Chvetsova v Synod of Bishops of the Russian Orthodox Church Outside Russia
2018 NY Slip Op 30401(U)
March 9, 2018
Supreme Court, New York County
Docket Number: 154847/2016
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** 58
Justice

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INNA CHVETSOVA

Plaintiff,

- v -

SYNOD OF BISHOPS OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE RUSSIA,

Defendant.

INDEX NO. 154847/2016

MOTION DATE 3/7/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35

were read on this application to/for Dismiss.

Upon the foregoing documents, it is

In this personal injury action, defendant Synod of Bishops of the Russian Orthodox Church Outside Russia (Synod) moves, pursuant to CPLR 3211 (a) (2) and (a) (7), for an order dismissing this action for lack of subject matter jurisdiction and failure to state a cause of action, or, in the alternative, remanding this action to the Workers' Compensation Board (WCB).

In the amended complaint, plaintiff Inna Chvetsova (Chvetsova) alleges that, on November 29, 2015, she sustained personal injury when she tripped and fell on uneven pavement, after having been instructed by a Synod staff member to perform an errand inside a courtyard at Synod's facility located at 75 East 93rd Street in Manhattan. Chvetsova further alleges that she was present at the facility as an unpaid volunteer.

In the amended answer, Synod denies all allegations of wrongdoing and asserts nine affirmative defenses, including a defense that this action is barred by the exclusive remedy provided by the Workers' Compensation Law (WCL).

Synod now seeks to dismiss the complaint as barred by the WCL, on the grounds that, at the time of the alleged incident, Chvetsova was a Synod salaried employee and performing manual duties required in the course of that employment. In the alternative, Synod seeks to remand this action to the WCB for a factual determination regarding Chvetsova's employment status.

In opposition, Chvetsova contends that she is outside the scope of the WCL because she was an unpaid volunteer at Synod's facility, and performed only nonmanual administrative work. Chvetsova further contends that, while she occasionally received charitable aid from Synod in 2015, she was not hired as a salaried employee until January 2016, two months after the accident.

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Joel v Weber*, 166 AD2d 130, 135-136 [1st Dept 1991]; *see* CPLR 3211 [a] [7]). Dismissal on documentary evidence is warranted only if the "evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d at 88; *see* CPLR 3211 [a] [1]).

As a matter of law, the right to benefits provided by the WCL is the exclusive remedy available to an employee injured in the course of employment (*Croston v Montefiore Hosp.*, 229 AD2d 330, 331 [1st Dept 1996]; *Kligman v Call Again Thrift Shop*, 209 AD2d 199, 200 [1st Dept 1994]). The WCL provides, in relevant part, that "[t]he liability of an employer . . . shall be

exclusive and in place of any other liability whatsoever, to such employee . . . or any person otherwise entitled to recover damages, contribution or indemnity, at common law or other wise, on account of such injury or death or liability arising therefrom" (WCL § 11; *see* WCL § 29 [6] ["(t)he right to compensation or benefits under this chapter, shall be the exclusive remedy to any employee"]).

Furthermore, a plaintiff entitled to WCL benefits cannot elect to waive such benefits and proceed on a tort cause of action (*Olsson v Nyack Hosp.*, 193 AD2d 1006, 1007 [3d Dept 1993]; *see Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 159-160 [1980]).

The parties dispute whether Chvetsova is entitled to the exclusive benefits provided by the WCL and whether that determination is one of law, to be made by this court, or one of fact, to be made by the WCB.

WCL § 3 excludes certain types of employment from the scope of the WCL. That statute provides, in relevant part, as follows:

> "1. Hazardous employments. Compensation shall be payable for injuries or death incurred by employees in the following employments:
>
> . . .
>
> Group 18. **All other employments, except persons engaged in a teaching or nonmanual capacity in or for a religious, charitable or educational institution**, notwithstanding the definition of employment in subdivision five of section two, not hereinbefore enumerated, carried on by any person, firm or corporation in which there are engaged or employed one or more employees regularly, in the same business or in or about the same establishment either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers and domestics other than those within the coverage of this chapter pursuant to groups fourteen-b and twelve respectively of this subdivision, **unless the employer has elected to bring such employees under the law by securing compensation in accordance with the terms of section fifty of this chapter and persons engaged in voluntary service not**

