

Mitchell v NRG Energy, Inc.

2013 NY Slip Op 33930(U)

December 10, 2013

Supreme Court, Erie County

Docket Number: 2010-8750

Judge: Timothy J. Drury

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

**MARGUERITE MITCHELL, Individually
and as Administratrix of the Estate of
JOHN K. MITCHELL, Deceased**

Plaintiff

DECISION

v.

Index No. 2010-8750

**NRG ENERGY, INC. and
DUNKIRK POWER LLC**

Defendant

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ERIE COUNTY
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FILED

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TIMOTHY J. DRURY, J.S.C.

In 2009 International Chimney Corp (ICC) entered into a contract with Dunkirk Power LLC and NRG Energy, Inc. (collectively referred to as NRG). The contract was to remove and dispose of lining from the interior of two chimneys as part of a relining project at the Dunkirk Power facility owned and maintained by these two entities. The decedent John Mitchell was employed on this project by ICC. It has been alleged that on December 10, 2009, while working at the above construction project, he was crushed by the body of a dump truck owned by ICC which was being used by Mr. Mitchell and his co-workers. The claim, which has been made by Marguerite Mitchell, Mr. Mitchell's wife and the Administrator of the estate, is that Mr. Mitchell's injuries and death

were caused by the Defendant's negligence in failing to provide a safe place to work and also caused by the Defendant's violation of Labor Law Sections 200, 240(1) and 240(6).

The Defendants have moved for Summary Judgment on the issue of their liability seeking the dismissal of the Plaintiff's complaint. They have first argued that the common law negligence and Labor Law Section 200 causes of action should be dismissed because the employees of the Defendants did not exercise any supervising control over the manner in which Mr. Mitchell performed his work and operated the dump truck. The Defendants have argued that the Purchase Order Agreement between the Defendants and ICC, the orientation of ICC employees conducted by James J. Murphy, the Defendants' site safety specialist, and the Defendants' corporate safety manual all have indicated that ICC would be solely responsible for the safety of the personnel on the job. The Defendants have argued that industry standards dictated that ICC, the contractor, was responsible for the maintenance of its own equipment and the training of its own employees. They have stated that after the accident OSHA issued citations and penalties to ICC for the improper operation and equipment of the dump truck and for the failure to properly train their employees, but no action was taken against the Defendants.

The Defendants have also argued that the employees of the Defendants were not present at the meetings where job assignments were passed out and

decisions regarding dumping of debris were made. They have argued that these decisions were made solely by the employees of ICC. They have stated that Mr. Murphy and other employees of the Defendants generally observed the work performed on the project by the ICC employees but did not give any direction as to the methods employed by the ICC employees in carrying out the demolition work. They have argued that the mere presence of a landowner on a job site to ensure the compliance of general safety regulations does not constitute supervision or control necessary to impose liability under common law negligence and/or Labor Law Section 200 (See Enderlin v Hubert Industrial Insulation, Inc., 244 AD2d 1020).

Finally, the Defendants have argued that because the safety bar at issue was in proper working condition, and that the accident occurred because of Mr. Mitchell's failure to engage the safety bar, there is no question of fact precluding Summary Judgment in regards to common law negligence and Labor Law Section 200.

Given the above submissions, this Court finds that the Defendants have made out a prima facie case that they did not possess the requisite control or supervision over the demolition work necessary to establish liability under common law negligence and Labor Law Section 200.

The Plaintiff in turn has argued that the reference in the Corporate Safety Manual to safety rules to be set by NRG and oversight by NRG creates a

question of fact as to whether NRG supervised or controlled the manner and method of the demolition at the project. More specifically, they have argued that, according to the manual, NRG was to provide a liaison who would conduct oversight of the contractors. Mr. Murphy, the site safety specialist for NRG, testified that part of his duties on the project was to travel throughout the plant to see that safety procedures were being followed and whether there was any defective equipment being used (98).

However, NRG's authority to enforce general safety standards and its role in visiting the job site to observe whether the work was being performed in compliance with safety standards is insufficient alone to establish liability under Labor Law Section 200 (See Enderin, et al v Herbert Industrial Insulation, Inc., supra, 1021). Moreover, the safety manual specifically states that the liaison must not direct the contractor's workers in how the job is done and only deals with various details of their pay and benefits.

