

Tineo v Airflow Windows Contr. Corp.
2008 NY Slip Op 30015(U)
January 2, 2008
Supreme Court, New York County
Docket Number: 0100268/2006
Judge: Walter Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB

PART 15

Index Number : 100268/2006
TINEO, RANDOLPH
vs
AIRFLOW WINDOWS CONTRACTING
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 10/28/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____
motion to/for _____

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

PAGES NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

IS DECIDED
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JAN 09 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/2/08

cy
WALTER B. TOLUB

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 15

-----x
RANDOLPH TINEO

Plaintiff,

Index No. 100268/06
Mtn Seq. 002

-against-

AIRFLOW WINDOWS CONTRACTING CORP., GARY
NEBIOL, INDIVIDUALLY and D/B/A AIR FLOW
WINDOWS,

Defendants.
-----x

WALTER B. TOLUB, J.:

This action arises in connection with an injury sustained by plaintiff on August 25, 2005 while interning at a facility operated by defendants (collectively, "Airflow Windows"). Plaintiff obtained his internship through his independent group living home and nonparty, the Rita J. and Stanley H. Kaplan House ("Kaplan House").

Plaintiff began working as an intern for Airflow Windows in the Summer of 2005 in exchange for a \$5.25 per hour stipend which was paid entirely by Kaplan House. According to plaintiff's deposition testimony, plaintiff was told that he was going to be installing windows, painting window frames, and cleaning (Notice of Motion, Exhibit E). Plaintiff further testified that he was not an employee of Airflow Windows (Id.).

Plaintiff was injured on August 25, 2005 while working with a table saw. Although plaintiff's affidavit claims that he

received no instruction as to how to carry out his work (see, Affirmation in Opposition, Exhibit C),¹ at deposition, plaintiff testified that defendant Airflow Windows instructed him how to use the saw (Id.). Plaintiff's deposition transcript, in pertinent part, reads as follows:

Q: Is that the way the gentleman would instruct you to do it? To put your left hand on top of the wood until you got about two or three inches from the blade?

A: Yeah.

Q: And did he tell you that it was at about two or three inches that you were supposed to grab the push stick?

A Yes.

Q: And did he tell you when you were about two or three inches that you should remove your hand?

A: Yes.

Q: Did he tell that you when you were about two or three inches and you removed your hand that the wood would continue going forward?

A: No. The wood had to be pushed in order to go through the blade. How I was doing it the whole day, I would push the wood three inches from the blade and then I would hold it with my left hand so it don't keep sliding up or down and grab the push stick and put it behind and push it. I would remove my hand once I start pushing with the push stick.

Plaintiff commenced this action in January, 2006. By this motion, defendants Airflow Windows Contracting Corp. and Gary

¹ In pertinent part, plaintiff's affidavit reads as follows:
7. On the day of my accident, August 25, 2005, I used a table saw for the first time. The only instruction I received was to push the wood I was cutting towards the blade with a wooden stick.
8. On that date, I received no other training or instructions nor was I ever supervised on using this table saw [...]

Nebiol move for summary judgment and dismissal of all of the claims advanced against them.

Discussion

As with any motion for summary judgment, the role of the court is limited to finding factual issues which would warrant trial (see, Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]; Winegrad v. New York University Medical Center, 64 NY2d 851, 853 [1985]. See also, Barr, Altman, Lipshie and Gerstman; New York Civil Practice Before Trial, §37:91-92). Therefore, unless the opposing party produces evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring trial, summary judgment will be granted.

Defendants argue that they are entitled to summary judgment because although defendants were responsible for directing plaintiff's work, Kaplan House alone was responsible for plaintiff's compensation, i.e., his \$5.25 per hour stipend. Defendants assert that they are therefore a "special employer" and are shielded from litigation by the Workers Compensation Law. Plaintiff, in opposition, asserts that summary judgment should be denied because there are open questions of fact with respect to plaintiff's employment status.

This court disagrees.

As the courts of this State have noted:

"Although a person's categorization as a special employee is usually a question of fact, this is not a per se rule. The determination of a worker's special employment status "may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact" such as "where the undisputed facts establish that the general employer was performing no work for the special employee and did not retain control over the special employee" (*Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557-558, 578 N.Y.S.2d 106, 585 N.E.2d 355).

(*Cruickshank v. Dykes* 1 Misc.3d 53, 55-56, [NY Sup. App. Term, 2003]).

Here, it is clear from the papers submitted by the parties that although Kaplan House paid plaintiff for his work, he was supervised entirely by Airflow Windows. Kaplan House did not provide any instruction to plaintiff, did not give him tools, and did not supervise him on the job. Airflow, who did not pay plaintiff for his services, did. As a matter of law, plaintiff was therefore a special employee of Airflow Windows (*Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553 [1991]; *Fung v. Japanese Airlines Company*, ___ NE2d ___; 2007 WL 4334169 (NY), 2007 Slip Op. 09815 [Court of Appeals, 2007]). As such, under the Workers Compensation Laws, plaintiff is precluded from commencing a negligence action against Airflow Windows. Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/2/08

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HON. WALTER B. TOLUB, J.S.C.

FILED
JAN 09 2008
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