Rosario v Port Auth. of N.Y. & N.J.
2018 NY Slip Op 33148(U)
December 5, 2018
Supreme Court, New York County
Docket Number: 150040/2018
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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MIGUEL ROSARIO,

Plaintiff,

- v -

THE PORT AUTHORITY OF NEW YORK & NEW JERSEY, ONE WORLD TRADE CENTER LLC, BP MECHANICAL CORP., WTC TOWER 1 LLC, and TOWER 5 LLC,

Defendants.

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INDEX NO. 150040/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 20, 21, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for DISMISS

In this action by plaintiff Miguel Rosario to recover for personal injuries pursuant to, *inter alia*, Labor Law §§ 200, 240(1), 241(6), 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 January 5, 2017 when he fell from a ladder while engaged in construction work at One World Trade Center, New York, New York. He commenced this action against the PA, which owns One World Trade Center, the subject premises. Doc. 1, at pars. 3-5, 29-36.

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 §§ 200, 240, and 241. He also asserts that the PA has been held liable pursuant to Labor Law §§ 200, 240 and 241 in a multitude of cases. Plaintiff further cites the Court of Appeals decision in *O'Brien v Port Authority of New York and New Jersey,* 29 NY3d 27 (2017) which held that there were triable issues of fact as to whether the staircase where plaintiff was injured provided adequate safety and fire protection and denied plaintiff's summary judgment on Labor Law §§ 240(1) and 241(6) causes. Additionally, both the decision and the dissent discussed the PA's non-delegable duty to provided safety at construction sites from hazards set forth in state statutes. In that case, the plaintiff was also injured at a One World Trade Center construction site.

This Court further notes that the PA seems to agree with this assessment in at least one of its publications dealing with the World Trade Center site. Plaintiff appends to its opposition papers as Exhibit 3 (Doc. No. 31) a document published by the PA entitled "Downtown Restoration Program The World Trade Center Site", designated as Revision Number 2.0 – 5/3/2010 "Safety, Health and Environmental Program." Article 3 of this document, entitled "Program Requirements", specifies the applicable requirements of various regulatory agencies that contractors working at the World Trade Center site must comply with, as they pertain to worker safety and health. It specifically states "[I]n the case of conflicting requirements, the most stringent shall be followed." Included in the list as item (g) is the New York State Department of Labor.

Plaintiff urges that the Appellate Division First Department has also applied New York's Labor Law to cases where the PA is the defendant. Plaintiff Aff. Para 7. See *Verdon v Port Authority of NY & NJ*, 111 A.D.3d 580 (1st Dept. 2013) affirming an order granting plaintiff summary judgment under the Labor Law. See also *Makarius v Port Auth. of NY & NJ*, 76 A.D.3d 805 (1st Dept. 2010) and *Spagnuola v Port Auth. of NY & NJ*, 8 A.D.3d 64 (1st Dept. 2001)

In its reply, the PA reiterates its argument that, as a compact Clause Entity, the PA is not subject to New York's Labor Law, citing an old law school stand-by, *McCulloch v Maryland*, 17 U.S. 316 (1819). However, as plaintiff points out, this case is not on point. In *McCulloch*, a state attempted to tax notes from the Federal Bank in opposition to and in an attempt to thwart or destroy Congress' federal banking laws. The United States Supreme Court found that Maryland could not impose a tax on the Federal Bank's notes, since Congress had conferred the powers on the Federal Bank as "necessary and proper." It therefore follows that a state cannot, without Congressional consent, try to increase its political power by encroaching on federal power, and this includes cases involving the Compact Clause. See *U.S. Steel Corp. v Multistate Tax Commission*, 434 U.S. 452 (1978). But, argues plaintiff, Congressional consent is not required where joint state activity does not affect federal authority. *See Seattle Master Builders Ass'n v Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F2d 1359 (9th Cir. 1986). In *Seattle Master Builders*, however, the Circuit Court emphasized the fact that the Compact Clause was only implicated where state political power impeded or infringed upon the supremacy of the United States or the federal structure. Id., at 1363, citing *U.S. Steel Corp. v Multistate Tax Commission, supra*, 434 U.S. 452 (1978).

This Court notes that the federal line of thought parallels the New York State Courts' decisions which look at the impact of a regulation in terms of internal or external conduct. In *Agesen v Catherwood*, 26 NY2d 521, 525 (1970), the Court of Appeals held:

> The distinction between the internal operations and conduct affecting external relations of the Authority is crucial in charting the areas permitting unilateral and requiring bilateral State action. New York and New Jersey have each undoubted power to regulate the external conduct of the Authority, and it may hardly be gainsaid that the Authority, albeit bistate, is subject to New York's laws involving health and safety, insofar as its activities may externally affect the public.

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 §§ 200, 240, and 241, simply because it was created by an interstate compact. This Court finds the reasoning 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 numerous opportunities, including several arising from this Court, to do so in the near future.

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

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

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 §§ 200, 240, and 241, 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 April 9, 2019 at 2:15 p.m.; and it is further

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

12/5/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE