

Lojano v Lake Grove Home & Land Co., LLC

2006 NY Slip Op 30603(U)

January 14, 2006

Supreme Court, Queens County

Docket Number: 15969/2006

Judge: Denis J. Butler

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 12

EDWIN GIOVANNY LOJANO X

INDEX NO. 15969/2006

MOTION SEQ. NO. 1

- against -

BY: BUTLER, J.

LAKE GROVE HOME & LAND COMPANY,
LLC

DATED: JANUARY 14, 2010

X

Defendant Lake Grove Home & Land Company, LLC has moved for (1) summary judgment dismissing the plaintiff's causes of action for common-law negligence and for violation of Labor Law § 200 and (2) summary judgment dismissing that part of the complaint which seeks damages for past and future lost earnings.

Plaintiff Edwin Giovanni Lojano, born in Ecuador, entered the United States illegally at the age of seventeen. According to the plaintiff, he met with "Wayne," from All County Services, Inc., a prospective employer, who asked him if he had a Social Security number. Lojano replied that he did not have a number, and Wayne allegedly told him to obtain one. Lojano returned to Wayne within two days with a fraudulent Social Security card that he had procured "on the streets." Lojano showed the card to Wayne who gave him permission to work without further inquiry. Debbie Maritato, All County's bookkeeper, swears that her company would had refused to hire Lojano if he had not supplied a Social

Security number and had not falsely informed the company that he had permission to work in the United States. On January 5, 2006, plaintiff Lojano sustained personal injury when he fell at a construction site owned by defendant Lake Grove. As Lojano nailed wood at the top of an elevator shaft, a plank gave way, causing him to fall twenty-five to thirty feet to the ground. Lojano had received supervision on the job site only from All County. This action for personal injury brought against defendant Lake Grove ensued on or about July 21, 2006. The plaintiff seeks to recover damages which include \$24,000 in past earnings and \$830,000 in future earnings.

The court notes initially that any failure of the plaintiff, who does not read English, to submit an affidavit in Spanish together with a translator's affidavit (*see*, CPLR 2101[b]) instead of the affidavit in English which he signed after translation to him will be disregarded. The affidavit is short and simple, and the chances of a mistranslation are very low. CPLR 2001 provides in relevant part: "At any stage of an action, ... if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded." (*See, e.g., Volpe v Canfield*, 237 AD2d 282.)

The plaintiff consented to the dismissal of the causes of action for common-law negligence and violation of Labor Law § 200. (*See, Kuriloff* affirmation dated May 27, 2009, par. 3.) The court notes that where a party does not exercise supervision and control of the work performed by a plaintiff laborer, there is no basis for imposing liability

either pursuant to common-law negligence or pursuant to Labor Law § 200. (*See, Comes v New York State Electric and Gas Corp.*, 82 NY2d 876; *Lombardi v Stout*, 80 NY2d 290.)

Accordingly, that branch of the motion by defendant Lake Grove which is for summary judgment dismissing the plaintiff's causes of action for common-law negligence and for violation Labor Law § 200 is granted.

Turning to the second branch of the motion, "the 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.) Defendant Lake Grove successfully carried this burden.

The Immigration Reform and Control Act of 1986 (8 USC § 1324a *et seq.*) (IRCA) makes it illegal to employ aliens who are not authorized to work in the United States. (*See*, 8 USC § 1324a[a][1]; *Hoffman Plastic Compounds, Inc. v N.L.R.B.*, 535 US 137; *Balbuena v IDR Realty LLC*, 6 NY3d 338; *Coque v Wildflower Estates Developers, Inc.*, 58 AD3d 44.) An alien who obtains employment through the submission of fraudulent documents to an employer commits a criminal act. (*See*, IRCA § 1324c(a); *Hoffman Plastic Compounds, Inc. v N.L.R.B.*, *supra*; *Balbuena v IDR Realty LLC*, *supra*.) IRCA mandates that an employer, before hiring an individual, must check that the person is not an unauthorized alien by examining specified documents that prove the person's identity and eligibility for employment in the United States, and the employer must thereafter complete

Form I-9 to record the required inquiry. (*See*, 8 USC § 1324a [b]; *Coque v Wildflower Estates Developers, Inc., supra.*)

The prospective employee's presentation of false documents is a factor, though not the only factor, that must be taken into account in determining whether a claim for lost wages is barred by federal immigration policy. (*See, Coque v Wildflower Estates Developers, Inc., supra.*) Another factor which must be taken into account is whether the presentation of false documents actually induced the employer to make the hire. (*See, Coque v Wildflower Estates Developers, Inc., supra; Macedo v J.D. Posillico, Inc., ___ AD3d ___, ___ NYS2d ___, 2009 WL 4672171.*) In the case at bar, defendant Lake Grove submitted prima facie proof that plaintiff Lojano obtained employment through the presentation of a forged Social Security card and that he would not have been hired but for that deception.

The burden on this motion shifted to the plaintiff to show that there is an issue of fact which must be tried. (*See, Alvarez v Prospect Hospital, supra.*) Plaintiff Lojano successfully carried this burden. In *Coque v Wildflower Estates Developers, Inc. (supra)*, the Appellate Division, Second Department, expressly held that "a worker's submission of false documentation is sufficient to bar recovery of damages for lost wages only where that conduct actually induces the employer to hire the worker, and that this circumstance is not present where the employer knew or should have known of the worker's undocumented status or failed to verify the worker's eligibility for employment as required by federal legislation." (*Coque v Wildflower Estates Developers, Inc., supra*, 46; *see, Macedo v J.D.*

Posillico, Inc., supra.) The appellate court stated further: “If the employer hires the employee with knowledge of the employee’s undocumented status, or without verifying the employee’s eligibility for employment, the employer has not been induced by the false document to hire the employee and, thus, the employee has not ‘obtained employment by’ submitting the false document.” (*Coque v Wildflower Estates Developers, Inc., supra*, 53.) In the case at bar, plaintiff Lojano offered proof that he returned to All County with a Social Security card within a mere two days after informing Wayne that he had no Social Security number and that, moreover, All County failed to complete the I-9 Form. Under these circumstances, there is an issue of fact concerning whether plaintiff Lojano’s presentation of a forged Social Security card actually induced defendant All County to hire him.

Accordingly, that branch of the motion by defendant Lake Grove which is for summary judgment dismissing that part of the complaint which seeks damages for past and future lost earnings is denied

Short form order signed herewith.

J.S.C.