

Torres v Amci Ltd.
2007 NY Slip Op 30533(U)
March 26, 2007
Supreme Court, New York County
Docket Number: 0102679/2005
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **EMILY JANE GOODMAN**

PART 17

Index Number : 102679/2005

TORRES, MANUEL

INDEX NO. _____

vs

AMCI

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied*

as failed

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
APR 2 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/26/07

[Signature]

J.S.C.
EMILY JANE GOODMAN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I. A. S. PART 17

-----X

MATTHEW TORRES,

Plaintiff,

-against-

Index No 102679/05

AMCI LIMITED,

Defendant.

-----X

EMILY JANE GOODMAN, J.S.C.:

FILED
APR 24 2005
NEW YORK COUNTY CLERK
OFFICE

In this personal injury action, defendant AMCI Limited (AMCI) moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing the complaint on the grounds that the parties had a “special employment” relationship which, under the Workers’ Compensation Law, precludes plaintiff from seeking damages from his special employer (defendant’s fourth affirmative defense).

Plaintiff Manuel Torres (Torres) commenced this action to recover damages for injuries he sustained on March 25, 2003, while fixing a machine on defendants’ premises on the second floor of a building located at 33-20 48th Avenue, Long Island City, New York (the Building). At the time of the accident, and for at least the prior seven years, plaintiff was employed by non-party AMPF, which is a separate corporate entity operating out of both the first floor and half of the second floor of the Building. Plaintiff’s supervisor at AMPF was Luis Lorenzotti (Lorenzotti), and his job assignment was to paint picture frames.

On the day of the accident, Lorenzotti sent Torres to assist in the repair of a paint fumes removal machine at AMCI. Although Torres told Lorenzotti that he was not qualified to do this type of repair, he was, apparently, ordered to go to AMCI or risk losing his job. Concerned for his job, Torres went over to AMCI's section of the building and began to work with AMCI employees Juan Cruz (Cruz) and Daniel Ruiz (Ruiz) on the subject motor.

After about two hours of trying to fix the motor, Ruiz, accidentally, turned on the machine while Torres's left hand was still inside. As a result, Torres sustained partial amputations of his left third and fourth fingertips, and was taken to St. Johns Queens Catholic Medical Center, in Elmhurst, Queens, where he underwent a series of operations on his left hand.

As a result, Torres filed for Workers' Compensation (WC) benefits and a WC hearing was held on December 27, 2004. The Notice of Decision of the State of New York - Workers' Compensation Board (WC Notice) awarded Torres disability payments over a period of 24.8 weeks, running from July 6, 2004 to December 27, 2004, at a weekly rate of \$125.00, for a sum total of \$3,100.00. The WC Notice listed only AMPF as plaintiff's employer, and neither AMCI nor any other entities were listed as additional parties.

By service of a summons and complaint, dated February 23, 2005, Torres commenced the instant action charging AMCI with negligence, carelessness, and recklessness in its ownership, operation, and supervision of the machine. Issue was joined by service of AMCI's answer, discovery ensued, and although a note of issue has not been filed, AMCI served the instant motion for an order dismissing the complaint on the ground that the action is barred by the WC Law.

AMCI's position is that, as an employee who was injured in the course of his employment as a result of the actions of a AMCI employee (Ruiz), plaintiff's exclusive remedy is to file for WC benefits (Workers' Compensation Law § 11; Billy v Consol. Mach. Tool Corp., 51 NY2d 152, 156, rearg denied 52 NY2d 829 [1980]; Cronin v Perry, 244 AD2d 448, 449 [2nd Dept 1997]). Defendant also asserts that at the time of his accident, plaintiff was a "special employee" of AMCI, and as such, his receipt of WC benefits from his general employer [AMPF] precludes him from bringing a tort action against either his special employer or his general employer (Workers' Compensation Law § 29, subd 6; Thompson v Grumman Aerospace Corp., 78 NY2d 553 [1991]).

Neither party disputes the fact that Torres, a general employee for AMPF, was sent to help fix AMCI's broken machine over his objection. Plaintiff, however, sharply disputes AMCI's claim that a special employee/employer relationship existed between them at the time of the accident. It is well settled law in New York that:

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. A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. 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

(Thompson v Grumman Aerospace Corp., 78 NY2d at 557 [internal citations omitted]).

While the courts have not recognized any one factor as controlling when called upon to determine the existence of a special employment relationship, the factors they have deemed relevant include "who controls and directs the manner, details and ultimate result of the employee's work" (id. at 558).

To this end, AMCI argues that both AMCI and AMPF belong to the same owner, have the same president and vice president, and operate together. AMCI offers the deposition testimony of Lorenzotti who, in response to questions posed, stated that he is a general manager for AMCI, a vice-president for both AMCI and AMPF, and that, although the companies have different employees, he has the authority to move the employees between them, and that he did so, as needed, on a regular basis. AMCI further claims that when Torres was sent to work on defendant's machine, AMPF relinquished control, and AMCI took control. More specifically, on the morning of March 25, 2003, AMPF supervisor Lorenzotti relinquished control of Torres to AMCI supervisor Lorenzotti.

In opposition, plaintiff argues that AMCI has mis-characterized the relationship between the two companies and has mis-characterized Lorenzotti's authority in order to thwart plaintiff's right to recovery. Torres submits the WC Notice which lists AMPF as his employer and fails to list AMCI as either an employer, or as an additional party. He also offers Lorenzotti's testimony as evidence that AMPF and AMCI maintain separate offices, have separate payrolls, and have different sets of employees. Torres submits a copy of his own pay stub showing that he was on AMPF's payroll, and a copy of what is purported to be Ruiz' pay stub¹ showing that he was on AMCI's payroll. He maintains that, in all the years he worked for AMPF, he had never before been sent to do any work for AMCI, and that at no time while he was working on the machine on March 25, 2003, did he believe himself to be under the direction or control of AMCI.

The central issue on this summary judgment motion is whether a special employment relationship existed between the parties on March 25, 2003. The deposition testimony of Torres and Lorenzotti conflict as to "who control[led] and direct[ed] the manner, details and ultimate result" of Torres's work on the date of the accident. The fact that both AMCI and AMPF belong to the same owner, president and vice president is irrelevant to the central issue as to whether Torres' employer, AMPF, transferred control

¹Torres submits a sworn affidavit stating, in relevant part, that "[i]n 2003, Daniel Ruiz did give me one of his original paystubs. It did not include the bottom portion that would have included his personal information."

over plaintiff to AMCI (see Dzieran v 1800 Boston Post Rd., 25 AD3d 336 [1st Dept 2006] [although two companies were managed by the same individual no issue of fact was presented as to special employment because there was no evidence that plaintiff's employer transferred control over plaintiff to the other company raising the defense]). It is the "party with power to control rather than the party temporarily designating the place of work, the details and time of the work is the party who is the employer" (see Bird v NYS Thurway Auth., 8 AD2d 495, 498 [4th Dept 1959]). Moreover, the requisite proof of assumption of control by AMCI is lacking. The only evidence submitted by movant as to the relationship between AMCI and AMPF is Lorenzotti's own deposition testimony, and a review of his testimony reveals that the lines of demarcation between the two companies is blurry at best. Further, there is an issue of fact as to whether Torres was aware of, or impliedly consented to, the employment relationship with AMCI (see Murray v Union Railway Co. of N.Y.C., 229 NY 110 [1920]; Bernier v Gabriel Contr., 6 AD3d 369 [2d Dept 2004]; Shelly v Flow Intl. Corp., 283 AD2d 958 [4th Dept 2001]; Gallo v Higgins Erections & Haulers, Inc., 45 AD2d 790 [1974]).

Summary judgment should only be granted where there are no triable issues of material fact (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). As noted above, general employment is presumed to continue; the presumption is only overcome upon a clear demonstration of surrender of control by the general employer (AMPF) and assumption of control by the special employer (AMCI) (see Thompson v


Grumman Corp., supra). AMCI has failed to demonstrate entitlement to judgment as a matter of law as its proffered evidence, consisting largely of Lorenzotti's deposition testimony, is contradicted by Torres's deposition testimony. The conflicting deposition testimony presents issues of credibility and "[o]n a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue" (S.J. Capelin Assoc., Inc., v Globe Mfg. Corp., 34 NY2d 338, 341 [1974]). The question which remains unresolved is whether Torres was in the special employ of AMCI on March 25, 2003, a question which can only be resolved upon a determination as to who, or which entity, controlled and directed Torres's work while he endeavored, along with Cruz and Ruiz, to fix AMCI's machine.

Accordingly, it is

ORDERED that the motion by defendant for an order granting summary judgment on its fourth affirmative defense and dismissing the complaint, is denied.

This constitutes the Decision and Order of the Court.

Dated: March 26, 2007

FILED
ENTER:
APR 17 2007
J.S.C.

EMILY JANE GOODMAN