

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

Shevlin v. Wonder Works Constr. Corp.

2022 NY Slip Op 07526 (N.Y. Ct. App. 2022) · No. Appeal No. 16990; Case No. 2021-04693; Index No. 150348/14 · Decided December 29, 2022

SUMMARY

The Appellate Division, First Department, affirmed a judgment awarding damages to the plaintiff against Wonder Works Construction Corp. The court held that the complaint stated a whistleblower claim under Labor Law § 740 based on allegations that the plaintiff was terminated for refusing to keep construction access gates open in violation of the New York City Building Code. The court also upheld the exclusion of deposition testimony under CPLR 3117 and found that the judgment was supported by the weight of the evidence.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, First Department
WRITING FOR THE COURT	Kern, J.P.; Kennedy, J.; Scarpulla, J.; Pitt-Burke, J.; Higgitt, J.
JURISDICTION	New York
DECIDED	December 29, 2022
DOCKET	Appeal No. 16990; Case No. 2021-04693; Index No. 150348/14
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed from a judgment awarding plaintiff damages after a bench trial and sought review of an order denying defendants' motion to dismiss the complaint.
STANDARD OF REVIEW	The court reviewed the denial of dismissal under CPLR 3211(a)(7) to determine whether the complaint stated a legally cognizable cause of action, reviewed the evidentiary ruling concerning deposition use for compliance with CPLR 3117, and reviewed the bench-trial judgment under the weight-of-the-evidence standard.
PRECEDENTIAL VALUE	Published New York Appellate Division decision
PARTIES	Wonder Works Construction Corp. v. Scott Shevlin

TOPICS

whistleblower

construction law

motions to dismiss

evidence

appellate procedure

PRACTICE AREAS

employment law

construction law

civil procedure

evidence

appellate procedure

QUESTIONS PRESENTED

1. Whether the complaint stated a whistleblower cause of action under Labor Law § 740(a)(c) sufficient to survive dismissal under CPLR 3211(a)(7).
2. Whether defendants established a basis under CPLR 3117(a)(3)(ii) or (iv) to use Ryan Black's deposition testimony at trial.
3. Whether the judgment against Wonder Works Construction Corp. after the bench trial was supported by the weight of the evidence.

HOLDINGS

1. Dismissal under CPLR 3211(a)(7) was not warranted because the complaint adequately stated a whistleblower cause of action. Allegations that plaintiff was fired for refusing to keep construction access gates open in violation of the Building Code supported a reasonable inference that the cited code provision applied to defendants and that defendants maintained a practice or policy of violating it.
2. Defendants were not entitled to use Black's deposition testimony under CPLR 3117(a)(3)(ii) because his self-serving, unsworn email statements did not establish that he was outside New York at the time of trial.
3. Defendants were not entitled to use Black's deposition testimony under CPLR 3117(a)(3)(iv) because they failed to demonstrate due diligence in securing his trial testimony, including by failing to seek enforcement of a trial subpoena served at his New York office.
4. The judgment against Wonder Works Construction Corp. was supported by the weight of the evidence.

KEY QUOTATIONS

*“Dismissal of the complaint under CPLR 3211(a)(7) was not warranted because the complaint stated a whistleblower cause of action under Labor Law § 740(a)(c).” (*1)*

*“Supreme Court's judgment against Wonder Works Construction Corp., made upon factual determinations after a bench trial, was supported by the weight of the evidence” (*1)*

FACTUAL BACKGROUND

Plaintiff alleged that defendants terminated him because he refused to comply with an instruction to keep certain construction access gates open. He alleged that keeping the gates open violated section 3307.3.4 of the 2008 New York City Building Code. At trial, defendants sought to use deposition testimony from Ryan Black, a representative of Xin Development Management East, LLC, but did not establish that Black was unavailable or that they had exercised due diligence to secure his testimony.

PROCEDURAL HISTORY

Supreme Court, New York County, denied defendants' motion to dismiss under CPLR 3211(a)(7), denied defendants' motion in limine to use portions of a deposition at trial, and entered judgment awarding plaintiff damages against Wonder Works Construction Corp. The Appellate Division unanimously affirmed the judgment to the extent appealed from, with costs.

DISPOSITION

affirmed

CASES CITED

- Shaw v. Brisman, 179 A.D.2d 459, 460 (1st Dep't 1992)
- Miller v. Daub, 128 Misc. 2d 1060, 1061–62 (Civ. Ct. N.Y. County 1985)
- Northern Westchester Professional Park Assoc. v. Town of Bedford, 60 N.Y.2d 492, 499 (1983)
- DiLorenzo v. Windermere Owners LLC, 174 A.D.3d 102, 107–08 (1st Dep't 2019), rev'd on other grounds, 36 N.Y.3d 965 (2020)

OPINION

PER CURIAM.

Shevlin v Wonder Works Constr. Corp. (2022 NY Slip Op 07526) Shevlin v Wonder Works Constr. Corp. 2022 NY Slip Op 07526 Decided on December 29, 2022 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: December 29, 2022 Before: Kern, J.P., Kennedy, Scarpulla, Pitt-Burke, Higgitt, JJ. Index No. 150348/14 Appeal No. 16990 Case No. 2021-04693 [*1] Scott Shevlin, Plaintiff-Respondent, v Wonder Works Construction Corp., Defendant-Appellant, 421 Kent Development, LLC et al., Defendants. Tsyngauz & Associates, P.C., New York (Steven N. Gordon of counsel), for appellant.

Michael G. O'Neill, New York, for respondent. Judgment, Supreme Court, New York County (Nancy M. Bannon, J.), entered December 14, 2021, to the extent appealed from, awarding plaintiff damages against defendant Wonder Works Construction Corp., and bringing up for review an order, same court and Justice, entered on or about March 1, 2018, which denied defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

Dismissal of the complaint under CPLR 3211(a)(7) was not warranted because the complaint stated a whistleblower cause of action under Labor Law § 740(a)(c). The complaint alleged that plaintiff was fired because he refused to comply with defendants' instruction that he keep certain

construction access gates open, in violation of section 3307.3.4 of the 2008 New York City Building Code.

Those allegations, read in the light most favorable to plaintiff, gave rise to a reasonable inference that section 3307.3.4 applied to defendants, and that it was defendants' practice or policy not to comply with that statute. Supreme Court properly denied defendants' motion in limine for leave to use, at trial, portions of the deposition testimony of defendant Xin Development Management East, LLC's representative, Ryan Black.

Defendants were not entitled to use Black's deposition testimony under CPLR 3117(a)(3)(ii) because Black's self-serving, unsworn e-mail statements were insufficient to show that he was not in New York at the time of trial. Defendants were not entitled to use Black's deposition testimony under CPLR 3117(a)(3)(iv) because they failed to show due diligence in seeking to procure his testimony, including failing to seek enforcement of their trial subpoena, which was served on Black at his New York office (see CPLR 308[2], 2303[a], 2308[a]; *Shaw v Brisman*, 179 AD2d 459, 460 [1st Dept 1992]; *Miller v Daub*, 128 Misc2d 1060, 1061-62 [Civ Ct, NY County 1985]).

Supreme Court's judgment against Wonder Works Construction Corp., made upon factual determinations after a bench trial, was supported by the weight of the evidence (see *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *DiLorenzo v Windermere Owners LLC*, 174 AD3d 102, 107-108 [1st Dept 2019], revd on other grounds 36 NY3d 965 [2020]).THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: December 29, 2022