

Ramos v Powell

2009 NY Slip Op 30285(U)

February 6, 2009

Supreme Court, Queens County

Docket Number: 18373/06

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X
FLORENTINO ALATORRE RAMOS and
JUANA ALATORRE,

Index No.: 18373/06
Motion Date: 1/28/09
Motion Cal. No: 19
Motion Seq. No: 3

Plaintiffs,

-against-

SYLVIA ANN POWELL,

Defendant.

-----X
SYLVIA ANN POWELL,

Third-Party Plaintiff,

-against-

SHERNOS INC. d/b/a SPIRO'S COFFEE SHOP,

Third-Party Defendant.

-----X

The following papers numbered 1 to 9 read on this motion for an order granting third-party defendant Shernos Inc. d/b/a Spiro's Coffee Shop, leave to reargue the order of this Court, dated August 8, 2008, and staying the trial of this action until such order is entered.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affirmation in Support.....	5 - 6
Affirmation in Opposition.....	7 - 9

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is an action for personal injuries allegedly sustained by plaintiff Florentino Alatorre Ramos ("plaintiff") during the course of his employment as a delivery person for third-party defendant Shernos Inc. d/b/a Spiro's Coffee Shop ("Spiros"), on August 5, 2006, as a result of a

collision with the motor vehicle operated by defendant/third-party plaintiff Sylvia Ann Powell (“defendant”), as plaintiff was turning left while riding his bicycle from Pershing Crescent onto Manton Street in Briarwood, New York. Defendant commenced a third-party action against Spiros for contribution and indemnification based upon its alleged negligence in failing to provide proper bicycle equipment to plaintiff. Spiros moved for summary judgment and dismissal of the third-party complaint on the ground that it was under no duty to provide plaintiff with proper bicycle equipment or to supervise him in the ordinary activity of bicycle riding inherent in his job. Spiros further sought dismissal on the ground that plaintiff did not sustain a grave injury pursuant to Workers’ Compensation Law § 11. By order of this Court dated August 8, 2008, Spiros’ motion for dismissal was granted to the extent that the claim that Spiros had a duty to provide plaintiff with proper bicycle equipment and supervise him was dismissed, and the balance of the motion for dismissal under the Workers’ Compensation Law § 11, inter alia, was denied. In making its determination, this Court stated, in relevant part, the following:

Here, defendant contends that Spiros owed a duty to provide a helmet to plaintiff and properly train him as he was engaged in making bicycle deliveries during the course of his employment. Spiro has made a prima facie showing of its entitlement to summary judgment dismissing the third-party complaint on the ground that it was under no duty to provide plaintiff Ramos with proper bicycle equipment or to supervise him in the ordinary activity of bicycle riding inherent in his job. In opposition, defendant has failed to raise triable issues to defeat the motion. []

Notwithstanding defendant’s reliance upon [New York City Code § 10-157] to impose a duty upon Spiros based upon its failure to provide a helmet to plaintiff during the course of his employment, the mandate on business owners to provide delivery persons with, inter alia, helmets pursuant to New York City Code § 10-157, became effective on July 26, 2007, almost one year after the August 5, 2006 accident. Thus, this section cannot serve as a basis for Spiros’ liability, as it had no duty to provide such protective headgear at the time of the incident.

Moreover, Spiros did not have a duty to supervise or train plaintiff in the ordinary activity of bicycle riding inherent in his job. “[A] party can seek contribution from a plaintiff’s employer if the plaintiff’s injuries stem in part or in whole from a lack of training or other independent actions on the part of an employer (citations omitted).” Stroschine v. Prudential-Bache Securities, Inc., 207 A.D.2d 828 (2nd Dept. 1994). However, when an activity is “so ordinary and within the ken of the average person, [] there is no duty to provide instruction, warnings and/or assistance in how to perform it” (citations

omitted).” Mangiafreno v. Wikstrom Machines, Inc., 243 A.D.2d 690 (2nd Dept. 1997) [].

With regard to the additional ground upon which Spiros sought dismissal, to wit, that plaintiff did not sustain a grave injury as defined by section 11 of the Workers’ Compensation Law, this Court further stated, in pertinent part:

With respect to the scope of the enumerated grave injury of ‘an acquired injury to the brain caused by an external physical force resulting in permanent total disability,’ the Court of Appeals, in Rubeis v. Aqua Club Inc., 3 N.Y.3d 408 (2004), found that a brain injury resulting in ‘permanent total disability’ under Workers’ Compensation Law § 11 is established when the evidence demonstrates that the injured worker is no longer employable in any capacity. []

Here, the record before this Court demonstrates that there are triable issues of fact with respect to whether plaintiff, whose injuries as specified in his bill of particulars are, inter alia, a traumatic brain injury, fractured skull and subdural hematoma, sustained a grave injury within the meaning of the Workers’ Compensation law. See, generally, Ramos v. DEGI Deutsche Gesellschaft Fuer Immobilienfonds MBH, 37 A.D.3d 802 (2nd Dept. 2007); Marshall v. Arias, 12 A.D.3d 423 (2nd Dept. 2004); Aguirre v. Castle American Const., LLC, 307 A.D.2d 901 (2nd Dept. 2003). Indeed, the affirmation of Dr. Malcolm Reid, the Chairman of the Department of Physical Medicine and Rehabilitation at St. Luke’s Roosevelt Hospital, who examined plaintiff in September 2006 and opined that plaintiff’s brain injuries include “chronic encephalomalacia with associated gliosis in the bilateral frontal lobes,” which renders him “not likely to be employable,” sufficiently raises triable issues, contrary to Spiros’ contentions. Thus, summary disposition of this ground is precluded.

It is upon the foregoing that Spiros now moves to reargue that branch of the motion which determined the grave injury portion of the motion. A motion to reargue allows a party to establish that the court “overlooked or misapprehended the relevant facts” or “misapplied any controlling principle of law,” in determining the prior motion. Cruz v. Masada Auto Sales, Ltd., 41 A.D.3d 417 (2nd Dept. 2007); Collins v. Stone, 8 A.D.3d 321 (2nd Dept. 2004); Delgrosso v. 1325 Ltd. Partnership, 306 A.D.2d 241 (2nd Dept. 2003). “The motion does not offer an unsuccessful party [] successive opportunities to present arguments not previously advanced (citations omitted).” Pryor v. Commonwealth Land Title Ins. Co., 17 A.D.3d 434 (2nd Dept. 2005); Amato v. Lord & Taylor, Inc., 10 A.D.3d 374 (2nd d Dept. 2004). CPLR 2221, and caselaw interpreting that statutory

provision, condition a grant of such a motion “upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion.”

In support of the motion, Spiros contends that based upon a plain reading of the decision, the third-party action was dismissed by virtue of this Court’s finding a lack of duty on its part to either supervise or provide plaintiff with safety equipment. Spiros states that it found no confusion with the Court’s decision, however, as plaintiff has taken a contrary position, to wit, that Spiros is still a party since the Court found a triable issue of fact under the grave injury analysis, the parties sent letters to the Court for clarification, and a confirmation of the proper position. As a result, this Court requested that Spiros move to reargue the decision, and thus, Spiros asserts that upon reargument, this Court promulgate an order “affirming the previous decision dismissing the third-party complaint against [Spiros] on the basis that [it] owed no duty to provide [plaintiff] with bicycle equipment or supervise him.” In further support of this position, defendant states the following:

A plain reading of the decision/order of [this Court] would lead any disinterested party to conclude that the Court granted summary judgment to the third-party defendant. It appears that in its zeal to cover all issues in the motion (i.e. whether third-party defendant owes duty to defendant or plaintiff and whether plaintiff sustained a “grave injury” under the Workers’ Compensation Law), the Court inadvertently decided the “grave injury” question when it need not have done so.

In opposition, plaintiff, who attempts to revisit some of the theories of liability that this Court deemed abandoned in the underlying decision, states in relevant part that:

Spiros fails to recognize that it may be free from its statutory obligations to provide a helmet and train plaintiff in the uses of the bicycle, but [that] does not alleviate [Spiros] from its common-law duties towards defendant and plaintiff. Those questions remain open in this case. Due to the question of grave injury, [Spiros] remains an active member of this case since we cannot completely eliminate all causes of action. []

This Court has already ruled that there was no duty to provide a helmet and/or train plaintiff. These actions are self evident. However, the question arises as to whether there is any duty owed by [Spiros] to [defendant] or plaintiff himself that would expose [Spiros] to have to indemnify defendant for the losses in this case.

It is within the court’s discretion to grant leave to reargue when it appears that the court may have “overlooked certain facts and misapplied the law in its initial order.” Dunitz v J.L.M. Consulting Corp., 22 A.D.3d 455, 456 (2nd Dept. 2005); Marini v Lombardo, 17 A.D.3d 545 (2nd Dept. 2005);

CPLR 2221. Judged by this standard, Spiros has meet its burden of demonstrating that the “court overlooked or misapprehended the facts or law so as to warrant reargument.” William P. Pahl Equip. Corp. v Kassis, 182 A.D.2d 22, 27 (1st Dept. 1992). Here, notwithstanding plaintiff’s contentions to the contrary, the interpretation of the underlying decision propounded by Spiros, as supported by defendant, who commenced the third-party complaint against Spiros, correctly espouses the determination of this Court. Indeed, resolution of the grave injury claim, although proper in its rationale, was unwarranted as Spiros owed no duty to plaintiff in the first instance, and served to convolute the record. Accordingly, in light of this, the motion for reargument to clarify the underlying decision is granted, and upon reargument, it is the determination of this Court that as Spiros owed no duty to supervise or provide safety equipment to plaintiff, the third-party complaint hereby is dismissed it its entirety.

Dated: February 6, 2009

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J.S.C.