

Blackman v Hit Factory

2007 NY Slip Op 34082(U)

December 3, 2007

Supreme Court, New York County

Docket Number: 0101743/2002

Judge: Marcy S. Friedman

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: MARCY S. FRIEDMAN

PART 57

Index Number : 101743/2002

BLACKMAN, NIKIYAH S.

vs

HIT FACTORY

Sequence Number : 007

SUMMARY JUDGMENT

NO. _____

N DATE _____

V SEQ. NO. _____

V CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 1A

2

3

M1, M2, M3

Cross-Motion: Memos of Law
 Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 12-3-07

M S Friedman
MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

NIKIYAH S. BLACKMAN,

Index No.: 101743/02

Plaintiff(s),

against

THE HIT FACTORY, et al.,

Defendant(s)

DECISION/ORDER

FILED FOR ENTRY IN THE COURT CLERK'S OFFICE. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Office (Room 141B).
This judgment has not been entered by the Court Clerk and notice of entry cannot be served based on this filing.

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this action, plaintiff sued defendants to recover damages for injuries allegedly sustained as a result of employment discrimination, sexual harassment, and assault. In October 2004, the parties reached agreement on the terms of a settlement. However, plaintiff did not sign the settlement agreement because Chubb Insurance Company ("Chubb"), the workers' compensation insurance carrier for defendant The Hit Factory, asserted a lien against the settlement proceeds. Plaintiff ultimately commenced an interpleader action for a determination as to Chubb's rights. Plaintiff now moves for summary judgment seeking a declaration that Chubb is not entitled to a lien on the settlement proceeds. Only Chubb opposes the motion.

Pursuant to Workers' Compensation Law § 29(1), an injured employee has the right to bring a third-party action while receiving workers' compensation benefits. Section 29(1) provides, in pertinent part, that "[i]f an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ * * * [the] insurance carrier liable for the payment of such compensation * * * shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise." "The

purpose of the lien provision is to allow injured employees to collect workers' compensation benefits immediately after the injury, while at the same time providing a mechanism for averting double recovery in the event of a subsequent recovery from a third-party tortfeasor." (Turner v City of Buffalo, 41 F3d 57, 60 [2d Cir 1994][citing Kelly v State Ins. Fund, 60 NY2d 131 [1983].)

"Contrary to the carrier's position, the Workers' Compensation Law does not broadly authorize liens and offsets to be applied against 'all' or 'any' recoveries from others without regard for their source. Rather, Workers' Compensation Law § 29(4) specifically authorizes application of the lien * * * only against recoveries from the third-party tortfeasors who are responsible for the claimant's injuries." (Matter of Shutter v Philips Display Components Co., 90 NY2d 703, 708 [1997].) "Inasmuch as § 29(1) explicitly limits its application to those 'not in the same employ,' the statute articulates a clear intent to exclude employers." (Turner, 41 F3d at 61.)

The complaint in the instant action alleged sexual harassment and assault by James Porte, plaintiff's supervisor, as well as retaliatory discrimination by plaintiff's employer, The Hit Factory, and Troy Germano, the chief executive officer of The Hit Factory. Plaintiff was awarded workers' compensation benefits for work-related injuries resulting from the sexual harassment and assault she experienced while employed at The Hit Factory, and also commenced the instant action. It is essentially undisputed that plaintiff's allegations of sexual harassment and assault constitute intentional torts, entitling her to bring an action against her employer. (See Matter of Jackson v Richman & Co., 15 NY2d 877 [1965]; Randall v Tod-Nik Audiology, Inc., 270 AD2d 38 [1st Dept 2000]; Spoon v American Agriculturalist, Inc., 120 AD2d 857 [3d Dept

1986].) The only issue here, then, is whether the instant action is a third-party action subject to the lien provisions of Workers' Compensation Law § 29(1).

The court finds that this is not a third-party action for purposes of Workers' Compensation Law § 29. Plaintiff and defendant Porte were both in the employ of The Hit Factory at the time that the harassment and assault occurred and were therefore in the "same employ." (See Workers' Compensation Law § 29(1).) Further, defendant Germano, against whom there are *direct claims*, was an officer of the company. Under analogous circumstances, where the alleged intentional torts were committed by employees in high level positions, the Court of Appeals has held that the action was not a third-party action under Workers' Compensation Law § 29. (See Matter of Jackson, 15 NY2d at 878. See also Randall, 270 AD2d at 39.)

Nor does the more recent decision in Hanford v Plaza Packaging Corp. (2 NY3d 348 [2004]) lead to a different conclusion. In Hanford, the court found that an employee who received workers' compensation benefits from her employer was not barred by the exclusivity provision of the Workers' Compensation Law from suing a coemployee based on an intentional tort, where the coemployee's conduct arose from purely personal motives and was not in furtherance of the employer's business. To the extent that Chubb relies on a footnote in Hanford which states that plaintiff's recovery from the coemployee "may be subject to recoupment by the workers' compensation carrier, as with any recovery by a workers' compensation claimant against a third party" (id. at 351, FN 3), the note is dictum. This dictum is consistent with other authority which holds that a workers' compensation carrier is entitled to a credit for the recovery received by the plaintiff from a coemployee for tortiously caused injury. (See Matter of Petterson

v Daystrom Corp., 17 NY2d 32 [1966]; Matter of Berenberg v Park Memorial Chapel, 286 AD 167 [3d Dept 1955].¹ Significantly, this authority is not applicable in the instant case because the settlement was not to be paid by the coemployee or a party not related to the employer, but rather was to be paid by the employer itself. Here, it is undisputed that plaintiff's employer, The Hit Factory, not only actively participated in settling the discrimination complaint, it agreed to make payments to plaintiff. It also subsequently sought to enforce the terms of the settlement agreement.

To the extent that there is case law which holds that an employee may not both accept workers' compensation benefits and then sue an employer for intentional tort and receive a separate recovery (see e.g. Werner v State of New York, 53 NY2d 346 [1981]), defendants are not entitled to the benefit of this case law at this stage of the proceedings. This case presents an unusual situation because defendants did not, at the time when the question of entitlement to a lien should have been raised, pursue the issue. Although defendants raised the issue of plaintiff's receipt of workers' compensation benefits as a bar to a suit against her employer in a motion in the underlying action, they chose to settle the case and withdraw the motion notwithstanding plaintiff's receipt of benefits. Under these circumstances, defendants are not entitled to a lien.

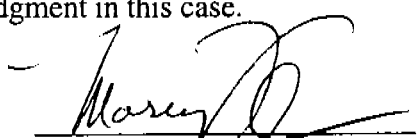
Plaintiff's motion is accordingly granted to the extent that it is

¹The rationale for such authority is that "[w]hile compensation law is designed to ensure that an employee injured in course of employment will be made whole and to protect a coemployee who, acting within the scope of his employment caused the injury, it has not protected the coemployee, even though the injured employee has accepted compensation benefits, when the coemployee was not acting within the scope of his employment at the time he inflicted the injury." (Maines v Cronomer Valley Fire Dept., 50 NY2d 535, 544 [1980][emphasis in original].)

ORDERED, ADJUDGED AND DECLARED that interpleader defendant Chubb Insurance Company is not entitled to a lien on settlement proceeds.

This constitutes the decision, order and judgment in this case.

Dated: New York, New York
December 3, 2007


MARCY FRIEDMAN, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).