Farrington v Fordham Assoc. LLC
2014 NY Slip Op 33423(U)
December 2, 2014
Supreme Court, Bronx County
Docket Number: 305063/2013
Judge: Lucindo Suarez
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FILED Dec 11 2014 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19
--X
CORY FARRINGTON,

Plaintiff,

- against -

FORDHAM ASSOCIATES LLC, JJ OPERATING INC., HARVEY & MOSHE LLC, BALLY TOTAL FITNESS CORPORATION, BALLY TOTAL FITNESS OF GREATER NEW YORK, INC. and FINE LINE RESTORATION LLC,

Defendants.
--X

DECISION AND ORDER

Index No. 305063/2013

PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated September 25, 2014 and the affirmation, affidavit and exhibits submitted in support thereof; defendants' notice of cross-motion dated November 13, 2014 and the affirmation, affidavit and exhibits submitted in support thereof; plaintiff's affirmation in reply dated November 19, 2014 and the exhibits submitted therewith; and due deliberation; the court finds:

Plaintiff moves for partial summary judgment on defendants' liability under his Labor Law § 240(1) claim, submitting his affidavit in which he avers that his job on the day of the accident was to pick up debris at a project where a new floor was being installed. He walked across a piece of plywood laying on the floor which caved in and broke, causing him to fall ten feet to the floor below. He averred that there was nothing underneath the plywood; that he was never instructed not to walk on plywood; that there were no warning signs or cones; that the area was not fenced or blocked off; that he was not provided with a hard hat or other safety gear aside from gloves; and that there were no nets, ladders or scaffolding. Plaintiff's proof was sufficient

to establish *prima facie* entitlement to summary judgment. *See Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 A.D.3d 446, 961 N.Y.S.2d 91 (1st Dep't 2013).

Given plaintiff's reliance on defendants' responses to plaintiff's notice to admit that defendant Fordham Associates LLC ("Fordham") owned the premises and leased same to defendant Bally Total Fitness of Greater New York, Inc. and that defendant Fine Line Restoration LLC ("Fine Line") was the general contractor, the *prima facie* case is established only as to defendants Fordham and Fine Line; movant has not affirmatively demonstrated that the other defendants were contractors, owners or agents for Labor Law § 240(1) purposes.

Defendants argue that plaintiff's disregard of his supervisor's numerous admonitions not to enter the work area was the sole proximate cause of the accident, submitting the affidavit of Jose Padilla ("Padilla"), Fine Line's project manager at the site, to that effect. Padilla's affidavit did not state that plaintiff had ever been informed why he was not to enter the area. Defendants also submitted the transcript of plaintiff's deposition testimony, in which plaintiff testified that he had never been instructed to avoid any area of the project.

Padilla also averred that the construction area was barricaded with eight-foot-high plywood walls with caution tape in the entranceway and that experienced workers were allowed to use a catwalk inside the construction area. However, these averments, given the lack of physical detail of the site, are insufficient to raise a question of fact as to whether the devices provided were adequate under the circumstances. *See Mercado v. Caithness Long Is. LLC*, 104 A.D.3d 576, 961 N.Y.S.2d 424 (1st Dep't 2013). The court further notes that defendants' argument is that "plaintiff was not provided safety equipment to be used around the open floor area because plaintiff was specifically instructed on multiple occasions not to go inside the area."

"To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of

an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained." *Nacewicz v. Roman Catholic Church of the Holy Cross*, 105 A.D.3d 402, 402-3, 963 N.Y.S.2d 14, 16 (1st Dep't 2013). However, "an instruction by the employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not itself a 'safety device.'" *Stolt v. General Foods Corp.*, 81 N.Y.2d 918, 920, 613 N.E.2d 556, 557, 597 N.Y.S.2d 650, 651 (1993); *Vasquez v. Cohen Bros. Realty Corp.*, 105 A.D.3d 595, 963 N.Y.S.2d 626 (1st Dep't 2013).

