White v Metropolitan Opera Assn., Inc.
2015 NY Slip Op 32639(U)
November 6, 2015
Supreme Court, New York County
Docket Number: 157064/13
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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WENDY WHITE,

Plaintiff,

-against-

METROPOLITAN OPERA ASSOCIATION, INC.,

Defendant.

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Index No.: 157064/13

Motion Sequence: 002

DECISION and ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

In this personal injury action, defendant Metropolitan Opera Association, Inc. ("the Met") moves for an order, under motion sequence number 002, pursuant to CPLR 3211 (a)(1) and (7), dismissing the complaint of plaintiff Wendy White ("White") based on documentary evidence and for failure to state a cause of action. The Met's prior motion for the same relief, under motion sequence number 001, was denied by this Court without prejudice.

STATEMENT OF FACTS

White is a professional opera singer and the Met owns, operates, manages, and controls the Metropolitan Opera House at Lincoln Center in New York City ("Lincoln Center"). On December 17, 2011, while performing the role of Marthe in the opera "Faust" at Lincoln Center, White fell from an on-stage platform or balcony and was injured. White alleges that her fall and injuries are due to the negligence of the Met.

White commenced the instant action on or about August 1, 2013 to recover damages for her personal injuries sustained as a result of her fall. The complaint sounds solely in common-law negligence. In her complaint, White describes herself as an employee of Wendy White, Inc. and as a member of the labor union American Guild of Musical Artists, Inc. ("AGMA"). At the time of the incident, she was working as a "Per Performance," "Principal Solo Singer" for the Met at Lincoln Center, pursuant to a written contract executed by Wendy White, Inc. and the Met, entitled

"Standard Contractor's Agreement (Per Performance) Season 2011/2012" ("Standard Contractor's Agreement"). White also alleges that under the terms of the Standard Contractor's Agreement, neither she, nor Wendy White, Inc., were considered to be employees of the Met.

In motion sequence number 001, the Met served a pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) on the ground that workers' compensation provides the exclusive remedy for unintentional injuries resulting from plaintiff's fall while performing for the Met at Lincoln Center. White submitted opposition to the Met's motion and oral argument was held on January 27, 2014. This Court denied the motion without prejudice on January 27, 2014, based on the Met's failure to include a copy of the workers' compensation policy to its motion papers.

The Met now moves again for an order dismissing the complaint pursuant to CPLR 3211(a)(1) and (7) on the ground that White's claims are barred by the exclusive remedy provision of the Workers' Compensation Law ("WCL") and attached a copy of the relevant worker's compensation policy to its motion papers. White again opposes the Met's motion to dismiss. At oral argument on the motion, held on July 23, 2014, the parties reiterated their arguments regarding whether White should, or should not, be considered an employee for the purpose of the WCL. The parties also disputed whether this Court should accept a second motion to dismiss from the Met, and whether it was procedurally appropriate for White to include information pertaining to the legislative background of WCL § 2(4) as part of her opposition.

What the parties do not dispute is that Wendy White, Inc. contractually agreed to provide White's services to the Met, pursuant to the Standard Contractor's Agreement, to perform certain operas, including the Met's production of "Faust" at Lincoln Center on December 17, 2011, and that White fell and was injured during that performance. It is also undisputed that the Met secured and

maintained a workers' compensation insurance policy for its employees from The Hartford Insurance Company ("The Hartford"), and that following White's fall, the Met notified The Hartford of her accident. On August 20, 2012, the State of New York Workers' Compensation Board ("the Board") filed a proposed decision based on White's "work related," "on-the-job injury" to her back, and directed payment by the insurance carrier The Hartford to White (Exhibit "6" to Exhibit "B" of Affirmation of Defendant's Counsel Abe M. Rychik, Esq., dated September 16, 2013, in Support of Defendant's Motion to Dismiss ["Rychik Aff. in Support"]). By letter dated August 22, 2012, White's counsel notified the Board that she was rejecting the decision on the grounds that (1) the Met was not her employer but instead, she was employed by Wendy White, Inc., (2) she "did NOT file a claim for New York workers' compensation" and (3) she chose "to file a New Jersey workers' compensation petition against her employer, Wendy White, Inc. in connection with the accident on 12/17/11" (Exhibit "7" to Exhibit "B"of Rychik Aff.). On October 11, 2012, the Board filed a Notice of Cancellation, confirming that the proposed decision dated August 20, 2012, was cancelled following receipt of the objection from White's attorney (Exhibit "8" to Exhibit "B"of Rychik Aff.). The Board noted that "[c]laimant wants the case to be discontinued as he [sic] has filed claim in New Jersey" (*id.*).

