Duchenne v 774 Dev., LLC
2012 NY Slip Op 33318(U)
January 5, 2012
Supreme Court, Bronx County
Docket Number: 21612/01
Judge: Wilma Guzman
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 FILED Jan 17 2012 Bronx County Clerk

motion #9 #10 #11

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART ~~17~~ 7

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Reginald Duchenne

Index Nº. 21612/01

-against-

Hon.. ~~BARRY SALMAN~~

774 Development, LLC + Gotham Construction

Justice. Wilma Guzman

The following papers numbered 1 to ____ Read on this motion,
Noticed on _____ and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this Motion was decided in accordance with the attached decision and order.

Motion is Respectfully Referred to:
Justice: Guzman
Dated: 1/5/12

Dated: JAN 5 2012

Hon. _____ J.S.C.
Wilma Guzman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
Part 7

Index No. 21612/01
Motion No.
Date:

REGINALD DUCHENNE,

Plaintiff,

-against-

774 DEVELOPMENT, LLC and GOTHAM CONSTRUCTION, CO., LLC,

Defendants.

DECISION / ORDER

Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	
Exhibits.....	
Other.....	

Upon the foregoing papers, the Decision/order on this Motion is as follows:

Plaintiff Reginald Duchenne moves to dismiss defendant 774 Development, LLC's (774) Worker's Compensation defense—which was added to 774's Answer by leave of this Court's Order dated May 23, 2011—pursuant to CPLR § 3211(b) on the ground that the defense has no merit.

Defendant Gotham Construction, Co., LLC (Gotham) moves to renew its Motion for Summary Judgment, alleging that plaintiff was its employee within the meaning of the Worker's Compensation Law and thus CPLR § 3212 warrants summary judgment in its favor.

Pursuant to CPLR § 2221, plaintiff cross-moves to renew and reargue its opposition to this Court's May 23, 2011 decision granting Gotham leave to amend its Answer to include a Workers' Compensation affirmative defense thus vitiating the Court's need to resolve Gotham's claim for summary judgment. All parties submitted written opposition to the respective motions. For purposes of disposition, the Motions to Dismiss, for Summary Judgment and to Renew and Reargue are consolidated and decided as follows:

The factual background of this case is as follows: On May 9, 2000 plaintiff was injured while working at a construction site located on 6th Avenue between 26th and 27th Streets in Manhattan. 774 owned the site in question, with Gotham working as a general contractor on the property. Plaintiff was hired by Millennium Mason, Inc. (Millennium), which is not a party to this case.

On July 30, 2001 plaintiff instituted suit against 774 and Gotham and on July 14, 2009 he was granted partial summary judgment on the issue of defendants' liability on his Labor Law § 240(1) claim. Plaintiff was permitted to remove his action from civil court to the Bronx Supreme Court on January 26, 2010 and was allowed to amend the *ad dannum* clause in his papers to reflect a current assessment of his damages.

Meanwhile, plaintiff lodged a claim with the State of New York's Workers' Compensation Board (Board). In the course of 21 separate decisions spanning from December 27, 2000 to May 23, 2006, the Board listed Millennium as plaintiff's employer. However, there was confusion as to what insurer was implicated before the Board settled on Kemper Security Insurance Co. (Kemper) as the liable entity. However, defendants provided documentary evidence showing that 774 acquired the Kemper policy on behalf of Gotham, not Millennium. The matter was further complicated when three checks totaling $77, 124 were issued pursuant to the Board's order listing Gotham as plaintiff's employer.

On May 23, 2011, this Court permitted both defendants to amend their answers to include an affirmative defense of Workers' Compensation, and gave Gotham the opportunity to reargue its motion for summary judgment on said ground. *See Caceras v.* Zorbas, 74 N.Y.2d 884, 885 (1989)(trial court has discretion to allow a defendant to amend its answer to include a Workers' Compensation affirmative defense in the absence of prejudice to defendant); *see also Murray v. City of New* York, 43 N.Y.2d 400, 405 (1977)(no claim of surprise or prejudice where variance develops between a pleading and proof admitted at the instance or with the acquiescence of the party, even where Workers' Compensation defense raised late, or even after, trial). This Court found that because plaintiff availed himself to Workers' Compensation, he could hardly be surprised that defendants would try to assert it as a defense. Furthermore, the coverage checks received and cashed by plaintiff listed Gotham, not Millennium, as his employer; putting plaintiff on notice that something was amiss.

