

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

Neville v. Chautauqua Lake Central School District

Neville · No. CA 13-01946 · Decided January 2, 2015

SUMMARY

The New York Appellate Division, Fourth Department, unanimously affirmed an order denying summary judgment in part to defendants Chautauqua Lake Central School District and LPCiminelli, Inc. The action alleged violations of New York Labor Law § 241(6) and related Industrial Code provisions concerning protective equipment for employees using corrosive substances. The court held that coworker deposition testimony raised a factual issue regarding whether the protective equipment provided for handling hot asphalt was adequate, despite finding the plaintiffs’ expert affidavit conclusory.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department
WRITING FOR THE COURT	Scudder, P.J.; Smith, J.; Carni, J.; Lindley, J.; Sconiers, J.
JURISDICTION	New York
DECIDED	January 2, 2015
DOCKET	CA 13-01946
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed from an order denying in part their motion for summary judgment dismissing plaintiffs' Labor Law § 241 (6) claims based on alleged violations of specified workplace-safety regulations.
STANDARD OF REVIEW	Whether plaintiffs raised a triable issue of fact sufficient to defeat defendants' motion for summary judgment.
PRECEDENTIAL VALUE	published appellate decision
PARTIES	Chautauqua Lake Central School District, LPCiminelli, Inc. v. Frederick Neville, Lucy Neville

TOPICS

- construction law
- personal injury
- standard of review
- appellate procedure
- municipal law

PRACTICE AREAS

construction law

personal injury

municipal law

appellate procedure

QUESTIONS PRESENTED

1. Whether plaintiffs' expert affidavit was sufficient to raise a triable issue of fact concerning violations of 12 NYCRR 23-1.7 (h) and 23-1.8 (c) (4).
2. Whether the deposition testimony of plaintiffs' coworkers independently raised a triable issue of fact sufficient to defeat summary judgment on the Labor Law § 241 (6) claims.

HOLDINGS

1. The expert affidavit was insufficient to raise a triable issue of fact because it stated in conclusory terms that the provided safety equipment and apparel were inappropriate and supplied no evidence of a deviation from industry standards.
2. The coworker deposition testimony raised a triable issue of fact sufficient to defeat summary judgment on the claims that defendants violated 12 NYCRR 23-1.7 (h) and 23-1.8 (c) (4).

KEY QUOTATIONS

“We nevertheless conclude that plaintiffs raised an issue of fact sufficient to defeat the motion by submitting the deposition testimony of two coworkers” (at 2)

FACTUAL BACKGROUND

Frederick Neville was injured when hot tar splashed onto his neck and face while he was placing a 100-pound keg of asphalt into a kettle. He was wearing a plastic face mask attached to a hard hat, two long-sleeved cotton sweatshirts, two pairs of gloves, long pants, and work boots. The mask did not prevent tar from splashing onto his face beneath the mask, and he had no protective equipment or apparel covering his neck. Plaintiffs submitted coworker testimony that longer face masks and hooded protective equipment had been used or ordered for similar work.

PROCEDURAL HISTORY

Plaintiffs commenced an action alleging that defendants violated Labor Law § 241 (6) by failing to comply with regulations requiring protective equipment and apparel for employees using corrosive substances. Supreme Court, Chautauqua County, denied defendants' motion for summary judgment insofar as it sought dismissal of those claims. The Appellate Division unanimously affirmed.

DISPOSITION

affirmed

CASES CITED

- Lee v Lewiston Constr. Corp., 23 AD3d 1002, 1003

- Flores v Infrastructure Repair Serv. LLC, 115 AD3d 543, 543-544
- Diaz v Downtown Hosp., 99 NY2d 542, 544
- Zuckerman v City of New York, 49 NY2d 557, 561

OPINION

PER CURIAM.

SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Fourth Judicial Department 1390 CA 13-01946 PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND SCONIERS, JJ. FREDERICK NEVILLE AND LUCY NEVILLE, PLAINTIFFS-RESPONDENTS, V MEMORANDUM AND ORDER CHAUTAUQUA LAKE CENTRAL SCHOOL DISTRICT, LPCIMINELLI, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. BROWN & KELLY, LLP, BUFFALO (H.

WARD HAMLIN, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS. COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (CHARLES H. COBB OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS. Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered February 28, 2013.

The order, among other things, denied in part the motion of defendants Chautauqua Lake Central School District and LPCiminelli, Inc., for summary judgment. It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs. Memorandum: Plaintiffs commenced this action alleging that defendants violated Labor Law § 241 (6) insofar as they failed to comply with 12 NYCRR 23-1.7 (h), requiring that protective equipment be provided to employees using corrosive substances, and regulation 23-1.8 (c) (4), requiring that employees using corrosive substances shall be required to wear appropriate protective apparel.

Supreme Court denied that part of the motion of defendants-appellants (defendants) seeking summary judgment dismissing the claim that they violated those regulations. Frederick Neville (plaintiff) was injured when his neck and face were splashed by hot tar while he was placing a 100-pound “keg” of asphalt into the “kettle” (see Lee v Lewiston Constr. Corp., 23 AD3d 1002, 1003; cf. Flores v Infrastructure Repair Serv.

LLC, 115 AD3d 543, 543-544). At the time he was injured, plaintiff was wearing a plastic face mask connected to a hard hat that covered his face to the chin, two long-sleeved cotton sweatshirts, two pairs of gloves, long pants, and work boots.

We agree with defendants that the court erred in determining that the affidavit of plaintiffs’ expert was sufficient to raise an issue of fact to defeat the motion with respect to the above regulations. The expert stated in conclusory terms, without evidence -2- 1390 CA 13-01946 of a deviation from industry standards (see Diaz v Downtown Hosp., 99 NY2d 542, 544), that the safety

equipment and apparel were not appropriate because the face mask was not long enough to prevent hot tar from splashing underneath it and plaintiff was not provided with a fire-proof hood to protect his neck and head.

We nevertheless conclude that plaintiffs raised an issue of fact sufficient to defeat the motion by submitting the deposition testimony of two coworkers (see generally *Zuckerman v City of New York*, 49 NY2d 557, 561). One coworker explained that he had also worked for other companies and had seen longer face masks used as protection for the task in which plaintiff was engaged.

The other coworker stated that he ordered safety equipment for plaintiff's employer and that he had ordered "hoodies" for employees to wear to cover the head and neck. It is undisputed that the face mask provided to plaintiff did not prevent the tar from splashing onto plaintiff's face under the mask and that plaintiff was not wearing any protective equipment or protective apparel to protect his neck.

Entered: January 2, 2015 Frances E. Cafarell Clerk of the Court