Tate v 222 E. 39th St. Co., LLC

2008 NY Slip Op 32469(U)

September 2, 2008

Supreme Court, New York County

Docket Number: 0101061/2005

Judge: Debra A. James

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SCANNED ON 9/11/2008

[* 1]

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

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

CAVELL TATE,

Plaintiff,

- v -

222 EAST 39TH STREET CO., LLC d/b/a EASTGATE TOWER and NOUVEAU ELEVATOR INDUSTRIES, INC.,

Defendants.

Index No.: 101061/05

Motion Date: 04/08/08

Motion Seq. No.: 03

Motion Cal. No.: 113

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3 - 5

Cross-Motion: ☒ Yes ☐ No

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Upon the foregoing papers,

The court shall deny the motion for summary judgment of defendant 222 East 39 Street Co., LLC (Eastgate).

Eastgate argues that plaintiff's claims against it should be dismissed based upon the Workers' Compensation bar (Workers' Compensation Law §11). Plaintiff opposes the motion and cross-moves for discovery on the grounds that the Workers' Compensation documents currently before the court on this motion set forth Affinia Management Company LLC as plaintiff's employer. Eastgate argues in support of its motion that plaintiff's W-2 forms state

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

that 222 East 39TH Street Co, LLC is plaintiff's employer. Eastgate also submits the affidavit of its Secretary stating that Affinia "is a corporate entity subsumed within 222 East 39th Street Co., LLC and not a separately owned and operated company."

The court agrees with plaintiff that the evidence proffered by the movant is insufficient to establish its entitlement to summary judgment. Plaintiff's W-2 forms are not dispositive on the question of the existence of an employer-employee relationship between plaintiff and movant. See In Re Pilku v 24535 Owners Corporation, 19 AD3d 722 (3d Dept 2005) ("Relevant to the determination [of such existence] are 'the right to control the claimant's work, the method of payment, the right to discharge, the furnishing of equipment and the relative nature of the work'".)

Moreover, the affidavit submitted in support of the motion fails to set forth the corporate relationship between Eastgate and Affinia and Eastgate's attempt to correct this deficiency in its reply papers is impermissible and in any event insufficient. That same affidavit concedes that Affinia and Eastgate are separate corporate entities yet also asserts that "Affinia" is merely a trade name. Defendant fails to establish its claim of alter ego for workers' compensation purposes and it appears that the parties engaged in no discovery on this issue. See Shine v Duncan Petroleum Transport, Inc., 60 NY2d 22, 28 (1983, Cooke,

C.J. concurring) ("Five Boro was already determined by the Workers' Compensation Board to be the decedents' employer. Duncan Petroleum claims that it was a coemployer because it and Five Boro were merely alter egos. Thus, the only question to be resolved is the relationship between the two companies: if alter egos, then Duncan Petroleum is an employer; if not alter egos, then Duncan Petroleum is not an employer. In short, the issue here is not the availability of workers' compensation as such, but rather the legal identity of two corporations. Deciding whether companies are alter egos, so that it is appropriate to pierce the corporate veil, is a task for which the courts are well suited"). Furthermore, the court is unable to consider plaintiff's collateral estoppel argument without evidence of the determinations and arguments made by the parties before the Board. See Rosa v Quarry Crotona Homes, Inc., 239 AD2d 273, 274 (1st Dept 1997) ("The motion court correctly held that because defendant-appellant was named in the Workers' Compensation Board proceeding and specifically argued therein, through counsel, that it was plaintiff's employer, it should be collaterally estopped from arguing herein that it was plaintiff's "co-employer" by reason of its alter ego relationship with the company found by the Board to be plaintiff's employer").

The authorities cited by Eastgate are distinguishable in a manner that demonstrates the movant's failure to clear the

summary judgment hurdle. In Hynes v Start Elevator, Inc. (2 AD3d 178, 180-181 [1st Dept 2003]), the Court found that plaintiff's deposition testimony did not contradict the defendants' assertion that he was employed by both defendants. Similarly in Baksh v Yassky, 195 AD2d 356, 357 (1st Dept 1993), plaintiff failed to adduce any facts in opposition to defendant employer's summary judgment motion seeking to invoke the workers' compensation bar. In this case however, plaintiff testified that Affinia was plaintiff's employer and the workers' compensation documents proffered do not list any other employer. Further, Eastgate presents no documentary evidence in support of its motion with reference to the relationship between Affinia and Eastgate.

Therefore, issues of fact as to whether Eastgate was plaintiff's employer for purposes of Workers' Compensation Law 11 preclude summary judgment.

The court shall also deny Eastgate's motion to dismiss the cross-claims of Nouveau Elevator based upon the indemnification clause in the contract between Nouveau and Eastgate. See Acosta v S.L. Green Management Corp., 267 AD2d 67, 68 (1st Dept 1999) ("It is true that, in the absence of "grave injury," the Workers' Compensation Law bars third persons from seeking contribution or indemnity from an employer when its employee is injured in a work-related accident]Workers' Compensation Law § 11]. The statute does not, however, bar such an action if the employer had

a contract with the third person, prior to the accident, in which it agreed to indemnify, or contribute to payment, for a loss by the employee").

Accordingly, it is

ORDERED that the motion is DENIED; and it is further

ORDERED that the cross-motion is DENIED to the extent that the parties may raise any issues of discovery still alleged to be outstanding at the pre-trial conference; and it is further

ORDERED that the parties are directed to attend the previously scheduled mediation conference before Part Mediation-1 on September 15, 2008 at 11:00 A.M. and provide the mediator with a copy of this Order, and if this action is not settled thereat, the parties are directed to attend a pre-trial conference on September 30, 2008, at 11:00 A.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013, to set a trial date.

This is the decision and order of the court.

Dated: September 2, 2008 ENTER:

J.S.C.
DEBRA A. JAMES
J.S.C.

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