Spasic v Cammeby's Mgt. Co.
2016 NY Slip Op 30472(U)
February 10, 2016
Supreme Court, Queens County
Docket Number: 701777 2012
Judge: Marguerite A. Grays

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

x

VLADA SPASIC and DRAGANA SPASIC,

Plaintiff(s)

-against-

CAMMEBY'S MANAGEMENT CO., CAMMEBY'S REALTY CORP., CAMMEBY'S INTERNATIONAL GROUP, JERSEY CENTRAL MANAGEMENT LLC, MID-QUEENS LIMITED PARTNERSHIP, KEW GARDEN ASSOCIATES, QUEENS FRESH MEADOWS LLC, SANDRA BYMAN, "JOHN DOE", XYZ CORPORATION

Defendant(s)

x

Index Number 701777 2012

Motion Date November 20, 2015

Motion Cal. Number 132

Motion Seq. No. 2

The following papers numbered 1 to 4 read on this motion by defendants Cammeby's Management Co., Cammeby's Realty Corp., Cammeby's International, Ltd. s/h/a Cammeby's International Group, Jersey Central Management, LLC, Mid-Queens Limited Partnership, and Queens Fresh Meadows, LLC for summary judgment dismissing the complaint against them and on this cross motion by plaintiff Vlada Spasic and plaintiff Dragana Spasic for, *inter alia,* an order compelling disclosure.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1
Notice of Cross Motion - Affidavits - Exhibits	2
Reply Affidavits.....	3-4

Upon the foregoing papers it is ordered that the motion by defendants is granted and the cross-motion by plaintiff is denied.

I. The Facts

Kew Gardens Associates owns an apartment complex located at 144-39A 72nd Avenue, Flushing, New York. Mid- Queens Limited Partnership is the daily managing agent for the Kew Gardens complex. Cammeby's International Group is a trade name for a group of businesses. Cammeby's Realty Corp. owns real properties, none of which are relevant to this action. Queens Fresh Meadows, LLC owns a property in Fresh Meadows, New York which is not relevant to this action. Jersey Central Management, LLC provides payroll and accounts payable services to Kew Gardens Associates. Cammeby's Management Co. is a real estate management company which plays no part in the daily management of the Kew Gardens complex.

Kew Gardens Associates hired plaintiff Vlada Spasic to be a maintenance worker at its apartment complex located at 144-39A 72nd Avenue, Flushing, New York. The complex has 200 residential rental units.The names on the plaintiff's pay checks were Kew Gardens Associates and Mid-Queens Limited Partnership and/or Jersey Central. The plaintiff received his orders from Al Dimino, the superintendent for the apartment complex and his immediate superior, and Chaim Rose, the property manager for the complex. Dimino is employed by Kew Gardens Associates. Rose is employed by Mid-Queens Limited Partnership. Rose and Dimino both had disciplinary authority over plaintiff Spasic, and Rose had the authority to fire him. Dimino reported to Rose whose duties included making sure that the superintendent delegated all maintenance requests and making sure that maintenance workers followed the superintendent's instructions.

On or about August 1, 2011, superintendent Dimino directed the plaintiff to remove a refrigerator from an apartment rented by defendant Sandra Bindman s/h/a/ Sandra Byman. The plaintiff and another maintenance worker (Damon Pinnock) went to the apartment with a hand truck, and upon arriving, they saw that the refrigerator had been placed in the dining room. Various objects cluttered the apartment floor, leaving only a narrow passageway to the door and preventing the use of the hand truck. The plaintiff and Pinnock decided to carry the refrigerator out of the apartment. As they were doing so, the plaintiff stepped on something that felt like a box, causing his leg to twist and his back to "give out." As the plaintiff lay on the floor, Pinnock called Dimino who arrived at the apartment with Chaim Rose, (Rose shares an office with Hy Weingarten, a district manager for Mid-Queens Limited Partnership, and Weingarten reports to Avi Schron, the Vice-President of Cammeby's Management Co.). An ambulance took the plaintiff to a hospital for treatment of allegedly serious injuries.

After the accident, the plaintiff applied for and received Worker's Compensation benefits.

II. Procedural History

The plaintiffs began this action for negligence and violation of Labor Law §§200 ,240, and 241(6) on or about August 28, 2012. Defendant Kew Gardens Associates filed a motion for summary judgment based on the exclusivity provisions of the Worker's Compensation Law, and the plaintiffs signed a stipulation dated January 20, 2014 discontinuing the action against that party.

The plaintiff filed a Note of Issue on June 24, 2014. The parties appeared for a pretrial conference in Trial Scheduling Part (TSP) on December 15, 2015, and they are scheduled to appear again in TSP on April 5, 2016.