However, while there is no proof that NRG had a role in dictating job duties at meetings of the ICC employees, they did raise an issue of the presence of dust where the linings were being removed. As a result of this complaint, ICC undertook certain measures, among which were the installation of elevated sides to the dump truck it was employing. According to the Plaintiff's proof, these elevated sides changed the equilibrium of the truck body when its contents were being dumped. The Plaintiff's evidence is that this fact,

along with the absence of a safety bar, caused the truck body to initially freeze in an upward position. The Plaintiff's proof is that thereafter the contents of the truck body suddenly rushed out and the body immediately descended and crushed the decedent who was attempting to free up the truck body and unclog the load.

It is important to note that the Defendants did not simply oversee the demolition process pursuant to a duty imposed on them by law to enforce general safety standards; they affirmatively obligated themselves to perform specific duties overseeing the project by the terms of the purchase order agreement and their safety manual.

More to the point, the Defendants had exercised their oversight responsibilities and noticed excessive dust in the process of the demolition. The Defendants' attention had been drawn to the method ICC was employing to remove the concrete debris. The Defendants' complaints caused ICC to change the method of removing the concrete debris. Instrumental to ICC's operation was the use of its dump truck. Side walls had been added by ICC to the truck body to control the dust from the demotion in response to the complaint of the Defendants (although there is no proof that the Defendants specifically ordered this change). However, James Murphy, the Defendants' liaison to the sub-contractors, testified that he was aware that the raised sides or "plates" helped control the dust problem (37).

The affidavit of Peter Tasca, former Inspector for the NYS Department of Labor, states that the extensive modification of the dump truck should have caused concern to NRG. The Plaintiff has submitted ample evidence as to the various findings that OSHA made in determining that ICC had committed very serious safety violations in the operation of the dump truck. The dump truck had malfunctioned twice within a month of the instant accident in the same exact situation, by being stuck in the raised position. It was after the sides were raised that problems occurred with the truck being stuck (Darling, 24 & 26).

Therefore, this Court concludes that the Plaintiff has made a showing that the Defendants should have been aware by virtue of their oversight responsibilities of the defects in the operation of the dump truck and should have acted to have these deficiencies corrected. Accordingly, this Court finds that the Plaintiff has raised a question of fact (in light of the Defendant's oversight responsibilities for safety at their plant during the demolition) as to whether they possessed sufficient supervision and control to hold them responsible for the deficiencies in the operation and condition of the dump truck under common law negligence and under Labor Law Section 200.

Finally, the safety bar referred to by the Defendants in their moving papers is different from the safety bar mentioned by the Plaintiff's expert as not being present in the dump truck and as a reason for the accident. At the very

least, the missing safety bar has also created a question of fact sufficient to deny Defendants' Motion for Summary Judgment as to this cause of action.

The Defendants have also moved for Summary Judgment seeking dismissal of the Plaintiff's cause of action based on a claimed Violation of Labor Law Section 241 (6). The Defendants have first addressed the Plaintiff's cause of action based on a failure to adequately repair the dump truck (See, Misicki v Caradonna, 12 NY3d 511). This would be a violation of 12 NYCRR Section 23-9.2(a). The Defendants have emphasized that this specific provision of the Industrial Code provides that the defective equipment shall be corrected "upon discovery". The Defendants have argued that Mr. Murphy, the Defendants' site safety liaison, stated in his affidavit and testimony that he never received any complaints about the functioning of the dump truck. The Defendants have also argued that Mr. Murphy testified that he observed the truck on a daily basis and did not observe any defects in its operation. The Defendants have also pointed to the testimony of the various ICC employees who operated and/or repaired the truck and who stated that they did not discuss the repairs or operation of the truck with the employees of the Defendants. The Defendants have argued that there is no evidence that the Defendants had actual knowledge of any defective condition with respect to the truck. They have also stated that the Defendants were not on constructive notice of any defect in the operation of the truck.

Rizzuto v L.A. Wenger Contracting Co. Inc. (91 NY2d 343), cited by the Plaintiff, holds that a cause of action under Labor Law Section 241(6) can be sustained regardless of proof that the Defendant was in control or supervision of the demolition and/or on notice with an opportunity to remedy the unsafe condition. However, that case involved a violation of 12 NYCRR 23-1.7[d], and not 12 NYCRR Section 23-9.2(a), which is the provision of the Industrial Code involved in the instant case. Ramos v Patchogue-Medford School District, et al., (73 AD3d 1010) does involve a violation of the latter provision of the Industrial Code and requires that the Plaintiff prove that the Defendant was on notice of a structural defect or unsafe condition in the operation of the dump truck involved.