DISCUSSION

Addressing the procedural matters first, this Court rejects each party's objections. As noted, this Court, in its discretion, denied the initial motion **without prejudice**, based on the Met's failure to attach a copy of the relevant workers' compensation policy to its motion papers. Inasmuch as no substantive additions or modifications to the initial motion were permitted by this Court or submitted by the Met, plaintiff's argument is without merit in this respect. Likewise, White was entitled to submit materials relating to the legislative history of WCL § 2(4) in her opposition to the

motion, as this Court indicated during the January 27, 2014 discussion that such information might be useful in its review of the motion. Moreover, plaintiff's submission of these materials, like defendant's re-submitted motion, did not substantively modify the premise of either party's position with respect to the motion.

Motion to Dismiss Standard

In deciding a motion brought pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the complaint should be liberally construed and the facts alleged in the complaint and any submissions in opposition to the dismissal motion accepted as true, according plaintiffs the benefit of every possible favorable inference (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law' " (*Id.*). On a motion to dismiss pursuant to CPLR § 3211(a)(l), the moving defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues, and that plaintiff's claims fail as a matter of law. *Robinson v. Robinson,* 303 AD2d 234, 235 [1st Dept. 2003]).

Arguments

Central to the Met's dismissal motion is WCL § 11, which provides, in relevant part:

> "The liability of an employer . . . shall be exclusive and in place of any other liability whatsoever, to such employee . . . on account of such injury . . . or liability arising therefrom, except that if an employer fails to secure the payment of compensation for his or her employees . . . as provided in section fifty of this chapter, an injured employee . . . may, at his or her option, elect to . . . maintain an action in the courts for damages on account of such injury."

Under WCL § 50 (*i.e.*, "section fifty of this chapter"), an employer is required to:

> "secure compensation to his employees in one or more of the following ways:
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> * * *
>
> 2. By insuring and keeping insured the payment of such compensation with any stock corporation, mutual corporation or reciprocal insurer authorized to transact the business of workers' compensation insurance in this state through a policy issued under the laws of this state."

The Met contends that the relevant sections of the WCL, together with documentary evidence consisting of the Standard Contractor's Agreement, the "The Metropolitan Opera - AGMA Basic Agreement" ("CBA"), which is the collective bargaining agreement between the Met and the AGMA, the Board's Notice of Proposed Decision, The Hartford workers' compensation policy and an affidavit from Mark Dieffenbach, a claims specialist of The Hartford's "Specialized Workers' Compensation Claim Unit," conclusively establish White's status as a covered employee of the Met.

WCL § 2(4), as amended in 1986 to include musicians and certain other performers, defines an employee in relevant part as follows:

> " 'Employee' shall also mean, for purposes of this chapter, a professional musician or a person otherwise engaged in the performing arts who performs services as such for a television or radio station or . . . a theatre . . . unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter. 'Engaged in the performing arts' shall mean performing service in connection with the production of or performance in any artistic endeavor which requires artistic or technical skill or expertise."

Accordingly, if White is determined to have been an employee of the Met at the time of her fall, White would be barred from maintaining this action.

In her opposition, White contends that, as a world renowned mezzo-soprano, she does not fall within the category of persons contemplated for receiving benefits under New York's WCL. White explains that the purpose of the 1986 amendment to WCL § 2(4) was to avert the need for litigation by musicians who were subject to case-by-case evaluations as to whether they were

considered to be "employees" under the existing law. The amendment was not intended to effect a substantive change and include individual performers, such as herself, who fall within the "star" category.

White also opposes the motion on the ground that it was the corporate entity Wendy White, Inc. that executed the Standard Contractor's Agreement with the Met. She explains that, by its terms, Wendy White, Inc. agreed to provide her services as a "Per Performance" "Principal Solo Singer" and that it was also agreed that payment for her services was to be provided to Wendy White, Inc., together with an IRS Form 1099. These terms, she contends, demonstrate the intent of the contracting parties that Wendy White, Inc. be considered White's employer, as it was Wendy White, Inc., and not the Met, that paid her wages.

