Etwaroo v Crotona Park E. Bristow Elsmere Co., Inc.
2014 NY Slip Op 30743(U)
February 6, 2014
Supreme Court, Bronx County
Docket Number: 21771/01
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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CHERTRAM ETWAROO,

Plaintiff(s),

- against -

CROTONA PARK EAST BRISTOW ELSMERE CO., INC., EDWARD WIND & MICHAEL WIND AS EXECUTORS OF THE ESTATE OF OSCAR WIND, AND PRESTIGE MANAGEMENT INC.,

Defendant(s).
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DECISION AND ORDER

Index No: 21771/01

In this action for the negligent maintenance of a premises, defendants move for an order pursuant to CPLR § 2221(e) granting renewal of this Court's order dated April 10, 2013, which denied defendants' motion for summary judgment. Defendants aver that renewal is warranted because since this Court issued its prior order, several parties have been deposed and, thus, new evidence exists which warrants summary judgment in defendants' favor. Plaintiff opposes the instant motion arguing, *inter alia*, that because defendants' fail to proffer an excuse for the failure to procure the newly discovered evidence prior to making their prior motion, renewal is unwarranted. Plaintiff further argues that even upon renewal, questions of fact preclude summary judgment in defendants' favor.

For the reasons that follow hereinafter, defendants' motion for renewal is granted and upon renewal defendants' motion for

summary judgment is hereby granted.

The instant action is for personal injuries allegedly sustained by plaintiff on February 19, 2000. Within his complaint, plaintiff alleges that while at or near 853 Elsmere Place, Bronx, NY, he fell while traversing the exterior metal steps leading to the basement. Plaintiff alleges that defendants owned, managed, and operated the premises, that the steps were defective, and that, therefore, defendants were negligent with respect to the maintenance of the premises.

On April 10, 2013, this Court denied defendants' motion for summary judgment. This Court not only found that summary judgment had been previously denied[1], but that the evidence submitted in support of defendants' motion failed to establish prima facie entitlement to summary judgment. Specifically, this Court found that defendants' salient evidence in support of their motion - an affidavit from Sylvia Wind (Sylvia) - failed to establish that the exclusivity provision of the Workers' Compensation Law barred this action.

With defendants' instant motion, defendants' not only tender all previously submitted evidence, but they also annex deposition

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[1] This was in fact error inasmuch as a review of the underlying papers evince that the order dated December 10, 2004 denied defendants' motion to dismiss not their motion for summary judgment.

transcripts of plaintiff's deposition and from Horace Henry's (Horace) deposition, both of which were conducted after this Court's prior decision.

It is well settled that

> [a]n application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the Court. Renewal should be denied where a party fails to offer a valid excuse for not submitting the additional facts upon the original application

(*Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]; *see also Healthworld Corporation v Gottlieb*, 12 AD3d 278, 279 [1st Dept 2004]); *Walmart Stores, Inc. v United States Fidelity and Guaranty Company*, 11 AD3d 300, 301 [1st Dept. 2004]). Accordingly, renewal is sparingly granted, and only when there exists a valid excuse for failing to submit the newly proffered facts on the original application (*Matter of Beiny*, 132 AD2d 190, 210 [1st Dept 1987]). Absent an excuse for the failure to previously submit available evidence renewal should generally be denied (*Burgos v City of New York*, 294 AD2d 177, 178 [1st Dept 2002]; *Chelsea Piers Management v Forest Electric Corporation*, 281 AD2d 252, 252 [1st Dept 2001]).

However, even when all the requirements for renewal aren't met, renewal will nonetheless be granted if the interests of

justice and substantive fairness so dictate (*Strong v Brookhaven Memorial Hospital Medical Center*, 240 A.D.2d 726, 726-727 [2d Dept 1997]; *see also Trinidad v Lantigua*, 2 AD3d 163, 163 [1st Dept 2003]; *Mejia v. Nanni*, 307 AD2d 870, 871 [1st Dept 2003]). As such, motions to renew will be granted in the interests of justice even when the newly offered evidence was known and available to the moving party on the prior motion but never provided to the Court, and even if the movant fails to proffer an excuse for such failure on renewal (*Trinidad* at 163 ["Under the particular circumstances presented, the affidavit of plaintiff's expert, which plaintiff's prior counsel *inexplicably* failed to submit, was properly considered by the court on renewal] [emphasis added]).

