SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1328-15T1

JOHN MADKIFF, III,

Plaintiff-Appellant,

v.

FRAZIER-SIMPLEX, INC.,

Defendant-Respondent.

Argued January 10, 2017 – Decided February 23, 2017

Before Judges Fisher and Leone.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, Docket No. L-0045-12.

Mario A. Iavicoli argued the cause for appellant.

Christopher J. Day argued the cause for respondent (Clark Hill, PLC, attorneys; Mr. Day, on the brief).

PER CURIAM

Plaintiff John Madkiff, III appeals the October 16, 2015 order granting summary judgment in favor of defendant Frazier-Simplex, Inc. We affirm.

I.

The following facts come from the parties' statements of undisputed facts and, where indicated, from plaintiff's deposition testimony.

Plaintiff, an employee of defendant, was one of several workers contracted to demolish a glass furnace at the Alcan Glass plant. The project included using jackhammers to break up a layer of "CTX"[1] lining the inside of the furnace and removing the resulting debris, referred to as boulders, by lifting them into bins or onto metal rollers. The boulders could be lifted manually by the workers or mechanically by using a hoist hanging from the ceiling above the furnace.

Plaintiff testified as follows. On January 15, 2010, the third day of the project, the foreman on the job instructed the workers to stop using the mechanical hoist in order to complete the job faster and earlier than scheduled. Plaintiff and some of his co-workers complained to the foreman "somebody is going to get hurt lifting these boulders." The foreman responded "do it or we

[1] CTX is a dense fire brick material that built up and lined the inside of the glass furnace.

will get somebody else to do it."[2] Plaintiff did not respond because he needed the job.

Plaintiff and his co-workers began manually removing the remaining debris. Plaintiff attempted to lift a boulder and felt a sudden pain in his neck and back that led him to exit the furnace. The foreman was not present in the furnace at the time of injury. No one instructed plaintiff to pick up that particular boulder.

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[2] In his certification in opposition to the motion to dismiss, and in his interrogatory answers, plaintiff asserted it was a supervising representative who told the workers to do the job without the mechanical hoist, that the foreman joined in the complaint that somebody would get hurt, and that the representative "said he did not care." However, plaintiff did not repeat those assertions at his subsequent deposition; indeed, his deposition testimony "directly contradicts" those assertions. Carroll v. N.J. Transit, 366 N.J. Super. 380, 388 (App. Div. 2004). "Under the circumstances, where plaintiff's contradiction is unexplained and unqualified, he 'cannot create an issue of fact simply by raising arguments contradicting his own [deposition testimony].'" Ibid. (quoting Mosior v. Ins. Co. of N. Am., 193 N.J. Super. 190, 195 (App. Div. 1984)); see Shelcusky v. Garjulio, 172 N.J. 185, 193-94, 201 (2002) (holding courts may disregard an affidavit submitted in opposition to a summary judgment motion "when the affidavit contradicts the affiant's prior deposition testimony"). Here, the contradictions were "patent[] and sharp[]," plaintiff has not "reasonably explained" them, and there was no "confusion or lack of clarity" at the deposition. Shelcusky, supra, 172 N.J. at 201-02. "'[I]t is only genuine issues of fact and not simply issues created by self-contradictions of an opposing party that are intended to preclude resort to the device of summary judgment.'" Shelcusky v. Garjulio, 343 N.J. Super. 504, 510 (App. Div. 2001) (citation omitted), rev'd on other grounds, 172 N.J. 185 (2002). Thus, we disregard these assertions. Even if we were to take those assertions into account, summary judgment was still warranted for the reasons that follow.

Plaintiff testified he attempted to lift the boulder without asking for help from any other worker. Plaintiff also testified he was aware the boulders were heavy and weighed anywhere from 150—200 pounds. Plaintiff did not believe the boulders were too heavy for him or any of the other workers to lift because they were "all pretty strong dudes." Plaintiff testified the incident was a "freak thing to happen."

Plaintiff testified it was common in his line of work for laborers to injure their backs when lifting objects that are too heavy. When asked if he believed the foreman intended to injure plaintiff by telling him not to use the mechanical hoist, plaintiff said "I don't know. It happened" and "It just happened. I can't answer yes or no."

Plaintiff filed a workers' compensation claim later in 2010. However, on January 11, 2012, plaintiff also filed a complaint directly suing his employer and asserting his claim fell under an exception to the New Jersey Workers' Compensation Act, N.J.S.A. 34:15-1 to -128.

Defendant filed a motion to dismiss for lack of subject matter jurisdiction. The trial court denied the motion and allowed plaintiff to submit an amended complaint.

Plaintiff filed an amended complaint on January 3, 2013. Defendant moved for summary judgment on September 9, 2015. On

October 16, 2015, Judge Richard J. Geiger issued an order and well-written opinion granting summary judgment because plaintiff was unable to provide sufficient proof the foreman either subjectively intended to injure plaintiff or was substantially certain plaintiff would be injured by not allowing use of the mechanical hoist. Plaintiff appeals.

