2015 IL App (4th) 140805-U

NO. 4-14-0805

FILED
December 1, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. THE DEPARTMENT OF LABOR, Plaintiff-Appellant, v. R.L. BRINK CORPORATION, Defendant-Appellee.	))))))))	Appeal from Circuit Court of Adams County No. 13SC575 Honorable Robert K. Adrian, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: Where the materials presented in support of a motion for summary judgment were insufficient to determine whether the work at issue fell under the Prevailing Wage Act, the circuit court erred by granting summary judgment in favor of the employer.

¶ 2 In April 2013, plaintiff, the Department of Labor (Labor Department), filed a complaint against defendant, R.L. Brink Corporation, seeking payments under section 11 of the Prevailing Wage Act (Wage Act) (820 ILCS 130/11 (West 2010)) for underpaid wages for employees who performed the following tasks: (1) hauling fuel and fueling equipment, (2) asphalt core sampling, and (3) nuclear density testing. Defendant filed (1) an answer denying the aforementioned duties fell under the Wage Act and (2) a counterclaim asserting the Labor Department violated the Illinois Administrative Procedure Act (Procedure Act) (5 ILCS 100/1-1 *et seq.* (West 2010)). In December 2013, defendant filed a motion for summary judgment on

both the complaint and counterclaim. After a May 2014 hearing, the Adams County circuit court granted summary judgment in favor of defendant on the Labor Department's complaint but denied defendant's motion as to its counterclaim. In August 2014, the court dismissed defendant's counterclaim at its request.

¶ 3 The Labor Department appeals, contending the circuit court erred by granting summary judgment in defendant's favor because the three duties at issue were covered by the Wage Act. We reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 The Labor Department's complaint contained three counts, one for each construction project. In all three counts, the Labor Department alleged (1) defendant did work on behalf of the Illinois Department of Transportation (IDOT), (2) the work involved "construction" work under section 2 of the Wage Act (820 ILCS 130/2 (West 2010)), (3) IDOT was a "public body" under the same section of the act, and (4) defendant's work involved construction of a "public work" under section 2 of the act. Thus, defendant was an employer subject to the Wage Act. All three counts also asserted the people listed on the Labor Department's audit (exhibit No. 2) were laborers, workers, and/or mechanics employed by defendant. As to count I, the Labor Department alleged the work occurred from August to October 2010 in Schuyler County (Rushville Project). As to the Rushville Project, the audit alleged (1) defendant's employee, Larry Hubble, was underpaid for his work of asphalt coring and truck driving in which he hauled materials and/or equipment; and (2) defendant's employee, Mike Allen, was underpaid for his work of hauling fuel and fueling equipment. Count II contended defendant's work took place from June to September 2010 in Adams County (Quincy Project). For the Quincy project, the audit alleged Hubble was underpaid for his work of hauling

materials and/or equipment and Allen was underpaid for his work of hauling fuel and fueling equipment. Count III was for defendant's work performed in August 2013 (exhibit No. 2 indicates the work was actually done in August 2011) in Adams County (Chapel Valley Subdivision Project). With the Chapel Valley Subdivision Project, the audit alleged Hubble was underpaid for his work of asphalt coring and Allen was underpaid for his work of nuclear density testing. In addition to the audit, the Labor Department attached (1) the prevailing wage sheets for June 2010 in Adams County and August 2010 in Schuyler County and (2) the letters it had sent to defendant about the alleged underpayments.

¶ 6 In its answer, defendant admitted it did work on IDOT's behalf, IDOT was a public body, and some of the work it performed was a public work. However, it denied the work involved construction and was covered by the Wage Act. Count I of defendant's counterclaim sought a declaration the delivery of fuel and fueling equipment, the conducting of nuclear density testing, and the taking of asphalt core samples are not covered under the Wage Act. Count II alleged the Labor Department violated the Procedure Act by engaging in rulemaking when it applied the Wage Act to the work duties at issue in this case.