Here, renewal is warranted because it is sought in order to have the Court consider evidence which to the extent it could have been obtained prior to the motion - it existed - but insofar as said evidence - the depositions - did not become available until after the Court issued its prior decision, it could not be considered by this Court. That the depositions were not conducted until after this Court issued its prior order is in it of itself a reasonable excuse for failing to tender said evidence on the prior motion since the defendants could not provide the Court with transcripts of depositions that had not yet been conducted. Contrary to plaintiff's assertion, renewal isn't bared because defendants fail to reasonably explain the failure to conduct the

aforementioned depositions prior to this Court's previous order since the threshold inquiry is the failure to tender the new evidence on the prior motion (*Matter of Beiny* at 210).

Notwithstanding the foregoing, assuming *arguendo*, that defendants' had proffered no excuse for failing to tender the new evidence, renewal would nevertheless be granted since the new evidence warrants summary judgment in favor of defendants renewal is, thus, warranted in the interests of justice (*Strong* at 726-727 *Trinidad* at 163; *Mejia* at).

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets the initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a

triable issue of fact (*Zuckerman* at 562).

The Workers' Compensation Law "evinces a legislative design to require employers to pay workmen's compensation benefits where employees sustain injuries or meet their death in the course of hazardous employments" (*O'Rourke v Long*, 41 NY2d 219, 222 [1976]). Thus, an employer who is subject to the Workers' Compensation Law, must secure and pay compensation for work related injuries without regard to fault and when he does, said employer's liability is limited to paying the benefits prescribed by the Workers' Compensation Law (*id.*). Because an employer is bound to secure and pay compensation for a covered accident without regard to fault the Workers' Compensation Law and its benefits "effectively precludes [a] plaintiff from pursuing a civil remedy for his injuries" (*Liss v Trans Auto Systems, Inc.*, 68 NY2d 15, 21 [1986]). This is because it is well settled that "that workers' compensation benefits provide an employee's exclusive remedy against an employer for a workplace injury" (*Hynes v Start Elevator, Inc.*, 2 AD3d 178, 181 [1st Dept 2003]). The Workers' Compensation Board has primary jurisdiction to determine whether an accident falls under the penumbra of the Worker's Compensation Law and, therefore, "[t]he Board must be given an opportunity to find plaintiff's injuries the result of a compensable accident. . . [and thus] [t]he compensation claim is a jurisdictional predicate to [a] civil action" (*Liss* at 21). Insofar as workers' compensation is an employee's exclusive

remedy for a covered accident, a determination by the Workers' Compensation Board that a plaintiff is entitled to workers' compensation "effectively precludes plaintiff from pursuing a civil remedy for his injuries even against defendants who were not parties to the hearing" (*O'Rourke* at 227-228).

A special employee is as one who is transferred for a limited time of whatever duration to the service of another (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]). 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" (*id.*). While many factors are weighed in deciding whether a special employment relationship exists, and generally no single factor is decisive, "a significant and weighty feature has emerged that focuses on who controls and directs the manner In determining whether a special employment relationship exists" (*id.* at 558). Thus, key to any determination as to the existence of a special employee relationship is whether a the special employer has the right to direct the details of the work performed by the special employee and whether he, therefore, controls the employee's manner of worki (*id.* at 558; *Stone v Bigley Bros.*, 309 NY 132, 142 [1955]; *Leone v Columbia Sussex Corp.*, 203 AD2d 430, 432 [2d Dept 1994]; *Cameli v Pace University*, 131 AD2d 419, 420 (2d Dept. 1987).

Just as workers' compensation is an employee's exclusive remedy for a covered accident against his general employer, the same is true with respect to his special employer (*Thompson* at 560 ["Thompson's (the plaintiff) receipt of workers' compensation benefits as an employee of ATS (his general employer) is his exclusive remedy and he is barred from bringing this negligence action against Grumman (his special employer)."]; *Fallone v Misericordia Hosp.*, 23 AD2d 222, 227 [1 st Dept [1965] ["The liability of a special employer is precisely the same as a general employer under the Workmen's Compensation Law. . . Consequently, since there was compensation insurance, plaintiff could not maintain an action in negligence against the special employer."] [internal citations omitted]).

