White v. Village of Massena

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This opinion is uncorrected and will not be published in the Official Reports.

Labor--Safe Place to Work

(*1)

DECISION & ORDER

IAS #44-1-98-0372

(*2)

Plaintiffs sue for injuries sustained by William White ("Plaintiff") while working in an excavation trench, as a laborer for Third-Party Defendant Perras Excavating, Inc., on March 11, 1997, pursuant to a contract with Defendant/Third-Party Plaintiff Village of Massena ("Massena"). The trench, alleged by Plaintiff to measure 13 feet deep and four to five feet wide without any sloping or shoring, failed and buried Plaintiff. Plaintiffs premise their personal injury action on various sections of the Labor Law [§§200, 240, 241(6)] and violations of 12 N.Y.C.R.R.R. §§23-4.2, 23-4.4, 23-4.1, as well as a derivative cause of action and seek summary judgment with regard to liability issues. Defendant Fisher, purported to be an "owner" (as defined by Labor Law §241) of the land upon which the accident occurred, cross moves for dismissal of the complaint pursuant to New York C.P.L.R. 3211(a)(7). Massena opposes Plaintiffs' motion. The Court, having entertained oral argument at its November 9, 2001, Special Term and reviewed the parties' submissions: Plaintiffs' Motion, dated September 26, 2001, with supporting Attorney's Affirmation, sworn to (*3)September 26, 2001, with attached exhibits; Plaintiffs' Memorandum of Law, dated September 26, 2001; Defendant/Third-Party Plaintiff's Attorney's Affirmation in Opposition to Motion, dated November 1, 2001, with attached exhibits; Defendant/Third-Party Plaintiff's Memorandum of Law, dated November 21, 2001; Defendant Fisher's Notice of Cross Motion dated October 9, 2001, with supporting Attorney's Affirmation, dated October 10, 2001, with attached exhibit, Defendant Fisher's Affidavit, sworn to October 10, 2001, and Affirmation of Service, dated October 10, 2001; and a copy of the case "Fox v. Jenny Engineering Corporation," tendered by Defendant Fisher's counsel at oral argument, renders the following Decision and Order.

The Court notes that although Plaintiffs' motion seeks "summary judgment with regard to issues of liability," it is specifically addressed to establishing liability under New York Labor Law §241(6). In

order to premise liability on this statute, Plaintiffs cite violations of regulations found at Part 12 of the N.Y.C.R.R. which set forth specific standards of conduct. Clearly those regulations, such as §§23-4.2 and 23-4.4, requiring sheeting and/or shoring of trenches or excavation areas do not constitute general bromides reiterating common law standards of care, but are sufficient to give a specific, positive command so as to support a Labor Law §241(6) cause of action. In this vein, the Court of Appeals has had occasion to address and compare Labor Law §§200, 241(6), and 240(1):

"Neither section 241(6), nor section 200, in contrast to section 240(1), is self-executing, but rather, both require reference to outside sources to determine the standard by which a (*4)defendant's conduct must be measured...[and §241(6)] `...requires a determination of whether the safety measures actually employed on a job site were reasonable and adequate....' "

Zimmer v. Performing Arts, Inc., 65 N.Y.2d 513, 523 (1985) citing to Kenny v. Fuller, 87 A.D.2d 183, 186 (2d Dep't 1982), lv. den. 58 N.Y.2d 603.

While the question of circumstantial reasonableness is irrelevant vis a vis Labor Law §240(1) since absolute liability is imposed for any injury arising out of a breach thereof, under §241(6) a determination must be made as to whether the safety measures actually utilized on the site were `reasonable and adequate.' In Zimmer the Court

"...observed that section 241(6) is to be contrasted with the first five subdivisions of section 241, in which specific safeguards are set out, and with section 240, `a self executing statute which, containing its own specific safety measures, does not defer to the rule-making authority of the [administrative] board.' Thus, a violation of section 240(1) or the first five subdivisions of section 241 creates absolute liability. The failure to provide any safety devices is such a violation." (*5) Id. at p. 522 (citations omitted).

The Third Department, affirming this Court's lower opinion, in Daniels v. Potsdam Central School District, 256 A.D.2d 897 (3d Dep't 1998), held that "...such a violation [of 12 N.Y.C.R.R. 23-4.2(g) -- the implementing regulation relied upon by plaintiffs in support of their Labor Law §241(6) cause of action], even if established, would constitute nothing more than " ` "some evidence of negligence which the jury could take into consideration with all the other evidence bearing on that subject." ' " (Allen v. Cloutier Constr. Corp., 44 N.Y.2d 290, 298, quoting Conte v. Large Scale Dev. Corp., 10 N.Y.2d 20, 29 , quoting Schumer v. Caplin, 241 N.Y. 346, 351; see, Rizzuto v. Wenger Contr. Co., 91 N.Y.2d 343, 349, 351)." Taken together with other record evidence as to the "step back" procedure employed, lack of industry practice in that locale utilizing shoring/bracing and plaintiff's participation in the trench excavation and comparative negligence, summary judgment predicated upon Labor Law §241(6) was properly denied.