> **under contract of hire.** A duly ordained, commissioned or licensed minister, priest or rabbi, a sexton, a christian science reader, or a member of a religious order, shall not be deemed to be employed or engaged in employment under the terms of this section. **Recipients of charitable aid from a religious or charitable institution who perform work in or for the institution which is incidental to or in return for the aid conferred, and not under any express contract of hire, shall not be deemed to be employed or engaged in employment under the terms of this section.** All persons who are members of a supervised amateur athletic activity operated on a non-profit basis shall not be deemed to be employed or engaged in employment under the terms of this section, provided that said members are not also otherwise engaged or employed by any person, firm or corporation participating in said athletic activity. **The terms 'religious, charitable or educational institution' mean a corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual"**

(WCL § 3 [1] [18] [emphasis added]).

Thus, the WCL, in relevant part, exempts from its scope a person engaged in a nonmanual capacity for a religious or charitable institution, unless such institution has purchased a policy of workers' compensation insurance.

There is no dispute that Synod is a religious and charitable institution, within the meaning of the statute.

There is no dispute that Synod obtained a workers' compensation insurance policy that covered clerical office employees at Synod's facility where the alleged accident occurred and that was in effect on the date of that accident (*see* Rosenfield affirmation, exhibit E, Church Mut. Ins. Co. Workers' Compensation & Empl. Liab. Ins. Policy, Aug. 12, 2015 [policy]). Chvetsova does not contend that the policy does not satisfy the requirements of WCL § 50 (2), which permits an

employer to secure compensation to its employees by obtaining a workers' compensation insurance policy issued under the law of New York.

However, contrary to Synod's contention, the existence of that policy does not, in the circumstances presented here, determine as a matter of law whether this action is barred by the WCL. By its express terms, the WCL exempts from its scope recipients of charitable aid, even where there exists a workers' compensation insurance policy.

Threshold issues exist regarding, among other things, whether Chvetsova was engaged in a manual or nonmanual capacity by Synod on the day of the alleged accident and whether the funds she received in November 2015 from Synod were paid as salary or charitable aid.

The documentary evidence does not conclusively resolve those issues. For example, the handwritten check evidencing a payment by Synod to Chvetsova dated November 24, 2015, the week prior to the alleged accident, bears the notation, "Benevolent," without further explanation. That notation may demonstrate a charitable payment. However, another such check, dated December 1, 2015, just after the alleged accident, bears that notation, "Nov. Salary," perhaps indicating that Chvetsova was a salaried employee.

The Form W-4 Employee's Withholding Allowance Certificate produced by Synod was completed by Chvetsova on January 26, 2016 for the 2016 tax year, and, therefore, is irrelevant to the issue of her employment status in 2015.

The November 2015 work or duty schedule produced by Synod is not dispositive of Chvetsova's employee status because, at most, it merely indicates the number of hours that Chvetsova was scheduled to be present at the Synod facility, in any capacity. Contrary to both sides' contentions, it does not definitively demonstrate whether Chvetsova was a salaried employee or a volunteer receiving charitable aid.

With that evidence, the parties have raised questions of fact that may be resolved only by the WCB. It is well-settled that the WCB has primary jurisdiction to determine issues relevant to the applicability of the WCL, such as whether a person is an employee and whether the alleged accident occurred during the course of that employment (*see Botwinick v Ogden*, 59 NY2d 909, 911 [1983]). "[W]here the availability of [workers'] compensation hinges upon the resolution of questions of fact or upon mixed questions of fact and law, the plaintiff may not choose the courts as the forum for the resolution of such questions" (*O'Rourke v Long*, 41 NY2d 219, 228 [1976]; *Liss v Trans Auto Sys.*, 68 NY2d 15, 20-21 [1986]).

Accordingly, it is

ORDERED that defendant's motion to dismiss is denied, without prejudice to renew upon a final determination of the Workers' Compensation Board on the issues of fact regarding whether plaintiff came within the scope of the Workers' Compensation Law on the date of the alleged accident; and it is further

ORDERED that, within 14 days of the date of this order, plaintiff shall submit this matter to the Workers' Compensation Board to determine those issues of fact; and it is further

ORDERED that this action is stayed, pending the final determination of the Workers' Compensation Board of those issues.

3/9/2018
DATE

DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE