

**Hurlburt v Noble Env't. Power LLC**

2013 NY Slip Op 33193(U)

December 17, 2013

Supreme Court, Wyoming County

Docket Number: 42259

Judge: Mark H. Dadd

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This opinion is uncorrected and not selected for official publication.

At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 17<sup>th</sup> day of December, 2013.

PRESENT: HONORABLE MARK H. DADD  
Acting Supreme Court Justice

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF WYOMING

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**WAYNE F. HURLBURT and  
MARSHA A. HURLBURT**

*Plaintiffs*

v.

**DECISION AND ORDER**

Index No. 42259

**NOBLE ENVIRONMENTAL POWER LLC;  
NOBLE WETHERSFIELD WINDPARK, LLC;  
DARLA DAWSON; and  
FRANK MONTELEONE, d/b/a  
FRANK MONTELEONE DUMP TRUCK &  
EXCAVATING**

*Defendants*

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Defendants, Noble Environmental Power, LLC, Noble Wethersfield Windpark, LLC, and Darla Dawson [hereinafter collectively, "Noble"], having moved, by notice of motion dated June 28, 2013, for an order pursuant to CPLR 3212 granting them summary judgment and dismissing the action against them on the grounds that it is without merit; and defendant Frank Monteleone, d/b/a Frank Monteleone Dump Truck & Excavating [hereinafter "Monteleone"], having also moved, by notice of motion dated June 6, 2013, for an order pursuant to CPLR 3212 granting him summary judgment and dismissing the action against him on the grounds that it is without merit; and said motions having duly come on to be heard.

NOW, upon reading the pleadings of the parties; and on reading and filing the notice of motion of Noble, supported by the affidavit of the Thomas W. Bender, Esq., attorney for Noble, sworn to on June 28, 2013, together with the annexed exhibits; the expert affidavit of Peter Tasca, sworn to on June 27, 2013; the memorandum of law of Thomas W. Bender, Esq., dated June 28, 2013; the affirmation in opposition of Bradley P. Krammholz, Esq., attorney for the plaintiffs, dated July 24, 2013, together with the annexed exhibits; the memorandum in opposition of Bradley P. Krammholz, Esq., dated July 24, 2013; the notice of motion of Monteleone, supported by the affirmation of Richard C. Brister, Esq., attorney for Monteleone, dated June 6, 2013, together with the annexed exhibits; the memorandum of law of Richard C.

Brister, Esq., dated June 6, 2013; the affirmation in opposition of Bradley P. Krammholz, Esq., dated July 24, 2013, together with the annexed exhibits; the memorandum in opposition of Bradley P. Krammholz, Esq., dated July 24, 2013; and the reply affirmation of Richard C. Brister, Esq., dated September 10, 2013; and after hearing Thomas W. Bender, Esq., in support of the motion of Noble, Richard C. Brister, Esq., in support of the motion of Monteleone, and Bradley P. Krammholz, Esq., in opposition to both motions, due deliberation having been had, the following decision is rendered.

The plaintiff, Wayne E. Hurlburt, fractured his pelvis and both legs when he was run over by a bulldozer on June 24, 2008, while working on a windmill project in the Town of Wethersfield, New York. As a result, his lower right leg had to be amputated. He was employed by Man O'Trees, Inc., which had been hired by the Noble corporate defendants to clear and build roads at the site in order to allow for the erection and operation of some 87, very large, power generating windmills. The land for the project had been leased to the Noble corporate defendants by the landowner, defendant, Darla Dawson.

