Vanderhall v Town of Hempstead
2009 NY Slip Op 31553(U)
July 9, 2009
Supreme Court, Nassau County
Docket Number: 6003/08
Judge: Daniel R. Palmieri
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

---x TRIAL TERM PART: 47

JOHN VANDERHALL and COLEEN VANDERHALL

INDEX NO.: 6003/08

Plaintiff,

MOTION DATE:4-29-09
SUBMIT DATE:7-7-09
SEQ. NUMBER - 004

-against-

TOWN OF HEMPSTEAD, TOWN OF HEMPSTEAD DEPARTMENT OF SANITATION and ERIC WIGGINS,

Defendants.

---x

The following papers have been read on this motion:

Notice of Motion, dated 3-16-09..1
Affirmation in Opposition, dated 6-9-09.............................2
Reply Affirmation, dated 7-6-09...3

The motion of the defendant Town of Hempstead (the Town) for summary judgment pursuant to CPLR §3212 is granted and the action is dismissed. Plaintiff may have an inquest as to damages against defendant Wiggins as to whom this Court previously granted a judgment by default.

Plaintiff and defendant Wiggins, both employees of defendant the Town, were involved in a physical altercation on July 23, 2007 at their work place during work hours.

Plaintiff applied for and after a contested hearing was awarded worker's compensation benefits on the basis that 'there was an injury sustained in the course of the claimant's employment."

The amended complaint contains two causes of action against the Town, for in effect negligent supervision and failure to keep its "premises in a good, safe and secure condition."

Plaintiff applied for, and after a hearing, received Worker's Compensation Law (WCL) benefits. Wiggins, who later pleaded guilty to Penal Law§ 240.26, a violation, has defaulted but has been deposed in this action.

Although the plaintiff and Wiggins have rendered differing versions as to which was the aggressor, the decision at the WCL hearing determined that it was Wiggins "who seems to be the aggressor and who seems to be out of control on this particular day. He seemed to be carrying on about something."

On this motion, the Town contends that since the parties are bound by the doctrine of *res judicata* as to the worker's compensation determination and since having made the election to obtain benefits under the Worker's Compensation Law, such benefits constitute the sole and exclusive remedy for plaintiff, he is thus barred by the WCL from suing the Town, his employer.

In opposition, plaintiff contends that the Town was aware of prior aggressive behavior by Wiggins as to others, that an action for an intentional tort against an employer and/or a co-employee is not barred by the receipt of WCL benefits, and that the exemption for WCL benefits is lost to an employer who participates, ratifies or is aware of an intentional tort and in the latter instance, fails to take remedial action.

WCL §11 provides in substance that if an employer is liable under WCL §10, such liability shall be exclusive and in place of any other liability whatsoever.

Neither plaintiff nor defendant dispute the *res judicata* effect of the findings under the WCL that plaintiff's injury was work related, thereby entitling him to receive benefits. *Mohn v. Smith*, 271 AD2d 662 (2d Dept. 2000). However, plaintiff maintains that he may also pursue a remedy against the Town based upon the Town's role in this case.

It is now settled that a co-employee who commits an intentional wrong against another employee is not shielded by the exclusivity provisions of WCL §29(6). *Hanford v. Plaza Packaging Corp.*, 2 NY3d 348 (2004); *Maines v. Cronomer Valley Fire Dept., Inc.* 50 NY2d 535 (1980). Plaintiff seeks to extend this exception to apply to the employer of one who commits an intentional act against a co-employee.

In the exceptional situation where an intentional tort was perpetrated by an employer or at an employer's direction, a plaintiff can bring a law suit against his/her employer for common law negligence. However, where an employee who attacks another is not acting within the scope of his employment when so attacking and there is no evidence that the wrongdoer's actions were directed or instigated by the employer, the exclusive remedy of the WCL prevails. *Martinez v. Canteen Vending Servs. Roux Fine Dining Chartwheel*, 18 AD3d 274, 275 (1st Dept. 2005). Followed by *Beja v. Meadowbrook Ford*, 48 AD3d 495 (2d Dept. 2008). There is no basis from which it can be reasonably construed that the conduct of Wiggins was in furtherance of the interest of his employer or within the scope of his employment. *Velasquez-Spillers v. Infinity Broadcasting Corp.*, 51 AD3d 427 (2d Dept. 2008; *Gray v. Macy's East Inc.*, 25 AD3d 475 (1st Dept. 2006). Despite the contention that

the altercation was based on which of the employees should have received overtime, Wiggins clearly acted beyond the scope of his employment, motivated by his own private concerns. *Conde v. Yeshiva University*, 16 AD3d 185 (1st Dept. 2005).

In order to sustain a cause of action against an employer for an intentional tort which is not barred by the exclusivity doctrine of the WCL, there must be intentional or deliberate conduct by the employer directed at causing harm to the particular employee. *McNally v. Posterloid Corp.*, 15 AD3d 456 (2d Dept. 2005). To constitute an intentional tort the conduct must be engaged in with the desire to bring about the consequences of the act. Mere knowledge and appreciation of a risk is not the same as the intent to cause injury. *Miller v. Huntington Hosp.*, 15 AD3d 548, 549-550 (2d Dept. 2008).

Here, there is no evidence that Wiggins was acting under the direction or control of the Town or that the Town was in any way responsible for his conduct toward the plaintiff. *Thompson v. Maimonides Medical Center*, 86 AD2d 867, 868 (2d Dept. 1982). Accepting as correct plaintiff's contention that the Town was on notice that Wiggins was a threat to others, is not sufficient to remove this case from WCL exclusivity, *Cf Spoon v. American Agriculturist, Inc.*, 120 AD2d 857 (3d Dept. 1986), which held that a factual issue existed as to whether the employer authorized an intentional tort on the part of its employee.

At best, the Town's culpability constitutes negligence on its part, rather than an intentional act or series of acts. Negligence, even gross negligence, which enables the commission of intentional, or criminal conduct by another, is not thereby converted to intentional conduct. The same acts involving an assault by a co-employee may be accidental as to the employer but intentional as to the perpetrator. The same acts, as to the employer

cannot be both accidental and intentional. *Werner v. State of New York*, 53 NY2d 346, 353 (1981).

In a similar factual situation, it has been held where an employer's conduct amounts to gross negligence, the remedy for the employee is pursuant to the WCL. *Gagliardi v. Trapp*, 221 AD2d 315 (2d Dept. 1995). That the negligence led to intentional criminal behavior at an employer's premises does not alter the negligent character of the employer's conduct. *Fucile v. Grand Union Co.*, 270 AD2d 227 (2d Dept. 2000).

The claims of the plaintiff that the Town's manner of keeping or operating the work premises where the conduct occurred, or that the Town was negligent in the employment, retention and supervision of Wiggins are barred by the exclusivity provisions of the WCL. Plaintiff's contention on this motion that the intentional conduct of Wiggins which might qualify as an exception as to him, should apply as well to the Town, extends the scope of the exception far beyond any existing precedent and in effect seeks to convert causes of action for negligence to claims of intentional conduct based on the same set of facts.

Finally, plaintiff has failed to demonstrate why he should not be bound by his previous election to apply for and receive WCL benefits in lieu of pursuing a common law cause of action. Where an intentional tort has been committed by an employer, the injured employee has the option to pursue either a civil damage remedy or Worker's Compensation but not both and voluntary acceptance of compensation benefits constitutes a bar to the maintenance of a civil damage action. *Cunningham v. State of New York*, 60 NY2d 248 (1983); *Mera v. Adelphi Mfg. Co. Inc.*, 160 AD2d 781 (2d Dept. 1990).

Based on the foregoing, the motion of the Town for summary judgment is granted.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: July 9, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: **Levin & Chetkof, LLP**
By: Howard A. Chetkof, Esq.
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ENTERED
JUL 13 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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