Cevallos v Morning Dun Realty Corp.*, 78 AD3d 547, 548 [1st Dept 2010] [any negligence on plaintiff's part could not have been the sole proximate cause of his accident, since the accident was caused, at least in part, by defendant's failure to satisfy its statutory duty to provide an adequate safety device to protect plaintiff from the risk of falling]). Thus, defendant's argument that plaintiff's conduct was the sole proximate cause of his own accident is without merit (*Kittelstad v Losco Group, Inc.*, 92 AD3d 612 [1st Dept 2012]).

That said, however, defendant's arguments regarding plaintiff's conduct may be considered in terms of comparative negligence since any comparative negligence on the part of plaintiff does not preclude liability founded upon a violation of Labor Law § 241 (6) (*Bradley v Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2d Dept 2005]).

Despite plaintiff's instructions by his employer as to the method of loading the casing onto the drill rod, it was incumbent upon the plaintiff to be alert and aware and avoid the obvious pinch point that would ultimately claim his thumb. The court tempers this, however, with the fact that plaintiff's employer, HBI, was behind schedule and under pressure to complete this job. This resulted in pressure placed on the laborers to move at a pace which often results in a lack of sufficient attention to detail and circumstances which result in injury. Under the circumstances here the court finds that a 35% assessment of fault should be appropriately attributed to plaintiff in this case.

II. DAMAGES

Plaintiff presented proof regarding lost wages and pain and suffering, including both past and future damages under each category. In addition to plaintiff's own testimony, plaintiff presented damage witnesses including a vocational expert, Karen Simone, and economic expert, Dr. Lawrence M. Spizman.

A. Pain & Suffering

Although there is no precise rule for determining damages for pain and suffering, the trier of fact is bound by a standard of reasonableness (*McDougald v Garber*, 73 NY2d 246 [1989]; *Paley v Brust*, 21 AD2d 758 [1st Dept 1964]).

Jon Loftus, M.D., plaintiff's treating surgeon, testified that plaintiff suffered a horrific industrial crush injury to his right thumb. In addition, plaintiff sustained crushing damage to four joints, fractures to the hand and a degloving of the flesh of the thumb. These injuries necessitated and resulted in three surgical interventions attempting to piece the thumb back together, albeit unsuccessfully, ultimately resulting in amputation of the thumb and fusion of the wrist. The result of these injuries and the surgical interventions, plaintiff testified, results in continued pain and discomfort as well as a permanent impairment rating of 85% to the right hand and wrist and 100% to the right thumb. As a result, plaintiff's treating physician, Dr. Loftus, found that plaintiff will be permanently impaired and limited to lifting restrictions of 10 pounds, occasionally up to 20 pounds, but will never be able to carry as much as 50 pounds and will suffer from chronic pain in the affected hand and limb. It was stipulated by the parties that medical expenses incurred by plaintiff as a result were $36,244.72. Based on the foregoing, the

court finds reasonable compensation for plaintiff's past pain and suffering to be $150,000 from the date of this accident to the date of this decision. With respect to future pain and suffering, the court finds plaintiff, age 37 at the time of trial, has a life expectancy of 36.3 years. The court finds reasonable compensation for future pain and suffering to be $300,000 for 36.3 years of future life expectancy.

B. Lost Wages

Plaintiff is entitled to be reimbursed for any earnings lost as a result of his injuries caused by defendant from the time of the accident to today, as well as in the future for a reduction of his capacity to earn money moving forward. That said, it is well-settled that plaintiff bears the burden of establishing loss of wages with reasonable certainty focusing, in part, on the plaintiff's earning capacity both before and after the accident (*Tassone v Mid–Valley Oil Co., Inc.*, 5 AD3d 931, 932 [3d Dept 2004], *lv denied* 3 NY3d 608 [2004]) such as by providing documentary evidence "[d]emonstrating the difference between what he is now able to earn and what he could have earned if he had not been injured" (*Burdick v Bratt*, 203 AD2d 950, 951 [4th Dept 1994], *lv. denied* 84 NY2d 801 [1994]; see also PJI 2:290).

Dr. Spizman's testimony was relatively straight-forward, credible and uncontradicted at trial since defendant chose not to offer any counter expert on economic loss. Dr. Spizman calculated economic loss with a work-life expectancy to age 59.71, as well as to age 62. Based on the testimony elicited at trial, the court is of the opinion that a work-life expectancy of plaintiff to age 62 is reasonable.

Dr. Spizman's opinion was based on plaintiff's base-year earnings of $64,701 for the last three full years prior to the plaintiff's injury which Dr. Spizman used for a base for future losses. Dr. Spizman next established that plaintiff is currently earning $13.15 per hour at Wells-Allyn as a forklift operator at an annual residual income of $28,080 per year.

