

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

KENNETH J. HERRMANN,

Plaintiff(s),

INDEX No. 10732/03

-against-

MOTION DATE: 9/16/05

DEFOE CORP,

Defendant(s).

MOTION SEQ. No. 4-MOD
5-MD
6-MD

The following papers read on this motion:

- DeFoe Notice of Motion/Affirmation/Exhibits
- Plaintiff Affirmation in Opposition/Memorandum of Law/Exhibits
- DeFoe Reply Affirmation
- Plaintiff Notice of Motion for Summary Judgment/Affirmation/Memorandum of Law/Exhibits
- DeFoe Affirmation in Opposition/Exhibits
- DeFoe Notice of Motion/Affirmation/Affidavit/Exhibits
- DeFoe Affirmation in Support/Memorandum of Law/Exhibits
- Plaintiff Affirmation in Opposition/Attachments/Memorandum of Law
- DeFoe Reply
- Plaintiff Reply

In this negligence action both plaintiff and defendant seek Orders granting them summary judgment. Defendant also seeks an Order vacating the Note of Issue filed in this action and an Order compelling plaintiff to submit to a vocational examination.

This arises out of an incident on April 24, 2003. On that date plaintiff employed by Hinck Electrical Contractors, was performing electrical work on the Mineola Boulevard Bridge, in Mineola, New York, as part of an ongoing construction project to erect a permanent bridge at that location.

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As part of his duties, plaintiff was required to walk atop certain exposed steel "I" beams which were supports for the structural foundation. Plaintiff was provided with a harness with a lanyard that attached to safety cables as a safety device. The cables ran from the north end of the bridge to the south end and were about waist high. This system allowed plaintiff to hook the lanyard onto a cable and walk north or south along the "I" beams. Thus, if plaintiff fell while walking along the length of an "I" beam, the cable to which he was attached would prevent him from falling to the ground. There were no safety cables running across the beams from east to west.

At approximately 11:00 a.m. plaintiff and his co-worker, Michael Giannini, were carrying a 10' piece of galvanized pipe while walking from east to west approximately 20 to 25 feet above the ground. Mr. Giannini was holding the front of the pipe while plaintiff carried the rear. There were no safety nets or scaffolding below them. As the safety cable did not run east to west, plaintiff had to detach his lanyard from a cable so that he could rehook it to the next cable. Due to the length of his lanyard, plaintiff could not stand in one spot and disconnect and reattach cables.

Plaintiff states that while he was holding the rear of the pipe, he began to lose his balance, and fell to the ground. As a result of his fall plaintiff suffered a comminuted fracture of his right distal radius and ulnar styloid of the right wrist with shortening and dorsal displacement of the carpal bone, lumbar fractures of the superior endplate at L1, L2 and L4, a comminuted burst fracture at L3 with retropulsion of bone fragments into the spinal canal, spinal nerve root compression and a herniated lumbar disc.

In his previous motion plaintiff argues that the defendant clearly violated Labor Law § 240 (1) in failing to provide plaintiff with adequate safety devices to prevent his fall and that the failure was the proximate cause of his accident and injuries. Defendant opposed seeking additional discovery. The Court agreed and denied plaintiff's motion with leave to move for the same relief after completion of discovery.

Plaintiff argues that now that discovery has been completed, it is clear he is entitled to summary judgment on his Labor Law claim.

As a result of this fall plaintiff sustained a comminuted fracture of the right distal radius and ulnar styloid of the right wrist with shortening and dorsal displacement of the carpal bone, lumbar fractures of the

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superior end plate at L1, L2 and at L4, a comminuted burst fracture at L3 with retropulsion of bone fragments into the spinal canal, spinal nerve root compression, and a herniated lumbar disc. (Motion, Exh. C)

At his deposition plaintiff's coworker Mike Giannini, a twenty nine year member of Local 25 IBEW and an A-book electrician testified that he was working with the plaintiff on the date of incident, which was the first date that Hinck was installing conduit on the structure. He testified that the steel was up and that a small portion of the tin decking has been installed. He testified that the plaintiff had to borrow a harness which was provided to him by DeFOE. Giannini testified that he did not recall any conversations taking place between the workers and the supervisor, Mr. Gomez, regarding the use of the harness. He also testified that he was not told that use of one was mandatory at any time. He also testified that there was no "tool box" meeting with Gomez on that morning.