White supports her argument that she was not considered an employee of the Met with a summary of testimony offered, in a matter unrelated to workers' compensation law, involving the Met and the National Labor Relations Board (NLRB).[1] In that matter, then General Manager Joseph Volpe and Director of Labor Relations Pamela Rasp explained that solo artists retained by the Met, including corporate artists engaged on a "per performance" basis, are not considered employees of the Met. White contends that, by the terms of the Standard Contractor's Agreement, she is a corporate artist, and, therefore, not an employee of the Met. Inasmuch as the Met previously argued against classifying such artists as employees, the Met should now be estopped from arguing a contrary position in this action.

Next, White contends that the benefits provision of the Standard Contractor's Agreement also reflects the intent of the contracting parties not to consider her services to be that of a Met

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1. *In re Metropolitan Opera Assn, Inc., and Operatic Artists of America*, 327 NLRB No. 136, 327 NLRB No. 740, 1999 WL 112550 (NLRB 1999).

employee, in that neither she, nor her corporate entity, were provided with benefits such as medical, health, disability, sick leave and/or overtime.[2] She explains that these are the types of benefits the Met routinely provides its performer employees who fall under the classifications such as "plan" and "weekly" solo singers and choristers. She also denies having a "special employment" relationship with the Met, in that she did not cede complete control over the manner of her work to the Met, or to any of its directors, or other employees.

Next, White points out that WCL § 2(4) excludes from coverage a professional musician who is "by written contract . . . stipulated to be an employee of another employer covered by this chapter." She then contends that the exclusion applies to her circumstance, as Wendy White, Inc. meets that criterion of "employer." She points to WCL § 2(3), which states, in relevant part, that an " '[e]mployer,' except when otherwise expressly stated, means a person, partnership, association, corporation . . . having one or more persons in employment." As Wendy White, Inc. has, at all relevant times, been a corporation having one or more persons in its employ, that being White herself, it meets the statute's only definition of an employer. Moreover, as Wendy White, Inc. secured workers' compensation benefits on her behalf prior to the accident, it meets the requirements set forth in section 10, as well as section 11, of the WCL, to secure compensation for its employee for a disability arising from unintentional injuries sustained in the course of her employment (*see* The Hartford's workers' compensation policy).

White discounts the Met's reliance on the CBA and on her acknowledged membership in the AGMA labor union, as evidence establishing her to be an employee of the Met. It is her position that, because the dispute is not based on a labor grievance, but concerns injuries she sustained due

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2. Interestingly enough, plaintiff includes workers' compensation among the benefits she does not receive from the Met.

to the Met's alleged negligence, the CBA is irrelevant and cannot support a CPLR 3211 (a)(1) dismissal. White also discounts the Met's reliance on the Board's Proposed Decision of August 20, 2012, directing payment by The Hartford, as documentary evidence supporting a dismissal of her complaint. She insists that any relevance this notice had to whether an employer/employee relationship existed between the Met and herself, within the meaning of WCL § 11, was abrogated by the Board's Notice of Cancellation. White argues the notice demonstrates that the Board's cancellation of the original decision was solely "because the 'claimant' (Plaintiff) 'has filed claim in New Jersey' " (plaintiff's aff in opp, ¶ 22). White also contends that the affidavit prepared by Hartford claims specialist Mark Dieffenbach ("Dieffenbach Aff."), in stating that The Hartford had "accept[ed] the claim for certain injuries without prejudice" indicates the insurance carrier was unsure whether White was entitled to such benefits, presumably due to her questionable status as a Met employee.

White concludes, and asks this Court to conclude, that the documentary evidence demonstrates, at a minimum, a question exists as to whether she was a Met employee at the time of her accident. Therefore, since the documentary evidence does not "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law," the motion to dismiss premised on that basis must be denied (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

The Met relies upon the decision in *Fouchécourt v Metropolitan Opera Assn.*, 537 F Supp 2d 629 (SDNY 2008), an action which also involved an opera performer who sustained injuries when he fell from a platform while performing at Lincoln Center. In *Fouchécourt*, the court stated that, with respect to workers' compensation law, it is of little significance what title a performer uses or whether he or she considers him/herself an independent contractor for any number of legitimate reasons, including tax purposes (*id.* at 633). In *Fouchécourt*, the court found the plaintiff to be an

employee of the Met for the purpose of the WCL, despite the provision in his contract that specifically provided that no employer-employee relationship was created with the Met and that he was performing as an "outside contractor" (*id.* at 631). The Met argues that here, as in *Fouchécourt*, the pertinent issue is whether, at the time of the accident, White was an employee of the Met within the specific meaning and context of the WCL.