In sum, 774 argued that because it purchased the Workers' Compensation insurance policy that ultimately covered some of plaintiff's injuries—the Kemper policy—it was immune from further recourse by plaintiff. Gotham argued similar immunity on the grounds that the Kemper policy was purchased by 774 for Gotham to cover Gotham's employees. Further, Gotham alleged that Millennium relinquished control over plaintiff so that plaintiff became a "special employee" of Gotham. Were the Court to find that no triable issue of fact existed as to whether defendants were plaintiff's employers, plaintiff would be precluded from recovering beyond what he was awarded by the Board. *See* Workers' Compensation Law § 11 (Workers' Compensation is the exclusive remedy for an injured employee with respect to his employer absent certain conditions not present here).

In the instant motion, plaintiff asks this Court to reconsider its decision to allow 774 and Gotham to amend their Answers to include the affirmative defense of Workers' Compensation and to deny Gotham's request for summary judgment. The Court will address each claimant's arguments in turn.

Plaintiff argues that 774's Worker's Compensation defense is meritless and should be stricken under CPLR § 3211(b). Plaintiff relies on *Vaughn v. City of New York* for the proposition that merely procuring Workers' Compensation coverage is insufficient to establish the employer-employee relationship necessary for refuge under the Workers' Compensation Law. 108 Misc. 2d 994 (New York Co. 1980) *aff'd* 89 A.D.2d 944 (1st Dep't. 1982).

In *Vaughn*, plaintiff sued the City of New York (City) as owner of her employer's property. The *Vaughn* defendant waited until the eve of trial to argue that it was plaintiff's employer by virtue of having acquired the insurance policy through which plaintiff recovered Workers' Compensation. The *Vaughn* court astutely recognized that while defendant City denied having control of the property in its response to plaintiff's verified complaint (to evade liability), it was seeking to establish said control to reap the benefits of Workers' Compensation immunity.

Here, 774 similarly denied that it controlled the property where the incident occurred or that Gotham was contracted by 774 to perform work on the property. As in *Vaughn*, the implicit contention here is that 774 considered Gotham a separate entity, and considered Gotham to be in exclusive control of the property. *See Id.* at 997. Furthermore, Gotham alleges that it gave plaintiff

its work assignment, directed him where to go, provided him with materials and controlled the ultimate result of his work. *See Id.* at 998. No mention is made of 774 enjoying a similar degree of control over plaintiff.

At oral argument, 774 claimed for the first time that the decision in *Morato-Rodriguez v. Riva Constr. Group, Inc.* provides a basis for finding that Gotham and 774 are alter egos of each other and thus the defenses of one imbue on the other. 88 A.D.3d 549 (1st Dep't. 2011). This Court finds this new defense untimely and prejudicial. *See Henry v. Peguero*, 72 A.D.3d 600, 602 (1st Dep't. 2010)(deficiency in proof in moving papers not cured by submitting evidentiary material in reply, the function of which is to address arguments made in opposition and not to introduce new arguments). Alternatively, this Court finds that the argument fails on the merits. In *Morato-Rodriguez*, the court listed a number of factors critical in its conclusion that the defendant companies were alter egos of one another—sharing a president, chief executive, office manager and office address—in addition to being insured by the same liability and Workers' Compensation policies. *Id.* No proof of such a relationship has ever been submitted by either 774 or Gotham. Furthermore, neither 774 nor Gotham exists solely to provide an auxiliary administrative function for the other, as was the case in *Morato-Rodriguez*.

As noted in this Court's May 23, 2011 decision, there is absolutely no basis to believe that a special employment relationship existed between plaintiff and 774. Further, the *Vaughn* court was clear that a third parties acquisition of Worker's Compensation insurance is insufficient to establish an employer-employee relationship. Accordingly, because there was no actual or de facto employment relationship between 774 and plaintiff as matter of law, 774's affirmative defense of Workers' Compensation is without merit, and thus stricken pursuant to CPLR § 3211(b).

With respect to Gotham, plaintiff asks the Court to reargue its opposition to the May 23, 2011 decision under CPLR § 2221(d)(2), which provides that leave for such a motion be granted where the court overlooked or misapprehended matters of fact or law in the prior motion. Alternatively, plaintiff asks the Court to renew under § 2221(e)(2), a motion that should be granted where there are new facts or law that would change the prior determination. For reasons explained below, both of these motions are denied.

Plaintiff claims that this Court overlooked the established rule that in determining whether to grant a motion to amend an Answer, the new defense need have merit. *See Norwood v. City of New York*, 203 A.D.2d 147, 148 (1st Dep't. 1994). However, plaintiff overlooks the fact that there were several key components that led the Court to believe that Gotham, more so than 774, could possibly avail itself to a Workers' Compensation defense.

Indeed, the 21 Board decisions all listed Millennium as plaintiff's employer. However, those same decisions fail to explain why the Kemper policy purchased by 774 for Gotham came to be responsible for plaintiff's Workers' Compensation payments. Nor do they explain why the checks that were issued to plaintiff listed Gotham as plaintiff's employer—checks that Gotham has authenticated as genuine. This Court declines to agree with defendants' argument that the implication of the Kemper policy somehow constituted an express finding by the Board that 774 and Gotham were plaintiff's employers, thus boiling down this entire exercise to *res judicata*. But this Court cannot disregard the ambiguity this unresolved issue creates to Gotham's potential liability. Plaintiff claims that it was Millennium's insurer that provided him with Workers' Compensation insurance, but he does not deny defendants' repeated assertions that 774 purchased the Kemper policy or that the policy was purchased on Gotham's behalf, not Millennium's.

Then there is the issue of whether or not a special employment relationship existed between plaintiff and Gotham. A special employee is one who is transferred to the service of another for a limited time. *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557. Defendants do not deny that Millennium was plaintiff's actual employer, but that is no bar to the creation of a special employee status "upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer." *Id.* Though no single factor is dispositive, payment of wages, right to hire and fire, right to direct where and how work will be done and supplying tools/materials for work are all indicative that a special employment relationship was forged. *Braxton v. Mendelson*, 233 N.Y. 122, 124 (1922) *accord Fung v. Japan Airlines Co., Ltd.*, 9 N.Y.3d 351, 359 (2007).

Several statements peppered throughout plaintiff's deposition could be interpreted in ways that suggest that there was indeed a special employee relationship in existence. In his deposition, plaintiff stated that a Gotham supervisor "instructed me to go on the scaffold and start patching up

holes" and that a Gotham supervisor provided him with cement (which was prepared by Millennium) and other supplies. This evidence is not irrelevant, as it indicates that plaintiff was working on Gotham's project and that Gotham exercised some deal of control over him. Whether or not the degree of control was sufficient to form a special employment relationship is outside the purview of this Court.

Also, there is the issue of who employed the supervisor that directed plaintiff to work at the Gotham site. Plaintiff now asserts that the supervisor who originally directed him to work at the Gotham site, Joe Austin, was a Millennium employee—Gotham says there is no proof to support that statement. Rather than engage in speculation on issues of credibility, this Court feels that testimony from Mr. Austin or his employer would best resolve the issue in a manner that provides finality to all sides. If Gotham were Mr. Austin's employer, it would compound the statements made in the plaintiff's deposition hinting that Gotham controlled plaintiff's employment and a Worker's Compensation defense may be applicable.

For Gotham, this also means that despite its Motion to Renew being granted based on Gotham's curing of the defect originally detected by this court—the authentication of the Kemper checks—far too many issues of fact have gone unresolved to warrant summary judgment on its behalf.

With respect to plaintiff's § 2221(e)(2) motion to renew, plaintiff has directed this Court to no new facts or law. Accordingly, that motion is also denied.

Accordingly, it is

ORDERED that plaintiff Reginald Duchenne's Motion to Dismiss defendant 774 Development, LLC's Worker's Compensation affirmative defense is hereby granted.

It is further

ORDERED that defendant Gotham Construction, Co., LLC's Cross Motion to Renew its Motion for Summary Judgment is hereby granted.

It is further

ORDERED that upon reargument, defendant Gotham Construction, Co. LLC's Cross Motion

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for Summary Judgment is hereby denied.

It is further

ORDERED that plaintiff Reginald Duchenne's Motion to Renew and Reargue his opposition to defendant Gotham Construction. Co., LLC's Workers' Compensation affirmative defense is hereby denied.

It is further

ORDERED that plaintiff Reginald Duchenne's serve a copy of this Order upon all parties, with notice of entry, within thirty (30) days of this Order.

This constitutes the decision of the Court.

JAN 5 2012

DATE

HON. WILMA GUZMAN, JSC