This witness testified that it took approximately fifteen to twenty minutes to bring a piece of pipe to the spot where it was to be installed and return it to the point of departure to carry out another length of conduit.. Giannini testified that on the first trip they walked north, then west, then north, and that while they were walking west they were not tied off. He testified that after this they decided to take a different route because neither men felt secure. He noted that the Q deck panels were not down in the area that would have permitted them to walk west to the pipes. He also testified that there were stacks of the curvy shaped panels and panels were hazards.

Giannini testified that at the time of the accident he and the plaintiff were carrying a five inch piece of rigid pipe which was approximately ten feet long and weighed approximately one hundred and fifty pounds. They were carrying it west from the departure point to where they could turn north to get to the bay where it was to be installed. Giannini testified that there was no place to continuously tie off in an uninterrupted manner, and that the only rope lines on the structure ran north to south.

Giannini testified that at the time of the accident DeFOE employees were on top of the structure, and that at no time before the accident did any of those employees tell them to change their route or direct them as to what path to take to transport the conduit. He further testified that there were no barricades across or other fall protection along the top of the south pier or netting beneath the bridge structure. He testified that after the accident DeFOE employees tried to set up a safety line over the south pier.

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DeFOE's project superintendent Paulino Gomez also appeared for a deposition. He was the safety officer for the job site. Mr. Gomez testified that the area was safe as there were toe kicks, harnesses and cables as well as a railing every five feet. He testified that he made sure his foreman enforced all safety procedures discussed at the meetings. He testified that he was not on the bridge structure when the accident occurred. He testified that there were no scaffolds, toe boards, east-west static lines or safety nets in the area where the plaintiff fell. Mr. Gomez further testified that he did not recall asking the plaintiff whether he had ever used a rope line before or whether he had ever worked using a body harness. He conceded that he did not have a Pro-safety sit down or meeting with the plaintiff prior to the incident. He testified that before the accident Bill Bellini advised that all work platforms required handrail systems and that all leading edges must have a warning or handrail system. He testified that the area where plaintiff fell had a leading edge, and conceded that the ironworkers installing the q-deck panels were working at the same time as the electrical contractors were attempting to install the conduit.

Kenneth Jacques, the Resident Engineer for the project testified that there were two forms of safety fall prevention on the site, q-decking and north-south static lines on every other north-south girder. He testified that there were no east-west static lines, handrails or guard rails, nor was there any safety netting. He testified that no one reported to him that the Hinck workers were not complying with fall prevention systems. He also admitted that on the date of incident there was no north-south static line to which the plaintiff could have attached a safety line and that he had not heard anyone tell the plaintiff that he could not walk east to west on the structure or direct them away from where they were walking prior to the accident. He also testified that the area where plaintiff was walking was a non-working area, which considered to be unsafe and did not have a safety line, but that this area was not barricaded and had no warning devices to prevent workers from traversing it in the course of the day.

William Bellini, the safety inspector for ProSafety also appeared for deposition. He testified that he was to conduct safety audits and "toolbox" talks and report to Mr. Gomez. He testified that it was his understanding that DeFOE had no responsibility for the safety of Hinck employees at the site. Mr. Bellini testified that all leading or open edges had to have a protective warning or handrail system. He testified that he did not observe any retractable lanyards where the accident occurred nor did he personally inspect any

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lanyards or guardrails prior to the accident. He testified that there were no controlled access zones and that he did not find any leading edge where the plaintiff fell. He testified that he filled out the Weekly Foreman Meeting Toolbox report the alleged meeting between Gomez, plaintiff and Giannini on the date of the accident, despite the fact that he did not meet with plaintiff or Giannini on that date, nor did he discuss any fall protection with them.

Finally Ray Weixler, the New York State DOT Engineer in Charge testified. He stated that Jacques and his staff reported to him and that DEFOE, as prime contractor and general contractor, was responsible for all safety aspects of the job, and was responsible for installing, maintaining and monitoring safety systems while the project was in place. He testified that he was not at the location at the time of the fall, and did not inspect the fall protection systems when he arrived, nor did he conduct a post accident investigation.

The Post accident corrective action plan provided to the State, states that all workers on the project were considered to be DEFOE employees with respect to safety.

The plaintiff seeks summary judgment contending that there is no triable issue of fact in dispute as the defendant failed to provide appropriate safety devices that could have prevented his fall, and violated Labor Law § 240(1). The defendant opposes contending that there is a question of fact whether a safe workplace was provided and that the plaintiff's fall was caused by his own negligence.