The Defendants have proven that they were not on actual notice of the defect or unsafe condition in the operation of the dump truck. However, the various submissions have shown that there is a question of fact as to whether the Defendants were on constructive notice of the defect and unsafe conditions of the dump truck. To establish constructive notice, the Plaintiff must show that the defect was visible, apparent and existed for a sufficient period of time to permit the Defendants to discover and remedy it (See Gordon v American Museum of Natural History, 67 NY2d, 836, 837).

Mr. Murphy testified that he had been hired in 2008 and trained as a site safety specialist and was assisting in the management of the safety program for

the employees at the plant at the time of the accident. He testified that he was also the liaison to conduct oversight of the contractors to insure that safety procedures were being followed and that no defective equipment was being used.

Mr. Murphy also testified that he probably observed the truck every day before the accident. It was parked in the truck bay under the shoot, which was a highly traveled area of the plant. He stated that "we" did request or require ICC to keep the dust down and he observed that the sides or "plates" that ICC installed on the dump truck did help control the dust (37). He also testified that he was not "aware of any problems at all that ICC was having with this dump truck in any fashion" (38).

Peter Tasca, a Senior Safety and Health Consultant, stated in his affidavit that Mr. Murphy as a safety professional should have noticed the significant modifications to the dump truck body and upon examination determined that the alterations meant that the continued use of the truck was dangerous.

George H. Meinschein, a mechanical and forensic engineer, stated in his affidavit that "any safety professional with even the most basic understanding of mechanics should be able to discern that adding these sheet metal panels to this dump truck created a different product, and it was likely to function and perform in a profoundly different manner than as originally intended. Also, "ICC - with NRG's input and knowledge - simply made an unsafe machine.

These sheet metal panels created an unintended consequence concerning the operation of the dump truck when dumping a load of concrete or anything else" (7).

In the months before the accident the dump truck twice became stuck in the same upright position before it lowered and it was not adequately repaired by ICC before the accident in question. Given the potential for danger caused by the alterations, the Defendants should have been on notice of the incidents of the dump truck being stuck that occurred before the accident itself. Therefore, the Defendants should have discovered these incidents even if they may have occurred away from an NRG employee. In any case, there is a question of fact as to whether the Defendants were on constructive notice of the defective condition caused by the added weight of the raised sides that resulted in the body of the truck being stuck in the air and then not being adequately repaired. Therefore, the Defendants' motion to dismiss the cause of action based on a violation of Labor Law Section 241(6) related to the raised sides of the truck body is denied.

Neither of the Plaintiff's experts cited "the prevailing standard" in the construction industry and therefore the Defendants have claimed that their opinions are speculative and insufficient. However, Mr. Meinschein based his opinions by citing the mechanics of the dump truck, and substantiated his opinions with photographs and references to the particular dump truck

manufacturer's manual, the dump truck operator manual, the pump manual, a subsection of the United States Federal Regulation, OSHA findings, the failure of the Defendants to supply discovery material, the level of training expected of ICC Employees, and his curriculum vitae. Mr. Tasca also submitted his curriculum vitae which showed that his specialty was construction safety and health. He stated that he reviewed numerous pictures of the accident scene and dump truck at issue. He stated that he had been involved with construction-site safety for well over thirty years and had never seen a dump truck like the one involved in his accident. He critiqued the Defendants' experts and the witnesses to the accident. He stated that from his examination of the depositions and discovery documents he believed that Mr. Murphy was negligent in his examination of the modified dump truck which led to the accident. Mr. Tasca also stated that from his review of discovery material he believed that the decedent, Mr. Mitchell, was not given proper training in the operation of the dump truck Mr. Tasca stated that OSHA had also reached the same conclusions. Mr. Tasca couched his findings in light of the requirements of 12 NYCRR Section 23-9.2a.

After a review of the affidavits of both Plaintiff's experts, the Court concludes that both possess the requisite expertise in the field of auto mechanics and both have selected the proper sources for their background

information. Therefore, the Court gives due regard to the opinions of both experts.

The opinions of the Plaintiff's experts are best understood in their entirety and not confined to one issue such as the weight of the raised side walls of the dump truck.

The Plaintiff has also claimed that the accident was caused by the lack of a central locking device as well as the raised sides of the dump truck. The central locking device is not in such a position to be seen by an onlooker and therefore there is no proof that the Defendants were on actual notice that it was not installed.

