Holdsworth v L & D Johnson Plumbing & Heating, Inc.
2019 NY Slip Op 34787(U)
November 14, 2019
Supreme Court, Erie County
Docket Number: Index No. 808323/2016
Judge: Dennis E. Ward
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At a Term of the Supreme Court of the State of New York, held in and for the County of Erie, located at 25 Delaware Avenue, Buffalo, New York, on the 6th day of November, 2019

PRESENT: HON. DENNIS E. WARD, J.S.C.
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

JOSHUA HOLDSWORTH

Plaintiff

Index No. : 808323/2016

vs.

L & D JOHNSON PLUMBING & HEATING, INC. a/k/a U.S. VETERANS CONSTRUCTION & MANAGEMENT CORP.,

Defendants

DECISION AND ORDER

This case arises out of a workplace accident that occurred on October 30, 2008. The Plaintiff, JOSHUA HOLDSWORTH, alleges that he sustained injury while exiting a 25,000 gallon water tank located at the V.A. hospital. Defendant L & D JOHNSON PLUMBING & HEATING, INC. ("L & D"), was the general contractor on the job. L & D subcontracted work to Plaintiff's employer, Eastern Star Services . The subcontract contained no provision for defense and indemnification, and thus Eastern Star is not a party in the present action, due to the exclusivity provisions of the Workers Compensation Law.

The case was originally filed in federal court and included claims against the United States pursuant to the Federal Tort Claims Act. The case against the United

States was dismissed in 2016, based on the finding that the contract between the United States and L & D placed the duties for workplace safety on L & D, thus supporting a finding that L & D's obligations required dismissal of the case against the Owner, the United States of America, based on the independent contractor exception to the Federal Tort Claims Act. The action was then commenced in State Court and is currently ready for trial to commence on November 18, 2019.

Presently before the court are various motions *in limine* filed by both L & D and the Plaintiff. Several of the issues were resolved at the time of oral argument. It was stipulated that plaintiff's treating doctor (Leone) will not be questioned concerning recent arrests/convictions. The court granted the Plaintiff's motion to preclude evidence concerning marijuana and harassment violations. The Plaintiff's application to give the jury the opportunity for a site visit has been rendered moot, inasmuch as the V.A. Hospital would not agree to grant access, citing liability concerns, given the location of the subject tank.

The Plaintiff's motion to preclude L & D from making comments on Mr. Holdsworth's height and weight is granted in part. The size of the plaintiff is not a basis for him to be found comparatively at fault, but since the Plaintiff will be testifying at trial, the jury members will see for themselves Mr. Holdsworth's physical appearance, which are thus facts that cannot be precluded from their consideration.

The Plaintiff's motion to admit into evidence the Decision of Judge Telesca in the federal court action, which articulates and states L & D's duties, is denied. The Plaintiff is seeking to offer this document in order to delineate the duties as between Eastern Star and L & D. However, the topic of L & D's duties is a subject of law for the court,

and the jury will be instructed, in accord with Judge Telesca's ruling, that L & D was under a legal duty to provide a workplace that was reasonably safe, pursuant to Labor Law §200 and principles of common law negligence.

L & D is not permitted to shift its obligations to the Plaintiff's employer, which cannot be brought into the suit under New York law. Defense counsel acknowledged during the oral argument that he does "not intend to argue that [plaintiff's employer] Eastern Tank was at fault." (Transcript, p. 24). He agreed it would be "problematic" to argue shared fault as between Eastern Star and L & D "because of the Workers Comp law" (Transcript at p. 25). "Our position at trial is it [the tank ingress and egress] was reasonably safe." "It was reasonably safe." *Id.*

For the same reasons, portions of the Defendant's motion to limit expert testimony is likewise granted. To the extent that Plaintiff's expert, Willett, is being asked to comment upon what a general contractor should have done as compared to the subcontractor, all such testimony is not relevant. The court agrees with defense counsel that "L & D either failed to operate a reasonably safe worksite or it didn't." (Transcript at p. 44). Testimony of experts, therefore, seeking to expound upon what the general contractor should have done as compared to the Plaintiff's employer is not germane and is precluded.

Likewise, that portion of the Defendant's motion is granted insofar as the Plaintiff's witnesses are attempting to testify concerning unspecified regulations. The expert disclosure must be supplemented prior to opening statements to advise of any statutes or regulations about which they will give testimony.

Finally, the Defendant's motion to be permitted to utilize the hearsay statements contained in the IME report of chiropractor Sean Higgins is denied. Although the parties stipulated that "medical records" would be admitted, the IME report, performed at the behest of the workers compensation carrier, is not a record of care and treatment but rather a document that reflects the observations and opinions of the examiner. The document is therefore not covered by the parties' stipulation. Plaintiff has not contested the admissibility of other statements attributed to Plaintiff as contained within the actual medical records that are stipulated into evidence.

DATED: November 14, 2019

Hon. Dennis E. Ward
Justice of the Supreme Court

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