Oumentseva v Crothall Facilities Mgt., Inc.

2012 NY Slip Op 32354(U)
September 6, 2012
Supreme Court, New York County
Docket Number: 105816/2009
Judge: Saliann Scarpulla

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SCANNED ON 9/12/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 105816/2009
OUMENTSEVA, TATIANA
vs.
CROTHALL FACILITIES
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

FILED

SEP 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

motion ~~and cross-motion~~ are decided in accordance with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____
FOR THE FOLLOWING REASON(S): ____

Dated: 9/11/12

____, J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19
--- X
TATIANA OUMENTSEVA,

Plaintiff,

- against-

Index No.: 105816/2009
Submission Date: 5/7/12

CROTHALL FACILITIES MANAGEMENT, INC., PROFESSIONAL SERVICES, INC., and MORRISON MANAGEMENT SPECIALISTS, INC., and JOHN DOE (INTENDED TO BE THE MAINTENANCE PERSONNEL PERSON WHO APPLIED THE WAX TO THE FLOOR),

Defendants.
--- X

DECISION AND ORDER

For Plaintiff:
Rosato & Lucciola, PC
233 Broadway, 5th Floor
New York, NY 10279

For Defendants:
Gordon & Silber, P.C.
355 Lexington Avenue, 7th Floor
New York, NY 10017

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Papers considered in review of this motion for summary judgment:

Notice of Motion 1
Aff in Support 2
Aff in Opp 3
Reply Aff 4

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Crothall Facilities Management, Inc. ("Crothall"), Professional Service, Inc., d/b/a Propoco ("Propoco"), and Morrison Management Specialists ("Morrison") (collectively

"defendants") move pursuant to CPLR 3212 for summary judgment dismissing plaintiff Tatiana Oumentseva's ("plaintiff" or "Oumentseva") complaint and all cross claims.

Plaintiff works as a nurse at Isabella Geriatric Center ("Isabella"). She was working on May 4, 2008, when she slipped and fell in liquid on the hallway floor. Plaintiff received workers compensation benefits for her lost wages. Plaintiff also commenced this action seeking to recover from defendants and alleging that the housekeeping staff either caused or failed to remedy the condition (the liquid in the hallway) which caused her to fall.

Plaintiff testified at her deposition that prior to her accident, she was in the hallway with her medicine cart, which contained patient medication, and on which she carried a pitcher of water and cups. Prior to entering the room, plaintiff testified, she filled a cup of water and carried it into the patient's room along with medicine to dispense, leaving the medicine cart in the hallway. Plaintiff further testified that as she stepped out of that patient's room, she slipped on transparent liquid that extended along the floor about two feet from the door.

Plaintiff testified that she saw no liquid on the floor prior to entering the patient room, nor was anyone cleaning the hallway. She also testified that she saw two men use a machine to polish the floor about ten minutes before she entered the room, and she did not see "wet floor" signs, such as she usually saw when the floors were washed or polished.

Plaintiff testified that at the time of her fall, there was an auto-scrubber machine located in the corridor, operated by Tyrone Williams ("Williams") and Curtis Wallace ("Wallace"). At his deposition, Williams testified that he was employed by Isabella as part of the environmental services group, and referred to his pay stub from Isabella.[1] Williams further testified that Angel Lugo, a Crothall employee, was his supervisor, and John Cuva, Isabella's Director of Environmental Services, was in charge of his department. Williams testified that he usually dealt with Crothall, not Isabella, and that while Isabella hired him and the other environmental services workers, Crothall provided the majority of his training.

Williams testified that at the time of plaintiff's accident, he and Wallace were supposed to be auto scrubbing and burnishing the floor, but he and Wallace were still bringing their machines and supplies from the fourth floor to the fifth floor. When Williams arrived on the fifth floor with the burnisher and blower, he saw plaintiff on the floor.

Williams testified that plaintiff said she fell because there was water on the floor. He testified that the machine was still on the other end of the corridor at the time she fell, but that he did notice medicine cups on the floor. Williams also saw liquid on the floor,

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[1] Counsel for defendants, when questioning Williams at his deposition, referred to a document marked "Exhibit A," which Williams stated was his pay stub from Isabella. However, no deposition exhibits were annexed to the transcripts submitted in support of this motion.

but noted it was not from his machine because "the machine chemicals would be sudsy," and what he saw was clear, like water. Williams further testified that he and Wallace only cleaned the fifth floor after plaintiff's accident.

Williams also testified that he received training, referred to as "in-service," once every other week, and sometimes twice a week. In-service training was provided by the supervisors. The environmental services workers were also trained by their supervisors whenever new equipment was received.

Defendants submit the deposition testimony of Isabella's Director of Environmental Services, John Cuva ("Cuva"). Cuva testified that the environmental services workers reported to managers and supervisors, all of whom were Crothall employees. Cuva stated that no supervisors worked for Isabella, and that there was no manager on duty on the weekend. Cuva also testified that environmental services provided its own weekly training or "huddles," as well as monthly training. He also explained that Crothall/Propoco supervised environmental services workers by giving them assignments and conducting their reviews.