Here, a review of the evidence, both new and old, establishes that at the time of the accident, plaintiff was a general employee of defendant CROTONA PARK EAST BRISTOW ELSMERE CO., INC. (Crotona), a special employee of defendant PRESTIGE MANAGEMENT INC. (Prestige), and that plaintiff applied for and received workers' compensation benefits. Accordingly, defendants' evidence establishes prima facie entitlement to summary judgment inasmuch as it establishes that this action is barred by the exclusivity provisions of the Workers' Compensation Law (*O'Rourke* at 222; *Liss* at 21; *Hynes* at 181).

Specifically, at his deposition, plaintiff testified that in February 2000, while heading to the basement located at 853 Elsmere Place, Bronx, NY (853), he was involved in an accident. At the time, he was employed by Crotona as the superintendent at 853. Prestige was the managing agent for 853. That day, plaintiff was working and immediately prior to his accident, he was en route to the basement to get tools necessary to fix a broken sink. Plaintiff's duties included building maintenance and he reported maintenance issues to Prestige, who would provide material necessary to ameliorate said issues. Plaintiff would also receive work assignments from Prestige, by way of work tickets. Once he completed the work at 853, he would notify Prestige of the same. At his deposition, Horace testified that he was Prestige's Executive Vice President. Prestige was in the business of managing and maintaining properties and in 1998 Prestige was hired by Crotona to manage and maintain 853, a property Crotona owned.

Based on the foregoing, defendants establish that while Crotona was plaintiff's general employee, his daily activities were controlled and directed by Prestige. Accordingly, defendants' establish that Prestige was plaintiff's special employer (*Thompson* at 557-558; *Stone* at 142; *Leone* at 432; *Cameli* at 420). Additionally, defendants' evidence, namely the Settlement Agreement from the New York State Workers' Compensation Board, not only establishes that plaintiff's accident arose in the course of his

employment, but that he availed himself of the benefits accorded to him by the Workers' Compensation Law. Accordingly, defendants establish that the exclusivity provisions of the Workers' Compensation Law bar this action not only as against Crotona, plaintiff's general employee (*Liss* at 21), but as to Prestige, which the evidence demonstrates was plaintiff's special employer (*Thompson* at 560; *Fallone* at 227). Accordingly, as to the claims made against Crotona and Prestige, defendants establish prima facie entitlement to summary judgment.

Defendants also establish prima facie entitlement to summary judgment as to the claims made against defendant OSCAR WIND (Oscar) since the evidence submitted, namely Sylvia's affidavit, establishes that his role with Crotona was limited to his membership in the partnership and that "[a]ny actions he ever took with respect to the premises were taken in furtherance of the partnership business." It is well settled that a corporate officer is not liable for the negligence of the corporation merely by virtue his employment relationship to the corporation (*Felder v R & K Realty*, 295 AD2d 560, 561 [2d Dept 2002]). Thus, a claim against a corporate officer must be dismissed absent a showing he acted in anything other than in his corporate capacity or that he committed individual and separate tortious acts (*Espinosa v Rand*, 24 AD3d 102, 102-103 [1st Dept 2005]; *Rodriguez v 1414-1422 Ogden Avenue Realty Corp.*, 304 AD2d 400, 401 [1st Dept 2003]; *Calip*

Dairies, Inc. v Penn Station News Corporation, 262 AD2d 193, 194 [1st Dept 1999]). Here, defendants establish that Oscar committed no independent and separate tort from that which is alleged against Crotona nor that he acted in anything but his corporate capacity. Accordingly, defendants establish prima facie entitlement to summary judgment with regard to the claims against Oscar.

Nothing submitted by plaintiff raises any issues of fact sufficient to preclude summary judgment. At best, plaintiff unconvincingly argues that questions of fact preclude summary judgment by impermissibly pointing to immaterial inconsistencies in the evidence (*Zuckerman* at 562 ["mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient [to defeat summary judgment."]). Accordingly, defendants' motion for summary judgment is hereby granted. It is hereby

ORDERED that the complaint be dismissed with prejudice. It is further

ORDERED that defendants serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof

Dated : February 6, 2014
Bronx, New York

Mitchell J. Danziger, ASCJ