There is considerable proof that the central locking device should have been installed. The locking control feature is mandated by the owner's manual (7), by the manufacturer's manual for the pump (6), by United States Federal Regulation 29 CFR 1926.601(b)(1), pursuant to the OSHA findings, and pursuant to the affidavit of Mr. Meinschein which stated that a qualified mechanic would have observed that the device was missing from the dump truck (5). The mechanics for ICC twice neglected to observe that the locking device was not installed in the truck (Meinschein, 5-6).

There is a question of fact as to whether Mr. Murphy, as part of his oversight responsibility was chargeable for the actions of the ICC mechanics in inspecting the workings of the dump truck. Moreover, assuming for the sake

of argument that the Defendants were on constructive notice of the dangerous condition caused by the added weight of the sides of the truck, there's a question of fact as to whether they were also on notice that the locking control device necessary to safeguard workers was not present in the truck.

Therefore, although the employees of the Defendants could not view the control locking device, there is a question of fact whether the Defendants were on constructive notice that the device was not in place in the truck body. Consequently, the Defendants' Motion to Dismiss Labor Law Section 241(6) as it relates to 123 NYCRR Section 23-9.2(a), covering a structural defect or unsafe condition dealing with the absence of a control locking device, is denied.

"A violation of (12 NYCRR Section 23-9.2(a)), while not conclusive on the question of negligence, would thus constitute some evidence of negligence and thereby reserve, for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (Rizzuto v L.A. Wenger Contracting Co., Inc., supra, 351). Given the fact that negligence must still be established by the Plaintiff, the Plaintiff's Motion for Summary Judgment must also be denied.

Also, the defense has raised a question of fact through the opinion of Mr. Lutz as to whether the weight of the raised sides of the truck would have caused the body of the dump truck to become struck in an upright position. Mr. Lutz's opinion was that the cause of the decedent's accident was his improper

operation of the dump body when he failed to open the tailgate before raising the dump body.

Mr. Lutz has also raised a question of fact as to the absence of a lock for the dump body control lever as a cause of the accident. His opinion was that even if the lever lock was present and not engaged, the safety bar would have prevented the accident from occurring if it had been engaged.

The Defendants have also moved to dismiss the Labor Law Section 241(6) cause of action based on 12 NYCRR Section 23.9.7(c). The Plaintiff has alleged pursuant to that Section that the dump truck was overloaded. The Defendants rely on the affidavits of the engineer Michael S. Lutz who stated that the dump truck was not overloaded. Mr. Lutz also stated that the weight of the load would not have contributed to the accident. However, the affidavit of George H. Meinschein, who is also an engineer, states that the increased weight of the dump body caused by the added side panels and a greater load of debris (page 3, par. 9) resulted in an altered center of gravity and ultimately the death of Mr. Mitchell. Mr. Meinschein stated in his affidavit that the increased weight created an unsafe condition that led to the Plaintiff's death. This Court finds that his opinions were properly founded and not speculative as claimed by the Defendants. Therefore, although the Defendants have established a prima facie case that the dump truck was not overloaded, the Plaintiff has raised a question

of fact otherwise. Accordingly, the Defendants' Motion for Summary Judgment is denied.

Finally, the Defendants have moved for Summary Judgment to dismiss the cause of action involving Labor Law Section 240(1) alleging that the Defendant's accident was not the type of elevation-related accident against which the statute was intended to protect. The Defendants have claimed that the Plaintiff's injury in the process of hauling construction debris away from a job site and dumping it does not fall under the protection offered by the statute. The Defendants have also alleged that the statute does not apply to the instant situation because the absence of a safety device such as those listed in the statute is not what caused the Plaintiff's injury. More specifically, the Defendants have alleged that the safety bar mentioned by the Plaintiff is not the type of safety equipment contemplated by the statute but rather a mechanism of the dump truck that was readily available to the decedent to use and solely in his control.

Given the above submissions, the Court finds that the Defendants have made out a prima facie case to dismiss a violation of the Labor Law Section 240(1).

On the other hand, the Plaintiff has alleged that the decedent filled the dump truck within minutes after the debris was jackhammered from the smoke stacks and that he dumped it immediately on the grounds of the power station.

The Plaintiff has asserted that these steps were part of the process of demolition, and that there was no delay in trucking the debris from the site as there was in the cases cited by the Defendants. Therefore, contrary to the assertions made by the Defendants, there is a question of fact as to whether the above situation, where the decedent's death occurred in the process of hauling and dumping debris from the job site, does fall within the ambit of the statute.