¶ 7 In December 2013, defendant filed a motion for summary judgment as to both the complaint and its counterclaim. Defendant contended the three employee duties of asphalt core sampling, delivery of fuel, and nuclear density testing at public projects in Adams and Schuyler Counties did not fall under the Wage Act. In support of its motion, it attached the depositions of (1) Larry Levery, conciliator at the Labor Department; (2) Clifford Dale Conaway, retired conciliator from the Labor Department; and (3) Thomas Whalen, conciliation mediation manager for the Labor Department. Defendant also attached the affidavit of Richard Lentz, its controller.

¶ 8 Levery testified part of his job was to investigate complaints made under the

Wage Act. He consults with Whalen on a weekly basis about what is covered by the Wage Act. Levery explained nuclear density testing involves a machine that sends some kind of signal into a material to test the material's density. It is a physical activity that requires carrying a 40-pound instrument. Levery also explained the term "fueling equipment" meant hauling fuel from a certain site to the public works project site. The term would also include putting the fuel into the machine. Levery had not observed fueling equipment done for defendant. Moreover, Levery described asphalt core cutting or sampling as an individual taking physical samples out of materials with a core drill. Levery had not observed the tasks of nuclear density testing and asphalt core sampling.

¶ 9 Levery also stated the three aforementioned tasks were not listed on the October 2013 prevailing wage rate sheets for Adams County or mentioned in the explanations at the bottom of those rate sheets. He also noted the three tasks were not mentioned on the Labor Department's website. Levery did state the October 2013 prevailing wage rate sheets for Cook County contained the classifications of material tester I and material tester II, which were not classifications listed on the sheets for Schuyler and Adams Counties. Levery had learned from Whalen and his work experience that laborers perform the work of a material tester in Adams County. The prevailing wage rate sheets for Schuyler and Adams Counties do not provide a definition of laborer. Levery explained the asphalt core sampling was covered under the Wage Act because it was done by laborers and the fact the Adams County prevailing wage rate sheets did not contain a classification or a description of it did not mean the task was exempt from the Wage Act. He noted the rate sheets are only to determine the proper job classification and pay.

¶ 10 Additionally, in investigating this case to determine if the work was covered under the Wage Act, Levery spoke with Hubble and Allen, who were employees of defendant or

a sister company. Also, in general, when determining whether certain work falls under the Wage Act, Levery talks with relevant unions during his investigations. Additionally, Levery defined construction as the work at a public works job site and tasks that are performed in relation to construction. The work needs to be necessary for the project to continue.

¶ 11 Throughout his deposition, defense counsel asked Levery about his notes from the investigation in this case. Those notes are not included in the record on appeal.

¶ 12 Whalen supervised Levery on the investigation in this case. Whalen agreed the issues in this case were the tasks of fueling of equipment, asphalt core sampling, and nuclear density testing. He noted the prevailing wage rate sheets state at the bottom to contact the Labor Department for wage rates and classifications for any classification not listed. Moreover, Whalen testified asphalt core sampling and nuclear density testing were laborer's work. Whalen further noted the testing was all in conjunction with the construction project, and thus it was covered. He additionally stated the detailed explanations for certain job classifications came from hearings under section 9 of the Wage Act (820 ILCS 130/9 (West 2012)). Additionally, when asked if the classifications of material tester I and II have ever been on the prevailing wage rate sheets for Schuyler or Adams Counties, Whalen noted a section 9 hearing on that issue had occurred the previous month. He also explained it was not his job to ask for a section 9 hearing on the tasks at issue in this case because his job is to enforce the law. Whalen also testified the fact a particular task did not appear on the prevailing wage rate sheets did not mean the task was not covered by the Wage Act. Last, Whalen noted the Labor Department was frequently asked for determinations of job classifications and gave a recent example.

¶ 13 In his affidavit, Lentz stated that, on August 22, 2011, he talked on the telephone with Conaway, who stated material testing was only a category in Cook County and thus that

work was "covered work" in Cook County but not in Schuyler and Adams Counties. Attached to Lentz's affidavit were the notes from his conversation with Conaway. In his deposition, Conaway stated he may have said that to Lentz.

¶ 14 Defendant also filed a November 2013 consent decree in administrative proceedings under sections 4 and 9 of the Wage Act (820 ILCS 130/4, 9 (West 2012)). The petitioner had objected to the Labor Department's June 2013 prevailing wage rate sheets and sought a hearing to establish new classifications for material tester I and II statewide. After several entities were allowed to intervene in the proceedings, the petitioner narrowed the scope of its request to just 10 counties instead of statewide. Thereafter, all of the parties agreed the Labor Department would add the classifications of material tester/inspector I and material tester/inspector II for construction projects. The consent decree defined the two new classifications and set the rates for the 10 counties subject to the decree.

¶ 15 In February 2014, the Labor Department filed a memorandum in opposition to defendant's motion for summary judgment, attaching the affidavits of Levery; Conaway; and Ron Willis, general counsel for the Labor Department. In his affidavit, Levery averred his duties included interpreting who is covered by the Wage Act, which was done on a worker-by-worker basis by looking at the work, function, activity, or job. He had never looked at rate sheets to interpret whether a worker was covered under the act. In making his coverage determinations, he may consult with fellow Labor Department employees, workers, unions, employers, contractors, public bodies, and legal counsel. In his opinion, the work of taking asphalt core samples, delivering fuel, and doing nuclear testing would be covered under the Wage Act, as long as it was not done by a third party. He further stated he believed all of the workers in this case were employed by defendant or a subcontractor of defendant. The other affidavits included

similar statements.

¶ 16 Defendant filed a March 2014 reply to the Labor Department's memorandum. In May 2014, the circuit court heard arguments on defendant's motion for summary judgment. On June 4, 2014, the court entered a written order, granting summary judgment in favor of defendant on the complaint but denying it as to defendant's counterclaim. The court found workers who deliver fuel to the worksite are not engaged in construction on a public works project. It further found workers who perform asphalt core sampling or nuclear density testing "are not engaged in 'construction or demotion [*sic*]' as they are not helping to build anything, nor are they tearing anything down" and thus are not covered under section 3 of the Wage Act. The court also found that, in both Adams and Schuyler Counties, asphalt core sampler and nuclear density tester are not mentioned in those counties' prevailing wage ordinances. Therefore, the court concluded those counties do not define those employees as laborers, mechanics, or other workers engaged in public works as required by section 2 of the Wage Act.

¶ 17 On August 12, 2014, at defendant's request, the circuit court dismissed defendant's counterclaim. On September 10, 2014 (date of mailing under Illinois Supreme Court Rule 373 (eff. Dec. 29, 2009)), plaintiff filed a timely notice of appeal from the court's June 4, 2014, judgment in sufficient compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008). Thus, this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 18 II. ANALYSIS

¶ 19 A. Standard of Review

¶ 20 In this case, the Labor Department appeals the circuit court's grant of summary judgment in favor of defendant. A grant of summary judgment is only appropriate when the

pleadings, depositions, admissions, and affidavits demonstrate no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 8-9 (2008). With regard to analyzing summary-judgment motions, our supreme court has stated the following:

> "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts. Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt. [Citation.]" *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

Additionally, the party moving for summary judgment bears the initial burden of proof. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624, 872 N.E.2d 431, 437 (2007). The movant can meet that burden of proof either by (1) affirmatively showing that some element of the case must be resolved in its favor or (2) establishing " 'an absence of evidence to support the nonmoving party's case.' " *Nedzvekas*, 374 Ill. App. 3d at 624, 872 N.E.2d at 437 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). We review *de novo* the trial court's ruling on a motion for summary judgment. See *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

¶ 21 B. Wage Act

¶ 22 On appeal, the Labor Department asserts the circuit court erred by finding the three duties at issue were not construction work and thus not covered by the Wage Act. Specifically, the Labor Department contends the circuit court improperly read exceptions into section 3 of the Wage Act and incorrectly relied on the list of job classifications set forth in the prevailing wage rate schedules for Adams and Schuyler Counties to find the tasks were not covered by the Wage Act. Conversely, defendant contends the court's ruling was correct based on the Labor Department's prevailing wage rate sheets and a consent decree in a different case. However, those documents are not dispositive of this case, and for the reasons that follow, we find defendant failed to meet its burden of proof on the summary-judgment motion.

¶ 23 First, we note the circuit court's construction of the section 3 of the Wage Act was too narrow and contrary to the plain language of sections 2 and 3 of the Wage Act. Section 3 of the Wage Act provides, in pertinent part, the following:

> "Not less than the general prevailing rate of hourly wages for work of a similar character on public works in the locality in which the work is performed, and not less than the general prevailing rate of hourly wages for legal holiday and overtime work, shall be paid to all laborers, workers and mechanics employed by or on behalf of any public body engaged in the construction or demolition of public works. This includes any maintenance, repair, assembly, or disassembly work performed on equipment whether owned, leased, or rented. Only such laborers, workers and mechanics as are directly employed by contractors or

> subcontractors in actual construction work on the site of the building or construction job, *and laborers, workers and mechanics engaged in the transportation of materials and equipment to or from the site*, but not including the transportation by the sellers and suppliers or the manufacture or processing of materials or equipment, in the execution of any contract or contracts for public works with any public body shall be deemed to be employed upon public works." (Emphasis added.) 820 ILCS 130/3 (West 2010).

Section 2 of the Wage Act (820 ILCS 130/2 (West 2010)) defines "construction" as "all work on public works involving laborers, workers or mechanics. *This includes any maintenance, repair, assembly, or disassembly work performed on equipment* whether owned, leased, or rented." (Emphasis added.) Accordingly, the emphasized language of sections 2 and 3 of the Wage Act clearly indicates the term "construction" in section 3 of the Wage Act is not limited to just "helping to build" something. While we find the circuit court's construction erroneous, we do not further address statutory construction of the Wage Act due to lack of pertinent facts, as explained below.

¶ 24 Next, we address the circuit court's other finding that the counties at issue do not define the employees who are asphalt core samplers and nuclear density testers as laborers, mechanics, or other workers engaged in public works because those jobs are not listed in the ordinances adopted by the counties. However, that conclusion is not supported by the language of the Wage Act. Section 4(e) of the Wage Act (820 ILCS 130/4(e) (West 2010)) states the following:

> "Two or more investigatory hearings under this Section on the

> issue of *establishing a new prevailing wage classification for a particular craft or type of worker* shall be consolidated in a single hearing before the Department. Such consolidation shall occur whether each separate investigatory hearing is conducted by a public body or the Department. The party requesting a consolidated investigatory hearing shall have the *burden of establishing that there is no existing prevailing wage classification for the particular craft or type of worker in any of the localities under consideration*." (Emphases added.)

Thus, the language of the Wage Act itself indicates situations will arise where a task covered by the Wage Act does not fall under an existing classification for a given locality. Accordingly, the fact the Adams and Schuyler County prevailing wage rate sheets fail to list the three tasks at issue does not establish those tasks do not meet the definition of construction in the Wage Act.

¶ 25 Now, we address the facts contained in the materials provided in support of defendant's motion for summary judgment. Initially, we point out that, in conducting our *de novo* review, we will not consider any statements made by the parties' attorneys at the summary-judgment hearing and oral arguments on appeal that were not based on facts contained in the documents in support of and in opposition to the summary-judgment motion. See 735 ILCS 5/2-1005(c) (West 2012). Here, the affidavits, depositions, and documents filed in support of the motion for summary judgment give very cursory, general descriptions of the three tasks at issue. Thus, we do not know what these workers actually did at the worksite and thus cannot determine whether the tasks fall under the Wage Act. For example, we do not know what the fuel transported to the job site was used for, if the worker also did the fueling (depositions refer to

fueling but the motion for summary judgment refers to the transportation of fuel), and what role the fueled equipment had in the construction process. Regarding the two testing activities, defendant's supporting materials do not set forth those activities' role in the construction process and/or why defendant had the employees perform the testing. This case lacks material facts establishing defendant is entitled to judgment as a matter of law.

¶ 26 Accordingly, we find defendant failed to meet its initial burden of proof on its motion for summary judgment as it did not present sufficient facts to determine whether the three tasks at issue fell outside the Wage Act's definition of construction.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we reverse the judgment of the Adams County circuit court and remand for further proceedings.

¶ 29 Reversed and remanded.