In order to demonstrate entitlement to summary judgment on a Labor Law 240(1) claim, a plaintiff must establish that : (1) the plaintiff was engaged in the erection of a structure; (2) plaintiff was exposed to an elevation-related hazard as part of his work; (3) the plaintiff was not provided with adequate safety equipment; (4) the lack of proper safety equipment was the proximate cause of the plaintiff's injuries; and (5) the defendant was the general contractor and prime contractor for the project. *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 (1991); *Orellana v. American Airlines*, 300 AD2d 638 (2nd Dept 2002).

Based on the proof presented, the Court agrees with the defendant to the extent that there is a triable issue of fact whether the plaintiff was provided with adequate safety equipment and whether any lack thereof was the proximate cause of his injuries. Thus, the plaintiff's motion must be Denied.

Based on the proof presented, the motion of the defendant seeking summary judgment is also Denied. It is clear from the testimony of the witnesses presented, that there is a dispute as to what , if any, directions

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were given to the plaintiff regarding moving the pipes from one area of the structure to another. Further, there is evidence that while some of the area had safety precautions, some areas did not, including the area of the plaintiff's accident. The Court agrees with the plaintiff that there is no question of fact that DeFOE had the responsibility to provide a safe workplace, as noted by the State DOT representative, as well as EIC Ray Weixler.. *Gasper v. Ford Motor Co.*, 13 NY2d 104 (1963). Claims to the contrary are without merit. However, there is a question of whether the safeguards provided were adequate and whether plaintiff acted in an unsafe manner despite those safeguards.

The Court finds that the defendant's argument that it is entitled to summary judgment due to plaintiff being a "recalcitrant worker" is without merit. There is no evidence that the plaintiff in this instance was given specific safety instructions on how to perform his assigned duties and where he was to travel which were not adhered to, resulting in his accident. *Stolt v. General Foods Corporation*, 81 NY2d 918 (1993); *Cahill v. Triborough Bridge and Tunnel Authority*, 4 NY3d 35 (2004). There is a question of fact whether he was given safety instructions at all.

As noted by plaintiff, in opposing the motion of the defendant, ProSafety told DeFOE's representative that "all" leading edges were to be protected with a warning or handrail system, and that all work platforms required proper handrail systems prior to the accident. (Motion, Exh. N) Further there is a question of whether the single lanyard provided to the plaintiff was adequate as it had to be detached when traveling east-west due to a lack of safety cables. Plaintiff also claims that DeFOE failed to have its welder install the Q-decking in an uninterrupted unobstructed path to the bay guarded by fall prevention devices. Plaintiff alleges that DeFOE's failures constitute violations of 29 CFR § 1926.501(b)(1) and § 1926.503(1), OSHA, and numerous violations of the provisions of 12 NYCRR 23, the Industrial Code.

The same evidence results in denial of those portions of the defendant's motion seeking summary judgment dismissing the plaintiff's common law and Labor Law § 241 claims. This Court cannot determine on the proof presented, that the defendant was not negligent as a matter of law. There is clearly evidence that could result in the ultimate trier of fact determining that the defendant had actual and/or constructive knowledge of a dangerous or defective condition and despite such knowledge, permitted it to exist, and

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whether the dangerous condition was the proximate cause of the plaintiff's injuries. *Pouso v. City of New York*, 177 AD2d 560 (2nd Dept 1991); *Higgins v. 1790 Broadway Assocs.*, 261 AD2d 223 (1st Dept 1999).

Thus, based on the proof presented, both plaintiff's and defendant's motions for summary judgment are Denied.

Defendant's motion for an Order striking the Note of Issue and compelling the plaintiff to appear for an additional vocational examination is Granted only to the following extent. The motion to strike the Note of Issue is denied. Plaintiff is directed to appear for the vocational examination, to take place at plaintiff's counsel's office within 20 days of this Order or his claims of lost income shall be stricken. Plaintiff's claims that the request is improper or untimely are without merit. CPLR § 3101; *Kavanugh v. Ogden Allied Maintenance Corp.*, 92 NY2d 952 (1998); *Smith v. Manning*, 277 AD2d 1004 (4th Dept 2000).

It is, SO ORDERED.

Dated: Nov. 17, 2005
ENTERED
NOV 21 2005
HON. GEOFFREY J. O'CONNELL, J.S.C.
NASSAU COUNTY
COUNTY CLERK'S OFFICE