Moreover, the Court finds that the instant accident involves a physically significant elevation differential. The dump body and its load were raised high in the air and then ultimately fell on the decedent. More to the point, the Plaintiff has succeeded in raising a question of fact as to whether the decedent's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. The Plaintiff has submitted proof that the additional weight present due to modifications done to the sides of the dump truck was a factor in the causing the accident. The Plaintiff has also shown that the absence of a locking device may have predicated the accident. This Court finds that while the increased sides of the dump truck created a defective condition, the absence of the locking device was one of the "other devices" mentioned in Labor Law Section 2401(1). The Court reaches this decision based on Wilinski v 334 East 92nd

Housing Development Fund Corp., 18 NY 3d1; Potter v Jay E. Potter Lumber Co., Inc. 71 AD3d 1565; and DiPalma v State of New York, 90 AD3d 1659.

The Defendants have argued that the locking devices or safety bar, as termed by them, is a mechanism of the dump truck itself and not a safety device contemplated by Labor Law Section 240(1). They have also argued that the failure to use the safety bar was the responsibility of the decedent. However, the argument describing the locking devices as the mechanism of the dump is not tenable given the Potter and DiPalma cases, *supra*.

Therefore, the Defendants' Motion for Summary Judgment dismissing the Plaintiff's cause of action based on a violation of Labor Law Section 240(1) is dismissed in its entirety.

The Defendants have alleged in the second affidavits of their experts and to an extent in Mr. Coniglio's first affidavit that the decedent's own negligence was the sole proximate cause of the accident. They have alleged that the raised sides of the truck did not create a dangerous piece of equipment, that the truck was not overloaded, that the accident occurred by reason of the decedent's misuse of the equipment and because he stood underneath the raised truck body, and that the absence of the control locking device was irrelevant because the decedent could have been protected by the safety bar if he had chosen to use it.

However, while the Defendants' allegations have made out a prima facie case that Plaintiff's negligence was the sole proximate cause, the various submissions of the Plaintiff and his expert have raised questions of fact to rebut the defense allegations. There is at least a question of fact, according to the operator's manual, the OSHA investigation and the federal regulations, as to whether the safety device involved was a locking device to be installed in the dump control lever and not a safety bar or body prop. If the safety device was the body prop, there was no proof submitted by the Defendants that the Plaintiff was properly instructed on its use.

To sum up, the Court has denied the Defendants' Motion to Dismiss all the Plaintiff's causes of action.

Also, given the alternate views of the cause of the accident as set forth in the affidavits of the defense experts, the Plaintiff's Motion for Summary Judgment on the issue of liability relative to a violation of Labor Law Section 240(1) is denied.

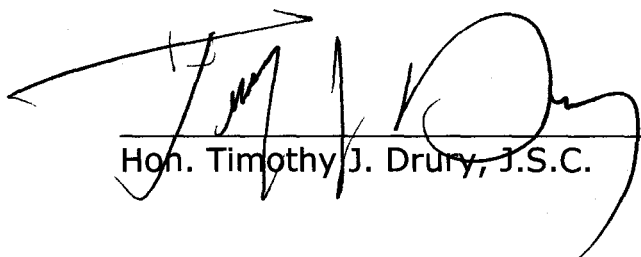
Finally, the Plaintiff has introduced a violation of 12 NYCRR Section 23-2.1 (b) dealing with the disposal of debris in response to the Defendants' Summary Judgment motion. The Plaintiff's position is that there is at least a question of fact as to that issue.

The Defendants have had no notice that the Plaintiff would raise this allegation. The Defendants have not obtained discovery as to this issue. They

have therefore been prejudiced by the litigation as to this issue. The Court will therefore defer any rulings as to this issue until the Defendants have had an opportunity to conduct discovery concerning the method of debris removal.

SUBMIT ORDER.

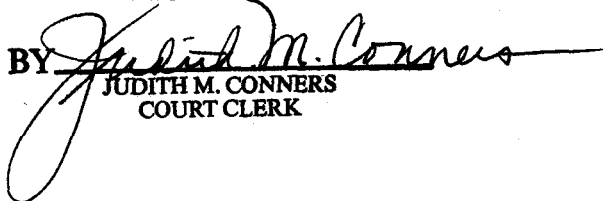
Buffalo, New York
December 10, 2013



Hon. Timothy J. Drury, J.S.C.

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