II.

Summary judgment must be granted if the court determines "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgement or order as a matter of law." R. 4:46-2(c). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). We must hew to that standard of review.

III.

The New Jersey Workers' Compensation Act (Act) embodies "'a social contract, "an historic trade-off whereby employees relinquish their right to pursue common-law remedies in exchange for prompt and automatic entitlement to benefits for work-related injuries."'" Estate of Kotsovska ex rel. Kotsovska v. Liebman, 221 N.J. 568, 584 (2015) (citations omitted). The Act "provides the exclusive remedy for claims against an employer when a worker is injured on the job, except for those injuries that have resulted from the employer's 'intentional wrong.'" Mull v. Zeta Consumer Prods., 176 N.J. 385, 387 (2003) (quoting N.J.S.A. 34:15-8).[3] If an employee can demonstrate an "intentional wrong" by the employer, an employee can bring a claim directly against the employer, rather than rely on the remedies and compensation traditionally provided

[3] N.J.S.A. 34:15-8 provides that an agreement to accept the compensation article of the Act

> shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation . . . and shall bind the employee . . . as well as the employer . . . .
>
> If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission . . . except for intentional wrong.

by the Act. Millison v. E.I du Pont de Nemours & Co., 101 N.J. 161, 169-70 (1985).

An employer can invoke the "intentional wrong" exception by demonstrating either (1) "a cause of action based upon subjective intent to cause injury"; or (2) "a cause of action based upon intentional conduct with a substantial certainty that injury would occur." N.J. Mfrs. Ins. Co. v. Joseph Oat Corp., 287 N.J. Super. 190, 194 (App. Div.), certif. denied, 142 N.J. 515 (1995). These two categories of conduct are not separate standards, but rather "subjective intent and substantial certainty of harm are expressive of the same standard, i.e. deliberate intent to harm." Id. at 197.

We agree with the trial court that plaintiff failed to provide sufficient evidence to satisfy either of the two alternatives available to establish an intentional wrong under the Act. No reasonable jury could find in favor of plaintiff when assessing plaintiff's testimony and affidavits even when read in the light most favorable to plaintiff.

"[I]ntentional wrong has been interpreted to mean deliberate intention beyond gross negligence or similar concepts imputing instructive intent." Van Dunk v. Reckson Assocs. Realty Corp., 210 N.J. 449, 456 (2012). The standard of intentional wrong is

"as close to 'subjective desire to injure' as the nuances of language will permit." Millison, supra, 101 N.J. at 173.

We agree with the trial court that plaintiff failed to provide any proof of deliberate intent by the foreman or defendant to injure plaintiff. Plaintiff testified he did not know if there was deliberate intent by the foreman to injure plaintiff when he instructed the workers to stop using the mechanical hoist. Neither the foreman nor anyone else instructed plaintiff to pick up the particular boulder he attempted to lift.

Plaintiff cites his testimony that he and some co-workers told the foreman "somebody is going to get hurt" lifting boulders and that the foreman told them to do it anyway. That did not show the foreman deliberately intended to injure plaintiff. The Supreme Court has made clear that "[t]he mere knowledge and appreciation of a risk — even the strong probability of a risk —" shows neither intent nor a substantial certainty. Tomeo v. Thomas Whitesell Constr. Co., 176 N.J. 366, 371, 376 (2003) (quoting Millison, supra, 101 N.J. at 179). "The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong." Van Dunk, supra, 210 N.J. at 460 (quoting Millison, supra, 101 N.J. at 177). Even if "the proofs plaintiff

advances could support a finding of gross negligence, that finding is insufficient to circumvent the statutory bar and maintain an action against plaintiff's employer." Id. at 452.

We also agree with the trial court that plaintiff also did not provide sufficient evidence to meet the Act's intentional wrong requirement under the less burdensome "substantial certainty" standard. Our Supreme Court "found the 'deliberate intention to injure' standard to be too onerous and concluded that a more appropriate balance was struck through adoption of a 'substantial certainty' standard." Id. at 460 (citation omitted). To meet the substantial certainty standard,

> two conditions must be satisfied: (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize.
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> [Id. at 462 (quoting Laidlow v. Hariton Mach. Co., 170 N.J. 602, 617 (2002)).]

"Th[e] first condition embodies what has become known as Millison's 'conduct' prong," and "the second condition reflects the 'context' prong." Mull, supra, 176 N.J. at 391.

As indicated by the trial court, plaintiff did not present sufficient evidence to support his conclusory claim that the

foreman knew it was substantially certain plaintiff would be injured when he instructed the workers not to use the mechanical hoist. The only evidence plaintiff proffered was the prediction by plaintiff and his co-workers that somebody was going to get hurt, and the evidence plaintiff did get hurt. Under the conduct prong, "[m]ere knowledge by an employer that a workplace is dangerous does not equate to an intentional wrong." Van Dunk, supra, 210 N.J. at 470. Moreover, "it is not enough that 'a known risk later blossoms into reality.' Rather, the standard 'demand[s] a virtual certainty.'" Id. at 460-61 (alteration in original) (quoting Millison, supra, 101 N.J. at 178). Plaintiff proffered no evidence, expert or otherwise, that it was virtually certain he would be hurt, let alone that the foreman or defendant was aware of that virtual certainty.

