

Romero v West 70th St. Assoc.

2007 NY Slip Op 33991(U)

December 7, 2007

Supreme Court, New York County

Docket Number: 0106171/2005

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Justice

Index Number : 106171/2005
ROMERO, WILFREDO
vs
WEST 70TH ST. ASSOCIATES
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 9/21/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

This motion to/for _____

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

PAPERS NUMBERED
1-3
4-6
7-10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED
DEC 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12/7/07


JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

WILFREDO ROMERO,

Plaintiff,

Index No. 106171/05

-against-

DECISION and ORDER

WEST 70TH ST. ASSOCIATES,
MARIN MANAGEMENT COMPANY,

Defendants.

-----X

Solomon, J.:

In this personal injury action, plaintiff Wilfredo Romero (Romero) sues for injuries sustained on January 4, 2004, when he tripped and fell while disposing of trash in connection with superintendent duties at 55 West 70th Street (Premises). Defendant West 70th St. Associates (West 70th) owns the Premises, and defendant Marin Management Company (Marin) manages the Premises. The four-count complaint asserts against each defendant one claim for negligence and one claim for nuisance.

Defendants now move for summary judgment dismissing the complaint as barred under New York's Workers' Compensation Law (WCL). Plaintiff cross-moves for summary judgment striking defendants' second affirmative defense, which claims that this action is barred by the exclusivity provisions of the WCL.

Discussion

West 70th argues that the exclusivity provisions of the WCL bar Romero from bringing this action because he has already

received workers' compensation benefits. Marin argues that the action is barred under the WCL because Marin is a special employer shielded from an action at law. In short, defendants' argument is that Romero's exclusive remedy is the receipt of worker's compensation benefits, which he has already received. Romero counters that he was neither a general nor special employee of West 70th, arguing that Marin was his sole employer.

Section 10 of the WCL requires employers to obtain worker's compensation benefits for their employees. Under section 11, "[t]he liability of an employer prescribed by [Section 10] shall be exclusive and in place of any other liability whatsoever, to such employee ... at common law or otherwise, on account of such injury or death" See also WCL § 29 (6) (the right to workers' compensation benefits "shall be the exclusive remedy to an employee"); *Matter of Doca v Federal Stevedoring Co.*, 284 App Div 46, 49 (3d Dept), *affd* 308 NY 44 (1954) ("purpose of [WCL] is to provide an exclusive remedy for all accidental injuries suffered by employees arising out of and in the course of employment in place of any other liability whatsoever on the part of the employer").

Here, defendants submit Romero's Form W-2s for the years 2001 through 2004, identifying West 70th as his employer. Defendants submit an "Information Page Renewal Policy" (policy number M 1059 630-2), issued by the State Insurance Fund,

identifying West 70th as an insured and the Premises as an insured location for the policy period October 31, 2003 through October 31, 2004. Marin is not listed as an insured on this policy.

Defendants also submit a Form C-2 Employer's Report of Work-Related Accident/Occupational Disease, dated January 5, 2004, the day after Romero's injury. This form identifies West 70th as Romero's employer and the above-referenced worker's compensation insurance policy. By letter dated January 16, 2004, the State Insurance Fund acknowledged receipt of the Form C-2 and assigned carrier case number 48949564-381. Defendants also submit an Employer's Statement of Wage Earnings and Employer's Report of Injured Employee's Change in Employment Status, both of which identify West 70th as Romero's employer and refer to the above-referenced carrier case number.

Romero submits two "Notice of Decision" documents issued by New York's Workers' Compensation Board. These decisions, dated August 12 and December 30, 2005, authorized Romero's medical treatment and awarded him workers' compensation benefits from the State Insurance Fund, from February 2004 to December 2005, under the above-referenced carrier case number, which is associated with the policy covering West 70th (WCB Decisions). In addition, defendants represent that Romero has been receiving these benefits under West 70th's policy for the

past three and a half years, and Romero testified that he has been receiving these benefits. Defendants also submit evidence that West 70th provided disability coverage for one male employee at the time of Romero's injury, and they represent that Romero was the only employee on the Premises.

As stated above, the policy of West 70th does not name Marin as an insured. Rather, defendants submit evidence demonstrating that Marin had its own insurance policy at the time of Romero's injury, evidenced by defendants' submission of an "Information Page Renewal Policy" for policy number L 1038 263-8. None of the evidence submitted by the parties indicates that Romero received workers' compensation benefits under a policy issued by Marin.