III. Discussion

A. Further Discovery and the Amendment of the Complaint

The plaintiffs' cross motion which seeks further discovery and an amendment of the complaint, brought on the eve of trial, lacks merit. In view of the more complete record made by the defendants on their motion for summary judgment, it does not appear that the discovery sought by the plaintiffs (e.g., an investigative file) will lead to information which is material and necessary to the prosecution of this action (*see, Allen v. Crowell-Collier Pub. Co*, 21 NY2d 403; *Hayes v. Bette & Cring, LLC*, - AD3d-, -N YS2d-, 2016 WL 71527). The plaintiffs have already conducted several depositions of witnesses produced by the defendants. Moreover, in determining whether to permit a party to amend a complaint to add a cause of action, the court must examine the merits of the proposed cause of action. (*See, Morgan v. Prospect Park Associates Holdings, LP*, 251 AD2d 306; *McKiernan v. McKiernan*, 207 AD2d 825). The plaintiffs did not make an adequate showing that the proposed additional parties, who are not owners or managing agents of the Kew Gardens complex, have possible liability in this case. The Court also notes that this case turns on the status of plaintiff Vlada Spasic as a special employee.

B. Labor Law §240

The plaintiff has no cause of action based on Labor Law §240. For a cause of action based on Labor Law §240, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 599, 603; *Wilinski v. 334 East 92nd Housing Development Fund* , 18 NY 3d 1). The case at bar does not involve a risk protected against by Labor Law §240.

C. Labor Law §241(6)

The plaintiff has no cause of action based on Labor Law§241(6). That statute provides, inter alia, that areas in which construction, excavation or demolition is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall comply with them (*see, Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343). Plaintiff Spasic was not engaged in construction, excavation, or demolition.

D. Negligence and Labor Law §200

"To prove a prima facie case of negligence, the plaintiff must prove the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff***" (*Gordon v Muchnik*, 180 AD2d 715). The common law imposes a duty upon an owner and a general contractor to provide a worker with a safe place to work (*see, Comes v New York State Electric and Gas Corp.*,82 NY2d 876; *Torres v. Perry Street Development Corp.*, 104 AD3d 672). "Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Electric and Gas Corp.*, 82 NY2d 876, 877; *Blessinger v. Estee Lauder Companies, Inc*, 271 AD2d 343). This duty may be violated in two ways: (1) through the defective condition of the premises itself and (2) through a danger arising from the worker's activities where a party has supervisory control (*see, Smith v. Nestle Purina Petcare Co.*, 105 AD3d 1384; *Clavijo v. Universal Baptist Church*, 76 AD3d 990; *LaGiudice v. Sleepy's Inc.*, 67 AD3d 969). Where a worker sustains an injury because of a defective condition on the premises, a property owner is liable for common law negligence and a violation of Labor Law § 200 when the owner created the dangerous condition which caused the injury or when the owner failed to remedy the dangerous condition of which he had actual or constructive notice (*LaGiudice v. Sleepy's Inc.*, 67 AD3d 969; *see, Mikelatos v. Theofilaktidis*, 105 AD3d 822 [general contractor]). Unlike injuries arising from the method of work, where the injury arises from a condition on the job site, it is not necessary to prove supervision and control over the worker. (*Urban v. No. 5 Times Square Development, LLC*, 62 AD3d 553; *Murphy v. Columbia University*, 4 AD3d 200).

Liability for negligence and violations of the Labor Law may also be imposed on "parties who have been delegated the authority to supervise and control the work such that they become statutory agents of the owners and contractors ***" (*Nienajadlo v. Infomart New York, LLC*, 19 AD3d 384, 385). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured ***" (*Medina v. R.M. Res.*, 107 AD3d 859,

860). Where the injury arises from a defective condition of the premises, whether or not a party had control over the premises or created the defective condition is the determinative factor in finding liability for negligence and a violation of Labor Law §200. (*See*, *Smith v. Nestle Purina Petcare Co.*, 105 AD3d 1384; *Gomes v. Revere Sugar Corp.*, 140 AD2d 582). Managing agents of buildings may be liable for negligence and a violation of Labor Law §200 unless they can show that they "did not directly control the method or means of plaintiff's work, or have actual or constructive notice of an unsafe condition ***" (*Russo v. Hudson View Gardens, Inc.*, 91 AD3d 556, 557).

"[T]he 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 demonstrate the absence of any material issues of fact ***" (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324). In the case at bar, defendants Cammeby's Management Co., Cammeby's Realty Corp., Cammeby's International, Ltd. s/h/a Cammeby's International Group, Jersey Central Management, LLC, and Queens Fresh Meadows, LLC made a prima facie showing that they were neither the owners nor the day to day managing agents of the Kew Gardens complex and are, thus, without liability for negligence or violation of Labor Law §200. Weingarten testified at his deposition that he oversees four apartment complexes including Mid-Queens, Mid Island Limited, Central Astoria, and Kew Gardens and that each of the complexes is a separate, independently owned corporation. Although the complexes are part of Cammeby's "portfolio," they are owned by different corporations. Jersey Central merely handles payroll and accounting duties. Avi Schron testified in a similar manner at his deposition. In opposition the plaintiff failed to raise a triable issue of fact.

