

**Tanzella v Ferreira**

2007 NY Slip Op 30146(U)

February 14, 2007

Supreme Court, Suffolk County

Docket Number: 0021855

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:  
Hon. PETER FOX COHALAN

-----x  
DAVID TANZELLA,

Plaintiff,

-against-

CARLOS J. FERREIRA d/b/a FERREIRA'S PAINTING  
& CONTRACTING,

Defendant.  
-----x

CALENDAR DATE: August 9, 2006  
MNEMONIC: MG; C/Disp.

PLTF'S/PET'S ATTORNEY:

Grey & Grey  
360 Main St.  
Farmingdale, NY 11735

DEFT'S/RESP ATTORNEY:

Nitkewicz & McMahon  
356 Veterans Memorial Highway  
Commack, NY 11725

Upon the following papers numbered 1 to 35 read on this motion for summary judgment ;  
Notice of Motion/Order to Show Cause and supporting papers 1-18 ; Notice of Cross-Motion and  
supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 19-27 ; Replying Affidavits  
and supporting papers 28-31 ; Other 32-35 ; and after hearing counsel in support of and opposed  
to the motion it is,

**ORDERED** that this motion by Carlos J. Ferreira d/b/a Ferreira's Painting &  
Contracting, (hereinafter Ferreira) for summary judgment and dismissal of the plaintiff' David  
Tanzella's complaint alleging Labor Law violations pursuant to CPLR §3212 is hereby granted  
in its entirety and the plaintiff's action is dismissed.

Plaintiff instituted this action for personal injuries allegedly sustained on  
November 20, 2001 in a construction accident at residential premises located at 25 White  
Birch Circle in Miller Place, Suffolk County on Long Island, New York. Plaintiff claims that he  
was second (2<sup>nd</sup>) man assisting Cory Conley of Cory Conley Carpentry (hereinafter Conley) in  
installing a new roof at the residence when he fell from the roof while carrying a bundle of  
shingles. The plaintiff sustained injuries including a shattered heel in his left foot. The plaintiff  
claims that Conley was a friend and asked for his assistance in installing the roof at the  
premises involved and the plaintiff alleges that the defendant was the plaintiff's employer.  
The defendant claims he was not the plaintiff's employer, that he is a painting contractor, and  
merely asked a friend, Conley, if he could do a roofing job at his sister-in-law's residence.  
Conley hired the plaintiff and the plaintiff was employed by him. After a Worker's  
Compensation hearing Administrative Law Judge Joel Joseph found that Conley was the  
plaintiff's employer and the plaintiff was not the defendant's employee.

The defendant now moves for summary judgment and dismissal of the plaintiff's  
complaint pursuant to CPLR §3212 arguing that he is not the plaintiff's employer, that he did  
not supervise, direct or otherwise control the manner, operation or work on his sister-in-law's  
roof and merely informed his friend Conley, that his sister-in-law who was his next door

neighbor needed a new roof and asked Conley if he would be willing to do the job. The plaintiff opposes the motion claiming there are issues of fact about the plaintiff's work status with the defendant, notwithstanding the Administrative Law Judge's determination after a Worker's Compensation hearing that the plaintiff was not an employee of the defendant.

For the following reasons, the defendant's motion for summary judgment and dismissal of the plaintiff's complaint pursuant to CPLR §3212 is hereby granted in its entirety and the plaintiff's action is dismissed.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. Elzer v. Nassau County, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); Steven v. Parker, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); Gaeta v. New York News, Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in Sillman v. Twentieth Century Fox, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (DiMenna & Sons v. City of New York, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' (Barnett v. Jacobs, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, Thomas v. Drake, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. S.J. Capelin Assoc., v. Globe, 34 NY2d 338, 357 NYS2d 478 (1974).

However, while summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [VanNoy v. Corinth Central School, District, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. DiSabato v. Soffee, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); Usefof v. Yamali, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980).

Here, in the case at bar, defendant points to the proof adduced at the Worker's Compensation hearing that he is a painting contractor, not a roofer, that Conley was a friend in the roofing business and he asked Conley to do work on his neighbor's (she was also his sister-in-law) roof. He did not hire or know the plaintiff, he did not direct or supervise the work and the materials provided were paid for and supplied by the homeowner, albeit Ferreira may have placed them outside the residence for Conley. The defendant also asserts that Conley provided all the equipment including the roofing gun, air compressor, ladders and roof planks to do the job and the defendant was not a contractor or agent for the work requested by his sister-in-law. The plaintiff admits he was hired by Conley as a helper to assist in the roofing work and that he was paid by Conley.

The evidence at the hearing from the witnesses was compelling enough that the Administrative Law Judge found that Conley, who was an uninsured contractor, was the plaintiff's employer and that Ferreira was not an employer or general contractor of Conley or his company. Judge Joel Joseph found that the defendant did not have a special or general contractor relationship with either the plaintiff Conley or Cory Conley Carpentry and the Judge rendered a decision discharging and removing the defendant based upon the non-existence of an employer-employee relationship. In *Lonior v. Zucker*, 299 AD2d 320, 749 NYS2d 86 (2<sup>nd</sup> Dept. 2002) the court on the issue of the binding effect of a Worker's Compensation determination of a employer-employee relationship stated:

“... the determination of whether an employer-employee relationship exists is conclusive and binding on the courts.” citing to *O'Rourke v. Long*, 41 NY2d 219, 391 NYS2d 553 (1976).

The court, upon review of the applicable papers and proceedings before the Worker's Compensation Judge, finds the Worker's Compensation hearing decision that the plaintiff was not an employee of the defendant binding and thus principles of res judicata and issue preclusion apply. The factual issue determination at the Worker's Compensation hearing that plaintiff is not an employee of defendant precludes the plaintiff from arguing in opposition to the defendant's motion for summary disposition that the status of the plaintiff's employment with the defendant is a factual issue so as to warrant denial of the motion. *Decavallas v. Pappantoniou*, 300 AD2d 617, 752 NYS2d 712 (2<sup>nd</sup> Dept. 2002); *Calhoun v. Big Apple Wrecking Corp.*, 162 AD2d 574, 557 NYS2d 90 (2<sup>nd</sup> Dept. 1990).

Finally, the plaintiff's failure to produce any evidence to raise an issue of fact is fatal to his argument that summary disposition should be denied to the defendant. While the plaintiff suggests that further discovery and/or depositions of the parties may produce evidence of a factual issue, the plaintiff ignores the pleadings and production of documents as well as the testimony from the parties involved at the Worker's Compensation hearing. A party opposing a summary judgment motion may not complain of a lack of discovery without

demonstrating some evidentiary basis or fact pattern to suggest that additional discovery might lead to some relevant evidence or facts so as to defeat the motion. **Lambert v. Bracco**, 18 AD3d 619, 795 NYS2d 662 (2<sup>nd</sup> Dept. 2005); **Romeo v. City of New York**, 261 AD2d 379, 689 NYS2d 517 (2<sup>nd</sup> Dept. 1999).

As has been stated so many times in the past, mere conclusions, expressions of hope or **unsubstantiated** allegations or assertions are insufficient to defeat a party's request for summary disposition. V. **Savino Oil and Heating Co. Inc. v. Rana Management Corp.**, 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); **Dabney v. Ayre**, 87 AD2d 957, 451 NYS2d 218 (3rd Dept. 1982). See, also, **Marine Midland Bank N.A. v. Idar Gem Distributors, Inc.**, 133 AD2d 525, 519 NYS2d 898 (4th Dept. 1987).

As the Court noted in **Andre v. Pomeroy**, 36 NY2d 131, 362 NYS2d 131, 133 (1974):


"[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (**Millerton Agway Co-op v. Briarcliff Farms**, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

Accordingly, the defendant, Carlos J. Ferreira d/b/a Ferreira's Painting & Contracting's motion for summary judgment and dismissal of the plaintiff's complaint alleging Labor Law violations and negligence pursuant to CPLR §3212 is hereby granted in its entirety and the plaintiff's action is dismissed.

Settle Judgment.

The foregoing constitutes the decision of the Court.

Dated: February 14, 2007



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J.S.C.