This evidence makes a prima facie showing that Romero received his wages from West 70th. It also demonstrates that Romero has been receiving workers' compensation benefits under the West 70th workers' compensation policy since February 2004. Thus, defendants have made a prima facie showing that Romero was a general employee of West 70th at the time of his injury. See *Sforza v Verizon Communications, Inc.*, 8 Misc 3d 1018(A), 2005 NY Slip Op 51183(U) (Sup Ct, NY County 2005) (employment found as a matter of law where employer provided workers' compensation benefits to plaintiff after the accident and issued W-2s to plaintiff), citing *Sorrentino v Ronbet Co.*, 244 AD2d 262 (1st

Dept 1997).

At the heart of Romero's counterargument is his assertion that Marin was his sole employer, evidenced by the fact that Marin hired and fired Romero, supervised and directed his work, paid him, issued his W-2s and controlled the process of obtaining worker's compensation policies. However, these facts do not establish that Marin was Romero's general employer. They are relevant, however, to what the Court of Appeals considers to be "a significant and weighty feature" in deciding whether a special employment relationship exists; specifically, that Marin "control[led] and direct[ed] the manner, details and ultimate result of the employee's work." *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 558 (1991).

In *Erazo v 136 East Management, Inc.* (302 AD2d 282 [1st Dept 2003]), a building handyman sued the building's owner and management company for personal injuries sustained while working at the building. The trial court granted defendants' motion for summary judgment dismissal against the management company as barred by the WCL, because the management company was the plaintiff's special employer. On appeal, the plaintiff conceded that he should not have sued the building owner, because he was its employee. With respect to the management company, the plaintiff argued that his duties were not so directed or controlled by the management company to become its special

employee. The First Department affirmed, reasoning that "the management company, through an on-site agent, exercised virtually complete and exclusive supervisory control over plaintiff and his immediate supervisor, the building's superintendent, also a general employee of the building owner, including the right to hire and fire." *Id.* at 282. The Court determined that, "[o]ther than paying plaintiff's wages, which plaintiff picked up from the management company, it does not appear that the building owner exercised any supervision or control over plaintiff and the superintendent." *Id.*

This is precisely what occurred in the instant action. As discussed above, West 70th merely paid Romero's wages, and Romero received workers' compensation benefits under the policy covering West 70th. Having established that West 70th was the general employer, Romero's argument that Marin directed and controlled his work, and the documentary evidence submitted in support of this argument, establish that Marin was a special employer. *Id.* Accordingly, Romero's claims against Marin also are barred under the WCL. See e.g. *Ugijanin v 2 West 45th Street Joint Venture*, 43 AD3d 911, 912 (2d Dept 2007) ("[w]hen an employee elects to receive workers' compensation benefits from his general employer, a special employer is shielded from an action at law commenced by the employee"), citing WCL § 29 (6).

None of the cases cited by Romero, or his documentary

evidence, warrant a different result. In addition, the court notes Romero's additional argument that the Workers' Compensation Board determined that Marin was his employer, because the WCB Decisions list his employer as "Marin Management Corp." *Kelner Aff.*, Ex. F. However, "[i]t is of no consequence that the management company was listed as plaintiff's employer in the files of the Workers' Compensation Board, where the issue of the identity of plaintiff's employer was not a subject of dispute before the Board." *Sorrentino v Ronbet Co.*, 244 AD2d 262, 262 (1st Dept 1997). Here, there is no evidence that the issue of whether Marin or West 70th was Romero's employer was ever litigated before the Workers' Compensation Board. Rather, based upon the evidence before the court, it appears that Marin was listed as Romero's employer because its name and office address are listed as the "c/o" mailing address for the insurance policy of West 70th, even though Marin is not identified as an insured under that policy.

Accordingly, it hereby is

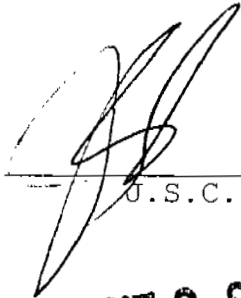
ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 7, 2007

ENTER:



J.S.C.

JANE S. SOLOMON

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