

Fichter v G. Fazio Constr. Co., Inc.

2009 NY Slip Op 32617(U)

October 28, 2009

Supreme Court, Nassau County

Docket Number: 008370/03

Judge: Daniel Martin

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

SUZETTE FICHTER, Individually and as
Administrator of the Estate of PHILIP
BARBOWSKI.

Plaintiff.

- against -

TRIAL/IAS, PART 30
NASSAU COUNTY

Sequence No.: 012 & 013
Index No.: 008370/03

G. FAZIO CONSTRUCTION CO., INC., ST.
MARY'S CATHOLIC SCHOOL, ST. MARY'S
CHURCH and ROMAN CATHOLIC DIOCESE
OF ROCKVILLE CENTRE.

Defendants.

G. FAZIO CONSTRUCTION CO., INC., ST.
MARY'S CATHOLIC SCHOOL, ST. MARY'S
CHURCH and ROMAN CATHOLIC DIOCESE
OF ROCKVILLE CENTRE.

Third-Party Plaintiffs.

- against -

CONCEPT CONTRACTING CORP.

Third-Party Defendants.

CONCEPT CONTRACTING CORP.

Fourth-Party Plaintiff.

- against -

PYRAMID AIR CONDITIONING, INC.

Fourth-Party Defendant.

The following named papers have been read on this motion:

Papers Numbered

Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	X
Answering Affidavits	
Replying Affidavits	

In a personal injury action predicated on injuries sustained as a consequence of alleged violations of the Labor Law, five motions are presented for consideration. The matters arise out of litigation stemming from the following fact pattern:

FACTS

On March 20, 2003, the decedent, Philip Barbowski, an employee of Pyramid Air Conditioning (hereinafter referred to as "Pyramid") was working at the defendant St. Mary's Catholic School (hereinafter referred to as "the church"). The church had retained the services of the defendant G. Fazio Construction Co. (hereinafter referred to as "Fazio") to build an extension on its property. The defendant Fazio as general contractor hired Pyramid to do work on its HVAC systems. Fazio also hired Concept Contracting Corp. (hereinafter referred to as Concept) to perform sheet rock work. The entire project was allegedly supervised by Fazio through Fazio's Superintendent, Charles Longworth.

The decedent was injured when he was working in the gym area. Allegedly, a piece of sheet rock fell on the decedent. Employees of Concept were on a scissor lift 20-30 feet above ground when the accident occurred. The instant action was commenced on May 23, 2003. Thereafter, on June 18, 2004 Barbowski died. After the appointment of an estate representative (Fichter), an amended complaint was served. The amended complaint alleges three causes of action: one sounding in negligence, the second setting forth an action for wrongful death, and the third alleging various violations of the Labor Law in failing to provide adequate safety devices for the work site. In the wrongful death action, the amended complaint alleges that the decedent died from an over-dose of painkillers ostensibly taken by the decedent for the pain stemming from the injuries incurred as a result of the events of March 20, 2003. The defendant Fazio and the defendant church brought a third-party action against the third-party defendant Concept alleging that the defendant Concept was solely responsible for the incident in question. In turn, Concept initiated a fourth-party action alleging that Pyramid was responsible for the accident in question. A note of issue was filed on May 12, 2009. The controlling certification order required that motions for summary judgment be filed within 60 days of the filing of the note of issue. The present motions ensued. However, in several instances the argument is advanced that pursuant to Brill v City of New York, 2 N.Y.3d 648, 781 N.Y.S.2d 261, the various motions for summary judgment are untimely as they were initiated subsequent to July 12, 2009.

MOTION #11

Motion #11, seeks an order granting summary judgment in favor of Concept. Concept has submitted proof endeavoring to establish that no evidence exists which would impose

liability upon it. In support of that contention all the depositions taken are submitted for the court's consideration. This motion was initiated within the time parameters of the certification order. That motion is opposed by plaintiff via motion #14. (See, *infra*).

MOTION #12

Motion #12 is brought by the defendants Fazio and the church seeking summary judgment dismissing all claims interposed against them. This motion was also initiated within the parameters set by the certification order. The motion is based, in part, on the deposition testimony of Mr. Gino Fazio, president of the defendant Fazio. Mr Fazio testified that his company did not supervise or control the work of either its subcontractors Concept or Pyramid. Mr. Fazio also offered the corroborative testimony of Charles Longworth, as well as the deposition of David Evans, an employee of Pyramid. Mr. Evans testified that Mr. Barbowski was a steam fitter, and was, in essence, an independent contractor; at least to the extent that Barbowski did not do "mechanical" work and supervised himself. Mr. Evans further testified that he was present at the date of the accident. In response to Barbowski's cries of pain he rushed to the scene and observed white chalky substances on Barbowski's shoulders. Mr. Evans claims to have overheard two carpenter workers employed by Concept descending from a lift who when asked what happened responded... "it fell". Mr Evans claims to have expressed his opinion to the supervisor of Concept that these carpenters purposefully discarded the sheet rock that hit Mr. Barbowski. Based on the foregoing, Fazio asserts that no basis exists upon which it can be found liable for the incident in question, whether predicated on Labor Law §§ 200, 240, or 241(6). This motion is also opposed by plaintiff via motions #13 and #14. (See, *infra*).

MOTION # 13

Motion #13, brought by order to show cause is a motion by the plaintiff for an order staying consideration of motions #11 and #12 until the completion of discovery and until the plaintiff has had an opportunity to supplement the plaintiff's bill of particulars. The court denied a request for a temporary restraining order. The plaintiff alleges that through the discovery already had the plaintiff just learned the identity of critical potential witnesses (other than Mr. Evans) and seeks the depositions of such witnesses. The plaintiff claims that these witnesses were only discovered on July 21, 2009 pursuant to a response of an outstanding discovery demand.