On the morning of the accident, some five dump trucks carrying gravel had lined up along one side of the road that Mr. Hurlburt would be working on that day as an employee of Man O'Trees. Typically, Hurlburt's job involved him, on foot, directing the dump trucks, one after the other, where to dump their loads of gravel. Simultaneously his co-worker, Steven Boyd, using a bulldozer, would be spreading the dumped gravel to create the roadbed. Another Man O'Trees employee would later drive a roller over the gravel after it had been spread into place by the bulldozer. On June 24, the first dump trucks had arrived at the job site before Hurlburt and Boyd. The work that morning was to begin with a repair of a "soft" patch in a section of the road that had been laid the day before. The deposition testimony suggests that dump truck drivers had, that morning, lined up their trucks at a somewhat greater distance than usual from the place where they would be dumping their loads. Mr. Boyd directed the first truck to its dump point, and then started his bulldozer and began to spread the gravel dumped by the first truck.

While Boyd continued spreading the gravel, Hurlburt placed himself in position near the place where the next load of gravel was needed in order to signal to the driver of the second truck, an employee of Monteleone named Harold Scott, to back up and dump his load. So as to insure that he would be visible to the driver in the driver's left side mirror, Hurlburt moved onto the side of the road where the bulldozer was working behind him. According to Hurlburt, the second truck did not respond to his signals. It did not move. Its back-up lights

did not come on. Hearing the bulldozer behind him backing toward him, Hurlburt moved back across the road away from the side where the bulldozer was. He observed that the bulldozer, at its furthest point in backing up, did not reach the place where he had just stood to signal the truck. When the bulldozer moved forward again, Hurlburt returned to the same spot in order to signal to the truck a second time. While signaling the second time, Hurlburt heard the back-up alarm on the bulldozer sound again, indicating to him that it was again backing toward him. He continued to signal to the unresponsive truck, however. He then turned to go back across the road away from the approaching bulldozer. Unfortunately, the bulldozer had moved very close to him by this point. As he moved to get out of its way, it made contact with his pant leg. This caused him to be pulled down under the track of the bulldozer, resulting in his injuries.

The plaintiffs sued Monteleone for the alleged negligence of its truck driver, Harold Scott. They sued the Noble defendants for common law negligence in failing to provide a safe work site, and for failing to comply with the requirements of Labor Law §§200 and 241(6). (The plaintiffs' complaint also alleged against Nobel violations of Labor Law §240, but those claims have been withdrawn.) The two actions were subsequently consolidated.

In arguing for summary judgment, Monteleone urges the Court to find as a matter of law that Mr. Hurlburt, in choosing to stand and remain behind a moving bulldozer, was the sole proximate cause of the accident. Also, Monteleone contends that its driver breached no duty of care owed to Hurlburt in allegedly failing to heed and promptly respond to the signals given to begin backing up. Furthermore, Monteleone argues that since Mr. Hurlburt being run over by the bulldozer was not a foreseeable result of the risk associated with its driver's alleged negligent act of failing to pay attention to signals, it cannot be held liable in negligence.

Upon review of Monteleone's submissions, the Court finds that it has not met its burden upon the motion to make a prima facie showing that it is entitled to judgment as a matter of law (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). No doubt Mr. Hurlburt bears some of the fault for causing his own injuries, but the Court cannot say on this record as a matter of law that the actions of Monteleone's driver were not also a substantial cause of the accident. Mr. Scott acknowledged in his deposition testimony that it was his job to watch for and respond to Mr. Hurlburt's hand signals. He was well aware from previous experience at the job site that the work involved a rather tightly choreographed, simultaneous movement of both the dump trucks and the bulldozer. He also knew that at the center of the movements of the machines stood the choreographer, Mr. Hurlburt, on foot and

required to constantly remain near the bulldozer while directing the dump trucks because that was where the gravel needed to be placed. Given all this, Mr. Scott clearly had some duty to move his truck with reasonable promptness when directed to do so. Furthermore, it was reasonably foreseeable that a breach of this duty could affect the movements of the signal man, thereby putting him in greater jeopardy of being injured by the nearby bulldozer. Thus, Monteleone has failed to show that no questions of fact remain to be determined with regard to whether its driver was negligent and, if so, whether his actions were a proximate cause of the accident. Accordingly, the Court will deny Monteleone's motion.

