O'Driscoll v Mary Manning Walsh Nursing Home Co., Inc.
2018 NY Slip Op 31723(U)
March 26, 2018
Supreme Court, New York County
Docket Number: 160804/2014
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

KELLY O'NEILL LEVY
JSC

----------X

WINIFRED O'DRISCOLL,

Plaintiff,

- v -

MARY MANNING WALSH NURSING HOME COMPANY, INC., CATHOLIC HEALTH CARE SYSTEM D/B/A ARCHCARE, MORRISON MANAGEMENT SPECIALISTS, INC.

Defendant.

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INDEX NO. 160804/2014

MOTION DATE 4/17/2017
5/18/2017

MOTION SEQ. NO. 003 and 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this application to/for Summary Judgment .

HON. KELLY O'NEILL LEVY:

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This is a personal injury action arising from a slip and fall accident.

Defendants Mary Manning Walsh Nursing Home Company, Inc. and Catholic Health Care Systems d/b/a Archcare (collectively, hereinafter, MMW) move under motion sequence 003, pursuant to CPLR § 3211(a)(7), to dismiss this action, and/or for summary judgment dismissing the complaint, pursuant to CPLR § 3212. Plaintiff Winifred O'Driscoll opposes.

Defendant Morrison Management Specialists, Inc. (hereinafter, Morrison) moves for summary judgment under motion sequence 004, pursuant to CPLR § 3212. Plaintiff opposes.

BACKGROUND

As plaintiff was walking to work on January 28, 2014 at approximately 7:50 A.M., she slipped and fell over an ice accumulation on the sidewalk outside the Mary Manning Walsh Nursing Home located at 1339 York Avenue in Manhattan (hereinafter, the nursing home). The nursing home is owned by Mary Manning Walsh Nursing Home Company, Inc. and operated by Catholic Health Care Systems d/b/a Archcare. Plaintiff claims that the ice accumulation formed from prior snowmelt runoff from an upper floor parapet of the nursing home that had frozen over [Deposition of Plaintiff (ex. E to the Bordoni aff.) at 24-25]. Jose Rodriguez, MMW's maintenance supervisor, claims that the ice originated from an air conditioner on the side of the building [Deposition of Jose Rodriguez, MMW Maintenance Supervisor (ex. F to the Bordoni aff.) at 53-56]. It had snowed a week prior to the accident, but there was no existing snow on the ground at the time of the accident (Deposition of Plaintiff at 25-26).

Plaintiff was a licensed clinical social worker employed by Green Key Resources, a temporary staffing agency (hereinafter, Green Key). During her employment with Green Key, plaintiff was assigned on a temporary basis to several nursing homes in New York, including this nursing home (*id.* at 19-21). Plaintiff had been assigned to work at the nursing home for a short assignment in November 2012 and again on February 19, 2013 until the date of the accident (*id.* at 20). The parties disagree on the degree of autonomy and supervision plaintiff had in performing her job.

At the time of the accident, Morrison was in contract with MMW to provide supervisory services associated with environmental services, which included the provision of maintenance, custodial, and grounds keeping services at the nursing home [Agreement (ex. A to the Vita aff.)]. Morrison's responsibilities included keeping the outside of the nursing home clean, including the

cleaning of snow and ice in the event of a snow storm, but did not include the maintenance of the building façade [Deposition of Helen Yee, MMW Assistant Administrator (ex. I to the Bordoni aff.) at 18-19]. MMW also had a maintenance department, which was responsible for servicing air conditioners and maintaining the building's exterior façade (Deposition of Jose Rodriguez at 53-56).

MMW argues for dismissal asserting that plaintiff was a special employee of MMW, and as such, her claims are barred by the exclusivity provision of the Workers' Compensation Law § 11, and in support of summary judgment, that there are no genuine issues of material fact in dispute. Plaintiff contends that the accident was not work-related, that plaintiff did not receive workers' compensation benefits through her employer, that plaintiff directed the manner, details, and ultimate results of the services she performed, that plaintiff received short-term disability benefits from Green Key's disability insurer because the accident was not work-related, and that MMW never pled Workers' Compensation Law § 11's bar to suit as an affirmative defense.

Morrison argues that an alleged failure to perform a contractual obligation does not give rise to a tort duty in favor of plaintiff, as Morrison did not launch a force or instrument of harm, plaintiff did not detrimentally rely on Morrison to remove ice on the sidewalk, and Morrison did not entirely displace MMW and wholly absorb its duty to safely maintain the premises. Plaintiff argues that a triable issue exists as to whether Morrison's exclusive contract with MMW was comprehensive enough to cloak Morrison with a duty of care to plaintiff.

DISCUSSION

When considering a motion to dismiss made pursuant to CPLR § 3211, the court's "task is to determine whether plaintiffs' pleadings state a cause of action." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151-152 (2002). The court must construe

plaintiffs' pleadings liberally (*see Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994]), and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. *See 511 W. 232nd Owners Corp.*, 98 N.Y.2d at 152. The Court must accord plaintiffs "the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). CPLR § 3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. If the court "determine[s] that the plaintiff [is] entitled to relief on any reasonable view of the facts stated, [its] inquiry is complete" and the complaint must be declared legally sufficient. *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 (1995).