Even if plaintiff could be considered recalcitrant, the failure to adequately secure the flooring was the more proximate cause of the accident. *See Milewski v. Caiola*, 236 A.D.2d 320, 654 N.Y.S.2d 738 (1st Dep't 1997). Because the accident was caused at least in part by the failure to provide adequate safety devices, plaintiff's entry into the work area cannot be the sole proximate cause. *See Henningham v. Highbridge Community Hous. Dev. Fund Corp.*, 91 A.D.3d 521, 938 N.Y.S.2d 1 (1st Dep't 2012). Once the statutory violation and its proximate cause of the accidence are established, "plaintiff's alleged contributory negligence becomes irrelevant." *Tzic v. Kasampas*, 93 A.D.3d 438, 439, 940 N.Y.S.2d 218, 221 (1st Dep't 2012).

Furthermore, in the absence of proof that the barricade and caution tape "would have actually furnished adequate protection, defendants failed to raise an issue of fact whether plaintiff's actions were the sole proximate cause of his injuries." *Miglionico v. Bovis Lend Lease, Inc.*, 47 A.D.3d 561, 565, 851 N.Y.S.2d 48, 51 (1st Dep't 2008).

The court notes that defendants' reliance on *Wonderling v. CSX Transp., Inc.*, 11 Misc.3d 1061(A), 2006 NY Slip Op 50337(U) (Sup Ct Monroe County Jan. 17, 2006) fails to take into account that the Appellate Division, Fourth Department found that the motion court properly

denied defendant's cross motion for summary judgment because defendant "failed to establish that the scaffolding was properly constructed and that, but for the wet conditions, plaintiff would not have fallen." *Wonderling v. CSX Transp., Inc.*, 34 A.D.3d 1244, 824 N.Y.S.2d 839 (4th Dep't 2006), *lv denied*, 37 A.D.3d 1208, 827 N.Y.S.2d 898 (4th Dep't 2007). Furthermore, "the conflicting accounts of 'what type of work [plaintiff] was doing at the time of the accident' do not raise a triable issue of fact." *Hill v. Acies Group, LLC*, 2014 NY Slip Op 7601, at *2 (1st Dep't Nov. 6, 2014). The motion is accordingly granted.

Fine Line cross-moves for summary judgment on the ground that plaintiff was its special employee, such that plaintiff's claims against it are barred by Worker's Compensation Law §§ 11, 29(6). Although Fine Line did not interpose such an affirmative defense in its answer, "[t]he affirmative defense of workers' compensation is waived 'only by a defendant ignoring the issue to the point of final disposition itself.'" *Raptis v. Juda Constr., Ltd.*, 26 A.D.3d 153, 155, 810 N.Y.S.2d 22, 25 (1st Dep't), *lv denied*, 7 N.Y.3d 716, 859 N.E.2d 921, 826 N.Y.S.2d 181 (2006).

A special employee is one who is transferred for a limited time to another employer, and whether an employee may be categorized as a special employee is a question of fact. *See Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557, 585 N.E.2d 355, 357, 578 N.Y.S.2d 106, 108 (1991). However, where the operative facts are undisputed, the determination may be made as a matter of law. *Id.* "While not determinative, a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work." *Id.* at 558, 585 N.E.2d at 357-58, 578 N.Y.S.2d at 108-9.

Padilla averred that he oversaw all the workers involved in the project, that plaintiff received instruction only from him and that there was no one else on the site to provide instruction to plaintiff. Padilla further averred that while he knew plaintiff was provided by a

temporary staffing agency, it was his understanding that plaintiff was Fine Line's employee while on-site. Fine Line's owner testified generally that Fine Line hired temporary workers from a staffing agency. Plaintiff testified that the day of the accident was his second day of employment with a temp agency that had assigned him to the site. He further testified that upon being given his assignment by an employee of the temp agency, he would not continue to report to the agency on a daily basis but would report directly to the site. He further testified that he received his instruction solely from Padilla and that the temp agency's only direction to him was to follow the directions of the supervisor at any site to which he was sent. An employee of the temp agency came to the site after the accident to take a report and sent him to a medical facility.