Angel Lugo ("Lugo"), a Crothall employee, testified that on the day of plaintiff's accident he managed the custodial workers at Isabella. Lugo testified at length about the evaluations conducted of Wallace and Williams, as to both their cleaning and floor care work. Lugo testified that he set the priorities for Williams: "[t]he priorities are written by me alone, what I want the employee to concentrate on for the next period."

Finally, defendants submit a copy of the contract between Propoco and Isabella, pursuant to which Propoco supervised the environmental services staff, conducted instructional programs and provided management staff.[2] The contract also provided that all Propoco and Isabella employees would follow Isabella polices and procedures. Isabella retained the right to remove and/or replace employees.

Defendants now move for summary judgment dismissing the complaint. Defendants argue that the environmental services staff, while supervised by Propoco/Crothall, remained the exclusive employees of Isabella, thereby triggering the exclusivity provisions of New York Workers Compensation Law §§ 11 and 29(6).[3] Defendants also seeks summary judgment on any negligence claim plaintiff may have based on a duty to supervise or train. Defendants claim that they offer conclusive evidence that they provided appropriate and adequate training, and that plaintiff cannot point to any evidence that her accident occurred as a result of improper training, supervision or retention. Defendants also argue that summary judgment should be

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[2] Crothall is successor in interest to Propoco. Defendants assert that Morrison operated the food services at Isabella.

[3] "It is well established that the exclusive remedy available to an employee injured in the course of his employment by either a fellow worker or by his or her employer is to file a claim for workers' compensation benefits." *Cronin v. Perry*, 244 A.D.2d 448 (2d Dep't 1997). *See also Marange v. Slivinski*, 257 A.D.2d 427, 428 (1st Dep't 1999)("Workers' Compensation Law § 29 (6) provides that Workers' Compensation benefits shall be the exclusive remedy when an employee is 'injured or killed by the negligence or wrong of another in the same employ.'").

granted as to Morrison because Morrison ran Isabella's food service operation, and was not involved with floor care at Isabella.

In opposition, plaintiff argues that whether a special employment relationship exists is an issue of fact, and that defendants have failed to refute that Williams and Wallace were their special employees. Plaintiff also argues that Cuva testified that on nights and weekends – including the day of plaintiff's accident – Crothall managers were not working and environmental services workers were self-directed. Plaintiff argues that when Crothall managers were not working, there was no one to supervise, check or inspect the work of the environmental services employees, and therefore defendants cannot establish that their supervision was not negligent.

Discussion

With regard to whether Williams and Wallace were defendants' special employees, it is well settled that "a general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits." *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557 (1991). "A person's classification as a special employee is usually a question of fact, but can also be decided as a matter of law." *Pena v. Automatic Data Processing, Inc.*, 73 A.D.3d 724 (2d Dep't 2010). *See also Villanueva v. Southeast Grand St. Guild Hous. Dev. Fund Co.*, 37 A.D.3d 155, 156 (1st Dep't 2007).

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Moreover,"[i]n determining special employment status, a 'significant and weighty' factor 'focuses on who controls and directs the manner, details and ultimate result of the employee's work.'" *Lane v. Fisher Park Lane Co.*, 276 A.D.2d 136, 140 (1st Dep't 2000) (quoting *Thompson*, 78 N.Y.2d at 558)).

Here, defendants fail to make a *prima facie* showing of entitlement to judgment as a matter of law. Plaintiff alleges Wallace and Williams were responsible for the water on the floor causing her to fall. And while defendants argue that Walker and Williams were not their special employees, but were rather solely general employees of Isabella, and as such plaintiff is limited in her recover to the exclusive remedy of Workers Compensation, defendants fail to establish that Isabella "control[led], assign[ed], supervise[d] or direct[ed]" their work. *Hanchett v. Graphic Techniques*, 243 A.D.2d 942, 944 (3d Dep't 1997).[4]

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[4] In support of their motion, defendants rely on *Spencer v. Crothall Healthcare, Inc.*, 38 A.D.3d 527 (2d Dep't 2007). The underlying facts in *Spencer* are similar to those here – plaintiff, a hospital employee, was delivering food to a patient when she slipped and fell, injuring herself. While she lay on the floor, plaintiff noticed a "puddle of water and a 'wet floor' sign behind a door leaning against the wall." *Spencer*, 38 A.D.3d at 527-528. As a result, plaintiff collected Workers' Compensation benefits from the hospital, and then brought suit against, among others, Crothall, which managed the hospital's housekeeping department. *Id.*, at 528.

The court in *Spencer* found that "the hospital did not surrender control of the employees as it paid their wages, provided them with workers' compensation insurance, and made the final decision to hire, discipline, or fire them. Since the members of the housekeeping staff are general employees of the hospital, the plaintiff is precluded by the exclusivity provision pf the Workers' Compensation Law from bringing this action against the defendants." *Spencer*, 38 A.D.3d at 528.