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Plaintiff's Special Employee Status

The parties disagree as to whether plaintiff was a special employee of MMW. MMW argues that as a special employee, plaintiff would be barred from pursuing this action based on

the exclusivity provision of the Workers' Compensation Law, and that CPLR § 3211(a)(7) dismissal is appropriate.

"[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." *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557 (1991). A special employee is "one who is transferred for a limited time of whatever duration to the service of another." *Id.* "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." *Id.* The question of whether such a complete transfer of control has occurred is normally a fact-sensitive inquiry not amenable to resolution on summary judgment. *Bellamy v. Columbia Univ.*, 50 A.D.3d 160, 161-162 (1st Dep't 2008). Summary judgment is appropriate where the defendant can demonstrate conclusively that it has assumed exclusive control over "the manner, details and ultimate result of the employee's work" (quoting *Thompson*, 78 N.Y.2d at 558). *Id.* at 162.

Here, plaintiff's general employer, Green Key, required plaintiff to wear a Green Key identification badge (O'Driscoll Aff. at ¶ 12). Plaintiff claims that Green Key instructed her to report to Green Key any work-related issues, that Green Key determined her hours, and that Green Key could, at any time, reassign her (*id.* at ¶ 11-12). MMW claims that Theresa Taplin, MMW's Director of Social Services, was a direct supervisor of plaintiff and that Taplin was responsible for plaintiff's daily activities (Taplin Aff. at ¶ 8). Taplin was responsible for the supervision of all social workers at the nursing home (*id.* at ¶ 2). This includes overseeing all activities of the social workers, including assigning shifts and providing the social workers with specific patients (*id.* at ¶ 8). Taplin asserts that she required daily updates from plaintiff (*id.*).

However, plaintiff contends that she had autonomy in performing her job and received no instruction from MMW (O'Driscoll Aff. at ¶ 5, 21). Plaintiff also asserts that she did not meet Taplin until several weeks after her assignment and that she would go weeks at a time without seeing her (*id.* at ¶ 14). There is a dispute as to who controlled plaintiff's day-to-day tasks. Plaintiff's affidavit contradicts Taplin's affidavit as it relates to the level of control MMW had over plaintiff. Since it is not clear what degree of control MMW had over plaintiff, whether plaintiff is considered a special employee remains an open question. Thus, triable material issues of fact remain and MMW's motion, whether considered under a motion to dismiss or one for summary judgment, is denied.

Morrison's Motion for Summary Judgment

The parties disagree as to whether Morrison owed plaintiff a duty of care based on its contractual obligations to MMW.

Generally, a contractual obligation alone will not give rise to tort liability in favor of a third party. *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138 (2002). There are three situations where a contractual party may be said to have assumed a duty of care to third parties: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm' (internal citation omitted); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (internal citation omitted) and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (internal citation omitted)." *Id.* at 140.

Here, there is no evidence that Morrison launched "a force or instrument of harm," and thus the first *Espinal* exception does not apply. Also, there is no evidence that plaintiff detrimentally relied upon the continued performance of Morrison's contractual duties, so the

second *Espinal* exception is similarly inapplicable. The only remaining question is whether the third *Espinal* exception applies here, namely, whether Morrison has entirely displaced MMW's duty to maintain the premises safely.

Morrison's agreement with MMW shows that Morrison directed and controlled all cleaning, maintenance, and grounds keeping duties by setting forth the procedures and policies to be followed and directing MMW personnel to carry out such functions (Agreement at 1.5(a-c), Exhibit A). The scope of Morrison's contractual obligations to maintain the inside and outside of the nursing home in a clean and safe condition, and obligation to supervise and manage MMW employees with respect to such services, is broad and raises a triable issue of whether Morrison displaced MMW's duty of care to maintain the premises safely. Specifically, in the absence of a snow storm occurring in the days immediately preceding the accident, it is unclear whether Morrison was responsible for monitoring the abutting sidewalks of the nursing home for slippery ice conditions, particularly if the ice condition was caused by a leaking air conditioner or snowmelt from the roof, which is not clear based on the evidence. Since triable material issues of fact remain, Morrison's motion for summary judgment in its favor is denied.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that Defendants Mary Manning Walsh Nursing Home Company, Inc. and Catholic Health Care Systems d/b/a Archcare's motion, pursuant to CPLR § 3211(a)(7), to dismiss this action and/or for summary judgment dismissing the complaint pursuant to CPLR § 3212 (mot. seq. 003) is denied; and it is further

ORDERED that Defendant Morrison Management Specialists, Inc.'s motion for summary judgment pursuant to CPLR § 3212 (mot. seq. 004) is denied.

This constitutes the decision and order of the court.

3/26/18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

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