To the extent, then, that Plaintiffs argue the absence of shoring or any evidence that safety measures were employed supports their summary judgment motion pursuant to Labor law §241(6), the Court is

not persuaded, notwithstanding Plaintiffs' proffer of Rodriguez v. City of New York, 232 A.D.2d 621 (2d Dep't 1996), to the contrary. In Rodriguez, the Second Department was caused to scrutinize plaintiff's "comparative negligence" as a defense to the Labor Law §241(6) cause of action. The (*6)Court held defendant's failure to proffer "evidentiary proof in admissible form" to counter plaintiff's claim "he was not given any time to move away or to get out of the trench before his co-worker began hoisting a support panel, causing the shoring beam to become dislodged [and strike plaintiff while the trench was being backfilled]," was fatal to plaintiff's dispositive motion. Similarly, the Second Department in Mendoza v. Cornwall Hill Estates, Inc., 199 A.D.2d 368 (2d Dep't 1993), held that defendant failed to offer evidentiary proof sufficient to raise a triable issue of fact with respect to the defense of plaintiff's contributory negligence.

In the instant case, however, there is proof in the record as to Plaintiff's possible contributory negligence insofar as he: personally brought the "mule" (steel box placed in trench to protect against collapse) to the job site upon his boss' instructions -- although it was not utilized; had worked for his employer for twelve (12) years prior to the accident; and, chose not to tell his supervisor that he felt the trench conditions were unsafe for fear of being laid off. Although Plaintiff's mere presence in the trench would, alone, be an insufficient tender to defeat this motion, there is evidence in admissible form as to Plaintiff's knowledge of the trench's dangerous condition.

Turning to Defendant Fisher's Cross Motion, the Court is inclined to grant his relief, notwithstanding the real estate being comprised of a rented one-family dwelling which is not entitled to the statutory exception (afforded properties used for one or two family residential purposes). See Lombardi v. Stout, 80 N.Y.2d 290 (1992); Sweeney v. Sanvidge, 271 A.D.2d 733 (3d Dep't 2000), lv. den. 95 N.Y.2d 931. To the extent (*7)Plaintiffs cite cases wherein the grant of an "easement" will not divest Mr. Fisher, as the underlying real property owner, from being considered an "owner" pursuant to New York Labor Law §241, it is appropriate to review the pertinent language contained within the Deed:

"Excepting and reserving, however, the right of way of ingress and egress for the purpose of maintaining and rebuilding the sewer crossing the portion of the land hereby conveyed."

In support of his cross motion, counsel for Defendant Fisher cites Palmer v. Alltel New York, Inc., 227 A.D.2d 914 (4th Dep't 1996), in his motion papers and, at oral argument, tendered the case of Fox v. Jenny Engineering Corp., 122 A.D.2d 532 (4th Dep't 1986), aff'd 70 N.Y.2d 761 (1987). Defendant Fisher, citing to Palmer, avers he did not grant an easement to the Village, but rather took title to the real estate "subject to the absolute right-of-way in the Village of Massena." Consistent with this rationale, Plaintiff cites to Fox wherein the Fourth Department distinguished between the grant of an easement and the act of condemnation:

"While the Court of Appeals has decided that an owner for purposes of Labor Law §241(6) includes the grantor of an easement (Celestine v. City of New York, 86 A.D.2d 592, 446 N.Y.S.2d 131, aff'd on

mem below 59 N.Y.2d 938, 466 (*8)N.Y.S.2d 319, 453 N.E.2d 548), we distinguish the grant of an easement from condemnation because in the case of condemnation the fee owner has no power to impose conditions concerning construction on the premises...."

Fox at p. 533.

Clearly Defendant Fisher's ownership interest excepts out the portion of real property upon which this accident occurred. Unlike the property owner in Celestine (the grantor of the easement remains the owner of the fee), there is no proof that Defendant Fisher possessed -- let alone retained -- any underlying property rights to the situs of the construction accident. The rationale applicable to condemnation in Fox is more akin to the facts at hand since the fee owner is powerless to impose conditions concerning construction on the premises. Accordingly, Defendant Fisher's cross motion is granted.

The foregoing constitutes the Decision and Order of this Court.

SO ORDERED DATED: April 16, 2002, at Chambers, Canton, New York.

(*9)

{Decision & Order, and moving papers filed}