The Noble defendants contend that they are entitled to summary judgment upon the plaintiffs' common law negligence and Labor Law §200 claims because they did not exercise supervision or control over the injury causing work. They also contend that they are entitled to summary judgment upon the plaintiffs' Labor Law §241(6) claim because, according to their expert, the specific section of the New York Industrial Code relied on by the plaintiffs in making the claim, Rule 23-9.7 "Motor Trucks – Backing" (12 NYCRR §23-9.7), is inapplicable, was substantially complied with and was not implicated in the manner in which the accident occurred.

The Court finds that Noble has met its burden upon the motion to show, prima facie, that it is entitled to judgment as a matter of law upon the plaintiffs' claims. Therefore, the burden shifts to the plaintiffs who must, in order to avoid summary judgment, show by proof in admissible form "facts sufficient to require a trial of any issue of fact" (Zuckerman v. New York, 49 N.Y.2d 557, 562 [1980]). With respect to the common law negligence and Labor Law §200 claims, at least, the Court finds that they have not done so. Proof of Noble's supervision or control is a required element of the plaintiffs' common law negligence and Labor Law §200 claims, which arise out of alleged defects or dangers in the methods or materials of the work. As such, "liability can only be imposed if defendant exercised control or supervision over the work and had actual or constructive notice of the purportedly unsafe condition" (Singh v. Black Diamonds, LLC., 24 A.D.3d 138 [1<sup>st</sup> Dept., 2005]; see also, Alonzo v. Safe Harbors of the Hudson Housing Development Fund Co., Inc., 104 A.D.3d 446, 449 [1<sup>st</sup> Dept., 2013]). Here, however, the deposition testimonies relied upon by both parties indicate no more than that Noble exercised a "general supervision and coordination of the worksite" which, by itself, is "insufficient to trigger liability" (Singh, supra). Therefore, Noble's motion shall be granted with respect to the plaintiffs' common law negligence and Labor Law §200 claims.

The plaintiffs' Labor Law § 241(6) claim, however, does not depend on a showing that the defendants exercised control over the injury causing work (Alonzo, supra, 450). The duty is non-delegable, and therefore the plaintiffs need only prove that the specific Industrial Code provision was negligently violated. With respect to this claim, the plaintiffs have countered the defendants' showing by submitting the affidavit of their own expert, John P. Coniglio. Mr. Coniglio's opinion entirely contradicts the opinion offered by Noble's expert, Peter Tasca. According to Coniglio, Rule 23-9.7 is applicable, was not complied with and was implicated in causing the accident. Based upon this, the Court finds that summary judgment is precluded with respect to the Labor Law § 241(6) claim because the plaintiffs have shown that there are genuine issues of material fact that remain to be determined.

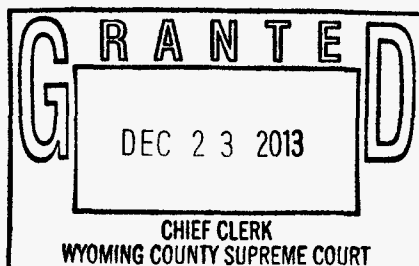
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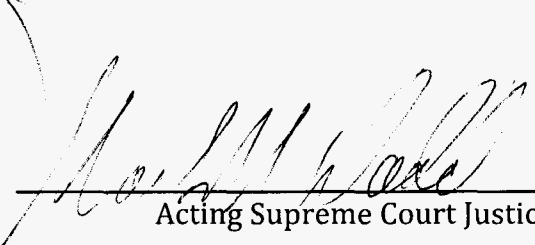
**ORDERED** that Monteleone's motion for summary judgment is denied; and it is further

**ORDERED** that Noble's motion for summary judgment is partially granted and the causes of action against Noble contained in the plaintiffs' complaint are dismissed to the extent that those causes of action are premised upon on allegations of common law negligence and violations of Labor Law §200; and it is further

**ORDERED** that in all other respects Noble's motion for summary judgment is denied.

Dated: December 17, 2013



  
Acting Supreme Court Justice