In regard to Mid-Queens Limited Partnership, an individual can have more than one employer for the purposes of the Workers' Compensation Law, a general employer and a special employer (*Munion v. Trustees of Columbia Univ. in City of New York*, 120 AD3d 779). The Worker's Compensation Law provides the exclusive remedy for a "special employee" injured on the job (see, *Thompson v. Grumman Aerospace Corp.*, 78 NY2d 553; *Szymanski v. Aramark Facility Services, Inc.*, 297 AD2d 829). "The receipt of Workers' Compensation benefits from a general employer precludes an employee from commencing a negligence action against a special employer" (*Pena v. Automatic Data Processing, Inc.*, 105 AD3d 924, 924; *Wilson v. A.H. Harris & Sons, Inc.*, 131 AD3d 1050; *Munion v. Trustees of Columbia Univ. in City of New York, supra*; *Akins v. D.K. Interiors, Ltd.*, 65 AD3d 946 [plaintiff cannot recover from management company of cooperative, his special employer]; *Villanueva v. Se. Grand St. Guild Hous. Dev. Fund Co.*, 37 AD3d 155 [plaintiff cannot recover from management company of building, his special employer]).

"[A] general employee whose wages and benefits are provided by one employer nonetheless may be deemed to be a special employee of another under certain circumstances ***" (*Szymanski v. Aramark Facility Services, Inc., supra;* 830*; see, Thompson v. Grumman Aerospace Corp., supra*). " A special employee is described as one who is transferred for a

limited time of whatever duration to the service of another ***" (*Thompson v. Grumman Aerospace Corp., supra*, 557; *Fung v. Japan Airlines Co.*, 9 NY3d 351; *Wilson v. A.H. Harris & Sons, Inc., supra*;, *Oppedisano v. Randall Elec. Inc.*, 285 AD2d 759). The principal factors examined in determining special employment status include who has the right to control the employee's work, who is obligated to pay his wages, who furnishes his equipment, who has the right to discharge the employee, and whether the employee was performing work in furtherance of the special employer's or the general employer's business. (*Munion v. Trustees of Columbia Univ. in City of New York, supra*).

"While many factors must be considered in determining whether a special employment relationship exists, with no one decisive, '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' ***" (*Oppedisano v. Randall Elec. Inc., supra*, 760, quoting *Thompson v. Grumman Aerospace Corp, supra*, 558; *Villanueva v. Se. Grand St. Guild* Hous. *Dev. Fund Co., supra*). "General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer ***" (*Thompson v. Grumman Aerospace Corp, supra*, 557; *Pena v. Automatic Data Processing, Inc.*, 105 AD3d 924).

While the question concerning whether a person may be categorized as a special employee generally presents a factual issue, a finding of special employment status may be made as a matter of law where the" particular, undisputed critical facts compel that conclusion and present no triable issue of fact " (*Thompson v. Grumman Aerospace Corp.*, supra, 558; *Munion v. Trustees of Columbia Univ. in City of New York, supra*; *Villanueva* v. *Se. Grand St. Guild Hous. Dev. Fund Co., supra*; *Sherman v. Reynolds Metals Co.*, 295 AD2d 843).

In the case at bar, defendant Mid-Queens Limited Partnership established its prima facie right to judgment as a matter of law (*see, Munion v. Trustees of Columbia Univ. in City of New York, supra*). The defendant controlled and directed the manner, details, and ultimate result of the plaintiff's work (*see, Munion v. Trustees of Columbia Univ. in City of New York, supra*; *Villanueva v. Se. Grand St. Guild Hous. Dev. Fund Co., supra*), and it did so for years, not just a short length of time. (*See, Thompson v. Grumman Aerospace Corp., supra*). Kew Gardens Associates exercised no daily control over the plaintiff (*see, Thompson v. Grumman Aerospace Corp., supra*), and Rose, an employee of Mid-Queens Limited Partnership, had the right to fire plaintiff (*see, Pena v. Automatic Data Processing, Inc., supra*). Rose supervised Dimino and the maintenance employees (*see, Akins v. D.K. Interiors, Ltd., supra* ["superintendent took his instructions from Akam's employee, the building's property manager"]; *Villanueva v. Se. Grand St. Guild Hous. Dev. Fund Co., supra).* In opposition, the plaintiff failed to raise a triable issue of fact (*see, Akins v. D.K. Interiors, Ltd., supra; Villanueva v. Se. Grand St. Guild Hous. Dev. Fund Co., supra).*

Dated: FEB 10 2016

J.S.C.