Discussion

A review of the submitted documents does **not** lead to the conclusion that White was indeed an employee of the Met within the meaning of the WCL or that the Met was White's employer under its workers' compensation policy allowing the Met the defense of the WCL statute's exclusive remedy provision. The first relevant document is the Standard Contractor's Agreement, which was executed on January 10, 2011, by the general manager for the Met and by White on behalf of "Wendy White, Inc. for the services of Wendy White." The top of the first page of the document reads: "THE METROPOLITAN OPERA // Lincoln Center, New York, NY 10023," and "APPROVED AMERICAN GUILD OF MUSICAL ARTISTS, INC. // 1430 Broadway, 14th Floor, New York, NY 10018." The Standard Contractor's Agreement provides, in relevant part:

> "AGREEMENT dated December 22, 2010 made in the City, County and State of New York by and between THE METROPOLITAN OPERA ("The Met"), having its Principal place of business at Metropolitan Opera House, Lincoln Center . . . and WENDY WHITE, INC. having its principal place of business at . . . New Jersey . . . and organized under the laws of the state of New York ("Contractor").
>
> * * *
>
> Contractor hereby agrees to furnish to The Met the services of its employee, WENDY WHITE ("Singer"), as singer on an individual performance basis and The Met agrees to engage Contractor for the services of Singer as follows:

REHEARSAL WEEKS"

* * *

The Met shall engage Contractor for the services of Singer and Contractor shall guarantee The Met the services of Singer for a minimum of nineteen (19) performances:

* * *

fourteen (14) of Marthe in FAUST (in Italian).

* * *

COMPENSATION:

The Met agrees to pay and Contractor agrees to accept the sum of . . . ($7,000) for each performance performed hereunder by Singer which performance shall include requisite rehearsals therefor. Any additional performances as agreed upon shall be compensated at the same fee.

* * *

OTHER TERMS:

This agreement is pursuant to and includes all the terms and conditions contained in the collective bargaining agreement between AGMA [American Guild of Musical Artists, Inc.] and The Met current at the time the applicable services hereunder are rendered, which terms and conditions are incorporated herein and made a part hereof in the same manner as if fully set forth herein. The term "Principal" as used in the collective bargaining agreement shall be deemed to refer to and include Contractor and Singer as if specially named herein as "Principal."

The Standard Contractor's Agreement incorporates by reference the terms of the CBA, which had a term of August 1, 2006 to July 31, 2011, and which, by Memorandum of Agreement dated May 27, 2011, was then extended through July 31, 2014, was inclusive of the date of plaintiff's accident. By executing the Standard Agreement, both the Met and White, through Wendy White, Inc., agreed to the terms contained in the CBA. The CBA provides, in relevant part:

"FIRST: COVERAGE

A. INCLUSIONS

1. The Met hereby recognizes AGMA as the exclusive collective bargaining agent for, and this [CBA] shall cover, all "ARTISTS" engaged by the Met solely in connection with the performance by ARTISTS of services rendered . . . in connection with . . . live performances by ARTISTS for paying audiences in theaters in which such performances are given . . . **This [CBA] does not cover any group of ARTISTS engaged by the Met which performs independently of the regular Metropolitan Opera Company.** (Emphasis added.)

2. The term "ARTISTS" shall mean and include the following (a) Solo Singers . . .

3. AGMA warrants and the Met acknowledges that AGMA represents, for collective bargaining purposes, a majority of ARTISTS.

B. EXCLUSIONS
. . . child choristers are excluded from the coverage of this [CBA]"

Under "INCLUSIONS," the CBA makes it clear that it covers all artists except those groups of artists engaged by the Met, "which perform[] independently of the regular Metropolitan Opera Company" (CBA § One, First: Coverage [A] [1]), and it defines the term "Artists" to include "Solo Singers" (CBA § One, First [A] [2] [a]). While the CBA makes it clear that AGMA represents a majority of artists for collective bargaining purposes (CBA, § One, First [A] [3]), it does not cover artists engaged by the Met who perform independently of the regular Met company. White alleges that she falls into this exclusionary category.

CBA Article FIFTH obligates the Met to use one of the six form "ARTISTS' CONTRACTS" which "have been agreed to between the Met and AGMA" when engaging the services of an artist, as defined. Samples of these contracts are annexed to the CBA. Of the four "PRINCIPALS CONTRACTs" available to opera singers who are not identified as "choristers," the Met and Wendy White, Inc. selected and executed the Standard Contractor's Agreement, rather than then the Per Performance, Weekly, or Plan contracts (CBA § Fifth [A]).

