

Wortham v Port Auth. of N.Y. & N.J.

2018 NY Slip Op 32274(U)

September 17, 2018

Supreme Court, New York County

Docket Number: 155686/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

-----X INDEX NO. 155686/2017

DEREK WORTHAM,

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and
TUTOR PERINI BUILDING CORP.,

DECISION AND ORDER

Defendants.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12,
13, 14, 15, 18, 19, 21, 34, 35

were read on this motion to/for DISMISS

Upon the foregoing documents, it is ordered that the motion is denied.

In this action by plaintiff Derek Wortham to recover for personal injuries pursuant to, inter
alia, Labor Law §§ 240, 241, and 241-a, defendant The Port Authority of New York and New
Jersey ("the PA") moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to
state a cause of action. After oral argument, and after a review of the motion papers and the
relevant statutes and case law, the motion is denied.

Plaintiff was allegedly injured on November 16, 2016 when he fell while working at The
George Washington Bridge Bus Station in Manhattan ("the bus station"). He commenced this
action against the PA, which owned the bus station, as well as defendant Tutor Perini Building
Corp., a contractor for construction at that location. Doc. 1, at pars. 7-8, 14, 22-25.

The PA now moves, pursuant to CPLR 3211 (a) (7), to dismiss the case for failure to state
a cause of action. In support of its motion, the PA argues that it was created by an interstate

compact and that New York's Labor Law does not apply to it because those statutes neither expressly indicate that they amend a certain portion of the compact nor apply to the [PA], and because New Jersey did not enact parallel legislation.

In opposition to the motion, plaintiff argues that the State of New York has a paramount interest in protecting the safety of its workers by enacting statutes such as Labor Law §§ 240, 241 and 241-a. He also asserts that the PA has been held liable pursuant to Labor Law §§ 240 and 241 in a multitude of cases. Plaintiff further argues that "New York and New Jersey have each undoubted power to regulate the external conduct of the [PA], [as opposed to the internal operations of the PA,] and it may hardly be gainsaid that the [PA], albeit bistate, is subject to New York's laws involving health and safety." Pltf's. Aff. In Opp., at p. 3, quoting *Agesen v Catherwood*, 26 NY2d 521, 525 (1970).

In reply, the PA reiterates its argument that it is not subject to New York's Labor Law.

This application is just one in a series of motions by the PA seeking to avoid liability under Labor Law §§ 240, 241, and 241-a. In March of this year, the PA made the same argument in moving to dismiss the complaint in *Granados v. The Port Authority of New York and New Jersey*, 2018 N.Y. Misc. LEXIS 2995, 2018 WL 2065436 (Sup Ct, Queens County 2018), in which the court (Butler, J.) held:

It is not disputed that Labor Law 240(1) and 241(6) are laws governing the [PA's] external conduct [as opposed to its internal operations], and that they bear on matters of public health and safety. The [PA] asks this Court to be the first to carve out an exception to a health and safety statute based upon the [PA's] status as a Compact Clause entity. The arguments set forth by the [PA] have not convinced the Court to make new law to exempt the Port Authority from liability in these circumstances.

In May of this year, this Court denied a motion by the PA seeking to dismiss another claim by the plaintiff herein, this time for injuries arising from an alleged incident occurring on July 18, 2016, when he fell from a ladder while working at One World Trade Center. In so holding, this Court (Lebovits, J.) stated that "[t]he PA has not persuaded this court to deviate from *Agesen* to set a new precedent to release the PA from its obligation to comply with New York Labor Law §§ 240, 241, and 241-a." *Wortham v. The Port Authority of New York*, 2018 N.Y. Slip Op. 31104[U], at *4 (Sup Ct, NY County 2018).

In June of this year, this Court (Kalish, J.), citing *Grenados* and *Wortham*, denied a motion to dismiss by the PA, reasoning that:

Applying *Agesen*'s internal-external test, the Court finds that Labor Law §§ 240 and 241 [do] not seek to regulate the internal operations of the [PA], but rather [seek] to regulate its external conduct affecting the public, in matters of health and safety, within New York's territorial borders.

Ayars v Port Authority of N.Y. & N.J., 2018 NY Misc LEXIS 2582, *14, (Sup Ct New York County 2018).

While recognizing that "the interpretation of an interstate compact presents a question of federal law", Justice Kalish found that there was no "basis in federal law to upend *Agesen*'s internal-external test that has prevailed in this state for almost fifty years and has been utilized by the Second Circuit and other federal courts." *Ayars*, at *10 (citations omitted).¹

This Court agrees with the reasoning in *Grenados*, *Wortham* and *Ayars*, which rely on the precedent set by *Agesen*, that the PA cannot escape liability pursuant to Labor Law §§ 240, 241, and 241-a simply because it was created by an interstate compact. This Court finds the reasoning

¹ This Court notes that the PA has appealed *Grenados*, *Wortham*, and *Ayars*.

in the foregoing decisions to be rational and declines to hold to the contrary. Should the Appellate Division wish to hold otherwise, it will have three opportunities to do so in the near future.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the instant motion by defendant Port Authority of New York and New Jersey, pursuant to CPLR 3211 (a) (7), to dismiss plaintiff's causes of action as against it for violations of Labor Law §§ 240, 241, and 241-a, is denied; and it is further

ORDERED that defendant Port Authority of New York and New Jersey is to serve an answer to the complaint within 20 days after this order is uploaded to NYSCEF; and it is further

ORDERED that the parties are directed to appear for a compliance conference on October 16, 2018 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of this Court.

9/17/2018

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

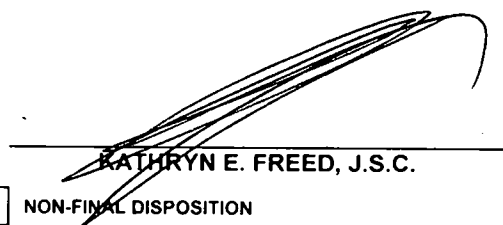
GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE


KATHRYN E. FREED, J.S.C.