Boothe v Dubato
2013 NY Slip Op 30153(U)
January 18, 2013
Sup Ct, Suffolk County
Docket Number: 07-1813
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX No. 07-1813
CAL No. 12-00780MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 8-8-12
ADJ. DATE 9-6-12
Mot. Seq.# 004 - MG

JOSEPH BOOTHE,

Plaintiff,

- against -

CHRISTIAN DUBATO, THE TOWN OF HUNTINGTON and C&J QUALITY DISTRIBUTORS, INC.,

Defendants.

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Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-11 Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12-20; 21-22 ; Replying Affidavits and supporting papers 23-27 ; Other ___; it is,

ORDERED that this motion by the defendant The Town of Huntington for an Order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint as asserted against it is granted.

This is an action to recover damages for injuries allegedly sustained by the plaintiff on August 16, 2006, as a result of a motor vehicle/pedestrian accident that occurred between 4:30 a.m. and 4:50 a.m. on Old Country Road, five hundred feet west of its intersection with Wolf Hill Road in the Town of Huntington. At the time of the accident, plaintiff was employed as a sanitation worker by Total

Collection Services, Inc. and T.C. Carting (collectively referred to as "T.C."). He was a pedestrian when he was struck by a 1996 Toyota which was owned and operated by defendant Christian Dubato. Plaintiff alleges, among other things, that defendant Dubato was negligent in that he operated his vehicle at an excessive rate of speed, and failed to bring his vehicle to a stop to avoid the accident. With regard to the movant, defendant The Town of Huntington ("Town"), it is alleged that the Town was careless, reckless and negligent in causing, allowing and permitting T.C. to carry out its sanitation services, pursuant to a written contract, by having knowledge of violation of the rules, regulations, statutes or ordinances of the Town thereby creating a dangerous and defective condition; in failing to properly supervise T.C., its agents, servants and/or employees in the collection of rubbish and recycling; and in other ways acting in a negligent and careless manner.

Defendant Town now moves for summary judgment dismissing the complaint against it on the grounds that it cannot be held vicariously liable for the alleged negligence, if any, of T.C. In support, defendant submits, *inter alia*, its attorney's affirmation; the pleadings; the verified bill of particulars and supplemental bill of particulars; the deposition and affidavit of Matthew Laux, an employee of defendant Town; the contract for collection, transportation and disposal of residential solid waste between the Town and T.C. In opposition, plaintiff submits, *inter alia*, his attorney's affirmation; the affidavit of the plaintiff; the deposition of Matthew Laux; the deposition of defendant Christian Dubato; a copy of the contract between the defendant Town and T.C.; and the verified bill of particulars. In opposition, defendant Dubato submits his attorney's affirmation.

Defendant Christian Dubato testified that he was driving from his home in Dix Hills to his job in Farmingdale. He was driving westbound on Old Country Road at approximately 4:30 a.m. The weather was fine and his vehicle was in excellent condition. It was dark. He was driving the speed limit of 35 miles per hour, and his headlights were on. He was in the left lane of the two-lane road. He saw the garbage truck moving westbound in the right-hand lane. The truck had work lights on. He never saw the pedestrian/plaintiff prior to his vehicle striking him. The driver's side headlight and hood came into contact with the plaintiff. He immediately stopped his vehicle. Afterwards, he noticed that the plaintiff was dressed in dark clothing and had been carrying a recycling bin. He waited for the police and spoke to them at the scene. He was not ticketed for any violation of the Vehicle and Traffic Law as a result of the accident.

Matthew Laux testified on behalf of the Town that he is the deputy director of the Town's Environmental Waste Management Department and has worked for the Town since 2002. Among his other duties, he handles contract management. He was shown a document and identified it as the contract between the Town and T.C. for the collection of curbside trash recycling and yard waste in the area of the Town where the accident occurred, which contract was awarded pursuant to bid and was in effect at the time of the accident. He testified that T.C. was considered to be an independent contractor. T.C. had previously been under contract from 2000 until 2005. The Town had the names of the drivers for the T.C. garbage trucks but not of the other employees. The only clothing requirement for the workers pursuant to the contract was that they must wear shirts. The Town had other clothing requirements for Town employees when collecting trash, but these were not imposed upon T.C. When asked whether anyone in the Town ever directed or controlled the work of T.C. or the work was left to

T.C., he testified that the work was left to T.C. to do. The Town had two carting inspectors whose jobs were to make sure that service was provided as per the contract, including failure to collect or missed stops.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

To sustain an action alleging negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was the proximate cause of his or her injuries (***Schindler v Ahearn***, 69 AD3d 837, 894 NYS2d 462 [2d Dept 2010]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]).

The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts. The primary justification for this rule is that one who employs an independent contractor has no right to control the manner in which the work is done and, thus, the risk of loss is more sensibly paced on the contractor (***Brothers v New York State Electric And Gas Corporation***,11 NY3d 251, 869 NYS2d 356 [2008]; ***Kleeman v Rheingold***, 81 NY2d 270, 598 NYS2d 149 [1993]; ***Wecker v Crossland Group, Inc.***, 92 AD3d 870, 939 NTS2d 481 [2d Dept 2012]). With regard to the issue of control over the contractor T.G.'s work, the determination of whether one is an employee or independent contractor requires examination of all aspects of the arrangement between the parties, although the critical inquiry pertains to the degree of control exercised by the purported employer over the results produced or the means to produce the results. The fact that a contract exists designating that a party is an independent contractor is to be considered but is not dispositive (***Araneo v Town Board for Town of Clarkson***, 55 AD3d 516, 865 NYS2d 281 [2d Dept 2008]).