Defendants submitted Williams's testimony that he was employed and paid by Isabella, and perhaps even received Worker's Compensation benefits from Isabella.[5] However, defendants also submitted testimony that Williams and Wallace received their assignments, supervision and substantially all their training from Crothall or Professional. Williams, Lugo and Cuva all testified that Cuva and Lugo – Crothall employees – provided all supervision and assignments to environmental services workers. Specifically, Cuva testified that Propoco managers supervised environmental services workers by setting their schedules, delegating their work, making specific assignments, and correcting any workers they saw using the equipment improperly.

Accordingly, I cannot find as a matter of law that Wallace and Williams were not special employees of defendants, and therefore deny summary judgment dismissing the complaint based upon the alleged exclusivity of the Workers Compensation Law.

Defendants also move for summary judgment on plaintiff's claims for negligent supervision, training and retention. Defendants assert that these claims are barred by the Workers Compensation Law, as derivative to a coworker's negligence. As discussed above, this presents a question for the trier of fact.

Defendants also argue that regardless of the Worker's Compensation Law, the claim should be dismissed because defendants have established that both Williams and

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[5] At his deposition, Williams testified that in 2000 he was injured on the job and collected Worker's Compensation benefits. When asked who provided that insurance, he stated "I guess Isabella."

Wallace were well trained, good employees "who knew their business." Defendants assert that the evidence that regular training, including manuals, classes and testing, was provided in addition to the supervision provided by Crothall managers and supervisor establishes prima facie entitlement to summary judgment on the negligent supervision claim. In opposition, plaintiff asserts that a gap in supervision at the time of plaintiff's accident undercuts defendants' arguments, claiming that on the weekends, such as the day of plaintiff's accident, environmental services workers were self directed, because there was no supervisor on site at that time.

Liability for negligent supervision "does not lie absent a showing that it constitutes a proximate cause of the injury sustained." *Schlecker v. Connetquot Cent. School Dist.*, 150 A.D.2d 548, 549 (2d Dep't 1989).

Defendants assert that the plaintiff has failed to set forth a prima face case that defendants were negligent in supervising or training the environmental services workers. However, on defendants' motion, it is *their* burden to set forth a prima face case that Crothall was *not* negligent in supervising or training the environmental services workers. It is well settled that the burden is on the movant – whether plaintiff or defendant – on a motion for summary judgment, and that if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers.*'" *Smalls v. AJI Indus., Inc.*, 10 N.Y.3d 733, 735 (2008) (quoting *Alvarez*, 68 N.Y2.d at 324) (emphasis in original). *See also Tsekhanovskaya v Starrett City, Inc.*, 90

A.D.3d 909, 910 (2d Dep't 2011) ("A movant cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case").

Moreover, summary judgment "is rarely granted in negligence cases since the very question of whether a defendant's conduct amounts to negligence is inherently a question for the trier of fact in all but the most egregious instances." *Johannsdottir v. Kohn*, 90 A.D.2d 842 (2d Dep't 1982).

Here, defendants have not met that burden, as they have failed to established that Williams and Wallace were not negligent and that their actions did not proximately cause plaintiff's accident. In support of their motion, defendants submit plaintiff's deposition testimony, in which she states that she saw the auto-scrubber machine in the vicinity of her fall, there were no "wet floor" signs nearby, and the liquid on the floor which caused her to fall was from Williams' and Wallace's auto-scrubber. On a motion for summary judgment the testimony of the nonmoving party is accepted as true. *O'Sullivan v. Presbyterian Hosp. in City of New York at Columbia Presbyterian Medical Center*, 217 A.D.2d 98, 101 (1st Dep't 1995). As discussed above, defendants also submit Williams' testimony that he and Wallace had not yet begun to use the auto-scrubber at the time of plaintiff's fall, and that even had they used the machine, it would have left a soapy residue, and not clear liquid. These two opposing accounts create a classic question of fact, which is properly decided not on a motion for summary judgment but by the jury.

Lastly, defendants argue in reply that plaintiff fails to oppose the motion as to defendant Morrison, and for that reason summary judgment should be granted to Morrison on default. However, defendants offer nothing more than one conclusory allegation – that Morrison operates food services at Isabella, and had nothing to do with floor care – in support of its motion. There is nothing in the record which pertains to Morrison at all, and as such summary judgment as to Morrison is denied.

In accordance with the foregoing, it is hereby

ORDERED that the motion by defendants Crothall Facilities Management, Inc., Professional Service, Inc., d/b/a Propoco, and Morrison Management Specialists for summary judgment dismissing plaintiff Tatiana Oumentseva's complaint is denied.

Dated: New York, New York
September 6, 2012

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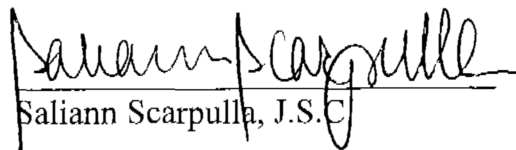

Saliann Scarpulla, J.S.C.

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