This residual income was established as an appropriate amount to the court's satisfaction by the testimony of Karen Simone, MS, CRC, CLCP, plaintiff's vocational/rehabilitation expert and certified lifecare planner. In her uncontradicted and credible opinion, plaintiff's current position at Wells Allyn of forklift operator at $28,080 per year is at the high end of plaintiff's residual occupational earning ability considering his education, work history and physical functional limitations as a result of this accident. She calculated plaintiff's residual earning capacity between $21,632 as a low and $28,080 as a high. The court agrees.

Using this residual amount allowed Dr. Spizman to testify that plaintiff's past lost earnings were $364,558 (Pl Exs 43 &45). With respect to future lost earnings, the court finds that plaintiff's expert Dr. Spizman established with reasonable certainty that plaintiff's lost earnings capacity minus residual earnings through the age of 62 is $1,589,373 (Pl Exs 43 & 45). In addition, based upon the testimony of Dr. Spizman, the future loss of household productivity plaintiff will suffer to his life expectancy of 78.83 is $199,084 (Pl Ex 43).

C. <u>Mitigation of damages</u>

Defendant correctly points out that plaintiff has an obligation to mitigate his damages (*Novko v State of New York*, 285 AD2d 696 [3d Dept 2001]). The burden of proof on this point is on the

defendant to establish that plaintiff, by his own action or inaction, failed to mitigate and minimize his damages (*Cornell v T.V. Dev. Corp.*, 17 NY2d 69 [1966]). Defendant argues plaintiff is not entitled to lost wages following the accident because plaintiff was terminated from HBI due to misappropriation of a company credit card. Defendant also argues that plaintiff failed to mitigate his own damages. Defendant did not submit any expert proof of its own on damages but rather relied on cross-examination of plaintiff's experts.

At trial, defendant attempted to establish plaintiff's loss of employment at HBI was due to his girlfriend's misuse of a HBI credit card while plaintiff was out of work due to this injury. Defendant claims, but for the misuse of the card, plaintiff could have returned to light duty work but that this misconduct resulted in his termination. However, the court finds the defendant has failed to meet its burden in this regard. While plaintiff did not deny that due to financial stress, his girlfriend did misuse defendant's credit card – allegedly to make a vehicle payment - the court finds the record is murky on whether plaintiff was ever formally terminated over this post-injury issue. The personnel manager could not recall if plaintiff was ever notified of his termination over this event. More importantly, although defendant claims that but for the plaintiff's conduct resulting in termination, he could have returned to light duty work at HBI, there was no admissible proof offered at trial that such an offer was ever made to plaintiff or that such light duty program ever existed. Based upon the foregoing, the court believes that with regard to loss of future wages and employment that defendant's claims of plaintiff's failure to mitigate his own economic loss was not established by credible admissible evidence.

Finally, the court notes that the parties stipulated that plaintiff's past medical expenses paid out by the Workers' Compensation carrier was $36,244.72 and the parties further stipulated the amount of plaintiff's past lost wages of $248,888.07 for a total lien from the Workers' Compensation Carrier of $285,112.79 (Pl Ex 23).

All trial motions not previously decided are hereby denied.

CONCLUSION

In sum, the court finds that plaintiff is awarded the following damages:

Past pain and suffering	$150,000
Future pain and suffering	$300,000
Future household productivity	$199,084
Past lost earnings	$364,558
Future lost earning	$1,589,373
Past medical expenses	$36,244.72

However, the total damages must be reduced by the percentage of plaintiff's comparative fault as found herein of 35%. After applying plaintiff's 35% comparative fault to the total damages determined herein the court awards the following:

Past pain and suffering	$150,000 is reduced to	$ 97,500.00
Future pain and suffering	$300,000 is reduced to	$ 195,000.00
Future household productivity	$199,084 is reduced to	$ 129,404.60
Past lost earnings	$364,558 is reduced to	$ 236,962.70
Future lost earnings	$1,589,373 is reduced to	$1,033,092.45
Past medical expenses	$36,244.72 is reduced to	$ 23,559.07
	TOTAL:	$1,715,518.82

The court awards plaintiff the amount of $1,715,518.82 together with statutory interest from the date of the initial Decision dated February 21, 2019.

Because the amount of future damages exceeds $250,000, a structured judgment is required pursuant to CPLR § 5041(e). Accordingly, the entry of judgment is stayed until a hearing is held pursuant to CPLR Article 50-B. The court will contact the parties to schedule said hearing. For purposes of CPLR Article 50-B, the court encourages the parties to agree upon the discount rate to be applied and to formulate a structured settlement of their own (CPLR § 5041[f]). All interest calculations shall be determined pursuant to the aforementioned Article 50-B hearing.

In the event the parties fail to reach an agreement, each party shall submit a proposed order directing judgment in writing conforming to the requirements of CPLR Article 50-B within 120 days of the filing date of the initial Decision.

This Amended Decision constitutes an order of the court. The mailing of a copy of this Amended Decision and Order by this court shall not constitute notice of entry.

Dated: March 28, 2019
Binghamton, New York

Hon. Ferris D. Lebous
Justice, Supreme Court