Although determination of whether a party is an independent contractor or an employee for the purposes of tort liability typically involves a question of fact, in those instances in which the evidence on the issue of control of methods and means of work present no conflict, the matter may be determined by the court as a matter of law (***Goodwin v Comcast Corporation***, 42 AD3d 322, 840 NYS2d 781 [1st Dept 2007]; ***Mojica v Gannett Company, Inc.***, 71 AD3d 963, 897 NYS2d 212 [2d Dept 2010]). Pursuant to the contract between the parties (designating T.C. as an independent contractor), the Town regulated the routes, hours and times of garbage collection activities. These were necessary to allow for the orderly pickup of and disposal of the Town's waste. However, the actual day-to-day collection of the garbage

was totally within the control of T.C. itself. The Town did employ two inspectors, but their job was limited to checking, at various times, that T.C. was making all of the required collections; they did not control the actual work. Based upon the totality of these circumstances, the Court finds that T.C. was, in fact, an independent contractor and the Town cannot be held liable for any negligent acts ascribed to T.C.

Exceptions to the rule that a party is not liable for the acts of its independent contractor fall into three basic categories, namely; negligence of the employer in selecting, instructing or supervising the contractor; employment for work that is especially or inherently dangerous; and instances in which employer is under a specific nondelegable duty (*see* ***Kleeman v Rheingold***, *supra*; ***Brothers v New York State Electric And Gas Corporation***, *supra*; ***Rosenberg v Equitable Life Assurance Society of the United States***, 79 NY 663, 584 NYS2d 765 [1992]).

Plaintiff claims that an exception applies to the general rule that a party who retains an independent contractor is not liable for its acts. In that regard plaintiff asserts that a sanitation worker's job is inherently dangerous, the Court of Appeals has stated, "[t]his State has long recognized an exception from the general rule where, generically, the activity involved is 'dangerous in spite of all reasonable care' [citations omitted]. This exception applies when it appears that 'the work involves a risk of harm inherent in the nature of the work itself [and] that the employer recognizes or should recognize, that the risk in advance of the contract' " [citations omitted] (***Chainani v Board of Education of the City of New York***, 87 NY2d 370, 639 NYS2d 692 [1995]). There is nothing in the record or the case law to support a finding that the job of a sanitation worker is inherently dangerous. In any event, the plaintiff cannot avail himself of this exception. The vicarious liability that the plaintiff attempts to invoke is designed to protect members of the public and does not extend to an employee of the contractor hired to do the dangerous work who, as here, is ordinarily covered by workers' compensation (*see* ***Whitaker v Norman***, 75 NY2d 779, 552 NYS2d 86 [1989]; ***Nagy v State***, 89 AD2d 199, 456 NYS2d 241 [3d Dept 1982]).

Plaintiff alleges that a further exception applies: that is that the Town has a nondelegable duty to control and regulate the collection and disposal of waste within its borders, which renders it vicariously liable for the alleged negligence of T.C. "The most often cited formulation is that a duty will be deemed nondelegable when 'the responsibility is so important to the community that the employer should not be permitted to transfer it to another' [citation omitted] . . . This flexible formula recognizes that the 'privilege to farm out [work] has its limits' and those limits are best defined by reference to the gravity of the public policies that are implicated [citation omitted]" (***Kleeman v Rheingold***, *supra*, at 81 NY2d 270, 275, 598 NYS2d 149, 153).

"A nondelegable duty has been found, for example, when the work contracted for was inherently dangerous [citation omitted]; when services, though in reality rendered by an independent contractor, were accepted by a third-party after assurance they were being supplied by the employer [citation omitted]; or when a duty was created by statute [citation omitted]. Because the employer knew that the work for which it had contracted posed particular danger to others, or because it knew that another person reasonably looked only to it for performance of services [citation omitted], or because of a

statutory obligation of care, a duty can fairly be said to run from the employer to the third-parties" (***Feliberty v Damon***, 72 NY2d 112, 119, 531 NYS2d 778, 781 [1988]).

Based upon this guiding precedent, there is no basis here to find that the Town was under a nondelegable duty to handle the collection and disposal of waste within the Town. Therefore it could legally contract this service out, pursuant to bid, to a company engaged in that business. In view of the foregoing, the plaintiff has not established the liability of the Town for the acts of T.C. pursuant to an exception to the general rule that a party is not liable for the acts of its independent contractor.

Plaintiff also bases its claim for liability against the Town on negligence for failing to provide reflective vests to T.C.'s workers. As the Town has established, that there were no Federal, State or local laws or regulations which required the use of reflective vests by sanitation workers at the time of the accident, this cannot be the basis for imposing liability on the Town herein (*see, e.g.*, ***Bradley v. Smithtown Central School District***, 265 AD2d 283, 696 NYS2d 65 [2d Dept 1999] [student who was injured by shattering glass failed to establish prima facie case against school district where there was no proof that glass was not in compliance with regulations in effect when the school was built]).

In light of the foregoing, defendant The Town of Huntington's motion for summary judgment dismissing the complaint as asserted against it is granted.

Dated: January 18, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**