It is undisputed that only Padilla, on behalf of Fine Line, directed and supervised plaintiff; that Fine Line provided any equipment used by plaintiff; and that plaintiff's work was intended to further Fine Line's business. *See Grilikhes v. International Tile & Stone Show Expos*, 90 A.D.3d 480, 934 N.Y.S.2d 384 (1st Dep't 2011); *cf. Holmes v. Business Relocation Servs., Inc.*, 117 A.D.3d 468, 984 N.Y.S.2d 868 (1st Dep't 2014). Such proof is sufficient to find that Fine Line was plaintiff's special employer. *See Zabava v. 178 E. 78*, 212 A.D.2d 406, 622 N.Y.S.2d 42 (1st Dep't 1995); *Fallone v. Misericordia Hospital*, 23 A.D.2d 222, 259 N.Y.S.2d 947 (1st Dep't 1965), *affirmed*, 17 N.Y.2d 648, 216 N.E.2d 594, 269 N.Y.S.2d 431 (1966).

In opposition, plaintiff argues that the Worker's Compensation Board has already determined that the temp agency was plaintiff's employer. Such finding is implicit in the Board's authorization of compensation to plaintiff. *See Mazzucco v. Atlas Welding & Boiler Repair, Inc.*, 297 A.D.2d 513, 747 N.Y.S.2d 23 (1st Dep't 2002). However, the identity of plaintiff's general employer is not at issue. "[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." *Ramnarine v. Memorial Ctr. for Cancer & Allied Diseases*, 281 A.D.2d 218, 219, 722 N.Y.S.2d 493, 495 (1st Dep't 2001).

Plaintiff also argues that the determination of a special employment relationship is one which must be deferred to the Workers' Compensation Board. However, it is the availability of benefits, including necessary determinations such as whether the accident occurred within the scope of employment, which must be made by the Board in the first instance. *See O'Rourke v. Long*, 41 N.Y.2d 219, 359 N.E.2d 1347, 391 N.Y.S.2d 553 (1976). Here, the applicability of benefits is not at issue; there is no indication that the temp agency has ever contested the award. "[A] determination by the Board that a plaintiff is entitled to compensation effectively precludes plaintiff from pursuing a civil remedy for his injuries even against defendants who were not parties to the hearing." *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d 15, 21, 496 N.E.2d 851, 855, 505 N.Y.S.2d 831, 835 (1986). A court may make a determination of special employment despite the Board's finding as to plaintiff's general employer. *See Gomez v. Penmark Realty Corp.*, 50 A.D.3d 607, 857 N.Y.S.2d 94 (1st Dep't 2008).

Plaintiff also points to his testimony that it was his understanding that he was to report to defendant Harvey & Moshe LLC at the site and that there was a truck with the logo of Harvey & Moshe LLC at the site to raise issues of fact as to the identity of his special employer, if any. Plaintiff's subjective belief is insufficient to defeat Fine Line's showing, and plaintiff did not submit evidence in admissible form to raise an issue of fact. *See Esposito v. New York City Indus. Dev. Agency*, 305 A.D.2d 108, 760 N.Y.S.2d 18 (1st Dep't 2003), *affirmed*, 1 N.Y.3d 526, 802 N.E.2d 1080, 770 N.Y.S.2d 682 (2003). While plaintiff may have raised an issue, if at all, as to whether Harvey & Moshe LLC was a special employer of plaintiff *in addition to* Fine Line,

see e.g. Alfonso v. Pacific Classon Realty, LLC, 101 A.D.3d 768, 956 N.Y.S.2d 111 (2d Dep't 2012); *Gonzalez v. Woodbourne Arboretum, Inc.*, 100 A.D.3d 694, 954 N.Y.S.2d 113 (2d Dep't 2012), plaintiff failed to raise an issue as to Fine Line's status as a special employer.

Accordingly, it is

ORDERED, that plaintiff's motion for partial summary judgment on defendants' liability on plaintiff's Labor Law § 240(1) claim is granted to the extent of granting the motion as against defendant Fordham Associates LLC; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff against defendant Fordham Associates LLC as to said defendant's liability on plaintiff's Labor Law § 240(1) claim; and it is further

ORDERED, that the cross-motion of defendant Fine Line Restoration LLC for summary judgment is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Fine Line Restoration LLC dismissing the complaint against it.

This constitutes the decision and order of the court.

Dated: December 2, 2014

Lucindo Suarez, J.S.C.