Although the sample Standard Contractor's Agreement contains a note at the top which states "the following standard contract may be modified depending on the terms of a specific engagement," and two amendments were, in fact, made, relating to the number of weeks and scheduling of rehearsals and specific performances, the first dated April 9, 2011, and the second dated September 25, 2011 (*see* notice of motion, exhibit 1 - exhibit B - exhibit 4), no other modification or adjustment was made to the contract signed by Wendy White, Inc. on White's behalf. A comparison of the executed contract with the sample contract fails to reveal that any terms or provisions were deleted or were added with the specific intent that, in the case of an accident,

workers' compensation would constitute White's exclusive remedy against the Met.

Additionally, and, as noted above, the Standard Contractor's Agreement explicitly incorporates all terms set forth in the CBA. This includes Article Ninth, which mandates that the Met make all "payments required to be made by it to maintain New York State Unemployment Insurance benefits, Federal Social Security benefits and Workers' Compensation coverage for all ARTISTS in conjunction with the performance by them of services for the Met."

White does not dispute that the Met complied with Article Ninth and obtained the workers' compensation policy with The Hartford. However, she points out that Wendy White, Inc. obtained workers' compensation insurance for its employee Wendy White, albeit in New Jersey. White argues that The Hartford policy is irrelevant, because her contract with the Met stipulated that she was an employee of Wendy White, Inc., which she contends, allows for her exemption from the Met's workers' compensation coverage under WCL § 2(4). White further argues that the Board recognized that she was not a Met employee when it cancelled the original decision due to the New Jersey filing.

WCL § 50(2) requires out-of-state employers with employees working within New York State to secure and maintain, for the benefit of such employees, a statutorily compliant workers' compensation policy issued in New York State. The policy must list New York "in Item 3A on the Information Page of the employers' workers' compensation insurance policy" (*Matter of Estate of Velasquez v NGA Constr. Co., Inc.*, 112 AD3d 1051, 1052 [3d Dept 2013]). Although White has failed to demonstrate that the worker's compensation policy purchased by Wendy White, Inc. lists New York in Item 3A on its Information Page, and she has failed to offer any evidence that Wendy White, Inc. obtained any other statutorily compliant New York workers compensation insurance policy on her behalf, this does not mean that she is necessarily covered by the Met's worker's

compensation policy. When an employer fails to obtain the required worker's compensation coverage the WCL requires the employer to reimburse the worker's compensation fund for any payments made to the employee (WCL § 26-a, sub-section 1[a]) and also may subject the non-complying employer to assessments and/or penalties (WCL § 26-a, sub-section 2[b] and [c]).

In addition, the worker's compensation coverage contract with the Hartford which the Met provided to this Court does not specify which persons were included in its coverage, so that it does not conclusively prove that Wendy White was actually covered by this contract. Furthermore, as the Dieffenbach affidavit notes, the Hartford's payment of some of White's medical bills paid under its worker's compensation contract with the Met was "without prejudice" and is not, therefore, conclusive of White coverage under the Met's policy.

The *Fouchécourt* decision cited by the Met is distinguishable from this case. In *Fouchécourt* the injured party, while identified as an independent contractor, was not employed by any other employer besides the Met. In the instant case White was acknowledged by the Met in numerous places in their contract to be the employee of a separate employer, Wendy White Inc., it cannot now claim that White was its own employee. This view is also supported by the Met's position in the NLRB case (*In re Metropolitan Opera Assn, Inc., and Operatic Artists of America*, 327 NLRB No. 136, 327 NLRB No. 740, 1999 WL 112550 [NLRB 1999]) that solo artists retained by the Met, including corporate artists engaged on a "per performance" basis, are not considered employees of the Met.

Since on a motion to dismiss, the Court must accept the allegations of the plaintiff as true and the defendant has not presented sufficient evidence to prove that the plaintiff was an employee of the Met at the time of the accident in which the plaintiff was injured, this Court must deny the Met's motion.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion to dismiss pursuant to CPLR § 3211(a)(1) and (7) by defendant Metropolitan Opera Association is denied and the plaintiff is directed to serve and file a Notice of Entry of this decision and order within thirty (30) days. After service and filing of the Notice of Entry of this decision and order the parties shall contact the Part 17 clerk to schedule a preliminary conference to set a discovery schedule.

The foregoing constitutes the decision and order of this Court.

ENTER:

Dated: November 6, 2015
New York, New York

Hon. Shlomo S. Hagler, J.S.C.