Our Supreme Court has found that knowledge of similar risks was inadequate to satisfy the conduct prong. In Van Dunk, the plaintiff's supervisor told him to enter a twenty-foot trench lacking safety devices even though Occupational Safety and Health Administration (OSHA) regulations forbade workers from entering a trench "deeper than five feet if protective systems are not in place." Id. at 453-54. The trench caved in, partially burying and injuring the plaintiff. Id. at 454-55. The Court found that, despite the employer's willful violation of OSHA standards and

"the other facts known to [the supervisor] at the time that could indicate the possibility of a cave-in, none singly or in combination provide an objectively reasonable basis for expecting that a cave-in almost certainly would occur during the brief time plaintiff was sent into the trench." Id. at 470-72 (citation omitted).

Plaintiff claims the foreman's instruction to the workers to stop using the mechanical hoist amounts to an intentional removal of a safety device. Our Supreme Court and this court have cited the removal of "a safety mechanism from a dangerous piece of equipment" as a factor supporting a finding of intentional wrong. Id. at 461-62; see, e.g., Mull, supra, 176 N.J. at 392 (despite receiving OSHA citations, the employer removed safety devices from a winder machine which prevented it from operating when its access cover was open); Laidlow, supra, 170 N.J. at 608 (the employer removed the safety mechanism preventing employees' hands from being pulled into a rolling machine, replacing it only when OSHA inspected); Mabee v. Borden, Inc., 316 N.J. Super. 218, 222-25 (App. Div. 1998) (despite an employee's injury, the employer removed and bypassed safety devices preventing employees' hands from being entangled in a labeling machine).

Plaintiff's analogy is flawed. The mechanical hoist was not a "safety device" on a dangerous machine. Rather, like a pulley,

lever, shovel, or forklift, it was a tool used by workers to accomplish their tasks. Even if it was a safety device, "'[t]here is no expert testimony or other evidence suggesting defendant knew that disabling the safety device was substantially certain to harm plaintiff.'" Tomeo, supra, 176 N.J. at 374-75 (citation omitted) (the employer deactivated a safety lever on a snow blower). Even plaintiff characterized it as a "freak" accident.

In any event, both our Supreme Court and this court have rejected any "per se rule that an employer's conduct equates with an 'intentional wrong' within the meaning of N.J.S.A. 34:15-8 whenever that employer removes a guard or similar safety device from equipment or machinery." Laidlow, supra, 170 N.J. at 622-23; Tomeo, supra, 176 N.J. at 374; Mabee, supra, 316 N.J. Super. at 230-31 (rejecting that "removal of a safety device presents a per se prima facie case of 'intentional wrong'"). Removal of safety devices, like OSHA violations, are simply "factors to be considered, given the particular facts of the case." Van Dunk, supra, 210 N.J. at 463.

Our Supreme Court in Van Dunk similarly rejected the plaintiff's effort to analogize to the removal of a safety device. Id. at 471-72. The Court contrasted Mull and Laidlow because they involved not only "the employer's affirmative action to remove a safety device from a machine" but also "prior OSHA citations,

deliberate deceit regarding the condition of the workplace, . . . knowledge of prior injury or accidents, and previous complaints from employees." Id. at 471. Here, we agree with the trial court that none of those factors were present here. The complaint to the foreman immediately before the accident cannot be equated with a prior history of employee complaints putting the employer on notice. See id. at 465. As in Van Dunk, "[t]he circumstances here are in sharp contrast to the removal of a safety device," and at worst represent "a quick but extremely poor decision" by an "on-site supervisor." Id. at 471-72. There was no evidence indicating that the mechanical hoist was a safety device implemented by defendant or that not using the hoist violated any safety standard.

Plaintiff's failure to satisfy the conduct prong precludes his claim. In addition, plaintiff failed to proffer evidence to show that his resulting injury was "'more than a fact of life of industrial employment'" and was "'plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize.'" Id. at 462 (citation omitted). Rather, plaintiff's evidence indicated it was a common fact of life for laborers in the construction and demolition industry to injure their necks and backs when lifting heavy objects.

As in Van Dunk, we "cannot reasonably conclude that the type of mistaken judgment by the employer and ensuing employee accident that occurred on this construction site was so far outside the bounds of industrial life as never to be contemplated for inclusion in the Act's exclusivity bar." Id. at 474. Given "the strong legislative preference for the workers' compensation remedy and an intentional-wrong standard that even an employer's recklessness and gross negligence fails to satisfy, we hold that this matter falls short of demonstrating that an intentional wrong creating substantial certainty of bodily injury or death occurred." Id. at 452. Plaintiff's sole remedy for this unfortunate injury is compensation under the Act.

Affirmed.