Motion #14

Motion #14 is a separate motion brought by plaintiff for an order allowing the plaintiff to further amend the complaint to: 1) make Concept a direct party defendant; 2) extending the time for plaintiff to make a motion for summary judgment; 3) granting summary judgment against Concept; and 4) striking the answer of all other defendants for spoliation of evidence. In so far as summary judgment is sought, this motion is brought beyond the time parameter established by the certification order. Motion #14 is opposed by Concept and Fazio.

Motion #15

Motion #15 is brought by the fourth-party defendant Pyramid. That motion seeks summary judgment. In essence, Pyramid claims through all the prior submissions no basis exists to impose any responsibility upon it. This motion was brought on August 28, 2009 which is beyond the time fixed by the certification order.

The plaintiff's motion must be addressed first because the determinations rendered therein will impact the ability of the court to pass on the remaining motions. In so far as the plaintiff seeks leave to amend the complaint as well as the bill of particulars, there is a strong policy that such leave should be granted absent a showing that granting the relief would be prejudicial or that the amendment is palpably improper or asserts a claim utterly devoid of merit. See, Sanatass v. Town of North Hempstead, 64 A.D.3d 695, 881 N.Y.S2d 901; Gitlin v. Chirinkin, 60 A.D.3d 901, 875 N.Y.S.2d 585. Given the allegations made herein, and the current status of known information, it appears that the plaintiff should be allowed to assert a direct cause of action against Concept and to serve an amended bill of particulars; the court discerning no prejudice in the granting of that relief. Accordingly, that branch of motion #14 which seeks an amendment of pleadings and leave to assert a direct action against Concept is granted. That branch that seeks summary judgment is denied as responsive pleadings have not yet been served. CPLR§3212(a).

Another branch of the motion #14 seeks summary judgment against the remaining defendants based on the alleged spoliation of evidence. Incredibly, the substance of the allegations of spoliation are not denied. Specifically, the plaintiff's papers submitted in support of motion #14 asserts that Fazio has lost or destroyed its daily log book for the date of the accident as well as work site documents pertaining to this job for a time in immediate proximity to the date of the accident. Fazio's own papers concede as much, but contend that such circumstance was inadvertent and that its employees went to great lengths to recover the log books and other records in question. Discovery of records were sought from Concept as to the identity of its employees on the site that date; in particular, those working on the scissor lift, but to no avail. The court has reviewed the papers submitted as well as the court orders and stipulations entered into under its role as supervisor of discovery. The court notes that the action was delayed, in part, due to the failure of the various parties to provide the very discovery at issue.

Concept argues that the amendment of the pleadings should not be granted and that the branch of the motion based on the theory of spoliation is not timely or properly brought. Concept also argues that the plaintiff cannot possibly prove its claims, particularly those sought against Concept directly as the plaintiff's representative lacks the knowledge possessed by the decedent as to how the decedent was injured. The court is asked to note that Concept is a defunct corporation and, as such, should not be expected to have kept the records now sought, and that any inference of spoliation is not warranted since the failure to produce the records was not willful.

Fazio claims that failure to produce the records previously requested and court ordered, was not purposeful. The record is not clear as to the precise information that might be contained therein. However, the plaintiff concedes Fazio supplied all such documents for all dates but the dates in close proximity to the accident, thereby identifying all the individuals who had worked on the site prior to the accident date. The court is also mindful that while the identity of all the workers on site on the date in question appears to be unknown, the workers on the scissor lift thus far appear to have been people employed by Concept. On the other hand, the plaintiff has been unduly restricted in establishing the degree of supervision or control of Fazio had with such individuals and the court is asked to rely on Fazio's representation that it had no control or supervisory role. The plaintiff cannot ascertain who Fazio had recorded as being on the site that date and claims to be impaired in its ability to contest Fazio's claim of lack of supervision or control over the workers involved in the accident.

A party invoking spoliation of evidence as a basis for imposing sanctions against an offending party has the burden of demonstrating that critical discovery was willfully or negligently destroyed, and thereby critically adversely affected the ability of the victimized party to succeed in the litigation. See, Utica Mut. Ins. Co. v. Berkowski Oil Co., 58 A.D.3d 717, 872 N.Y.S.2d 166; Kirschen v. Marino, 16 A.D.3d 555, 792 N.Y.S.2d 171. On the other hand, the ultimate sanction of striking the pleadings or granting the victim summary judgment is so severe, that a lesser sanction should be imposed where the victimized party may still be capable of proving its case without the missing material. De Los Santos v. Polanco, 21 A.D.3d 397, 799 N.Y.S.2d 776, Ianucci v. Rose, 8 A.D.3d 437, 778 N.Y.S.2d 525. In assessing the sanction, if any, to be imposed for spoliation of evidence the court is possessed of broad discretion. See, Ianucci v. Rose, supra.

Applying these broad principles to the facts and circumstances herein, including the issuance of orders pursuant to stipulations of the parties in which full compliance has not been had, as well as the fact that the OCA "track" negatively affected the ability of the parties to timely achieve the agreed upon discovery and the follow-up demands that were a natural outgrowth thereof (e.g. deposition of discovered witnesses), the court does not believe that at this juncture the plaintiff has proved a right to summary relief. In this instance, a lesser sanctions is appropriate. Neither Concept nor Fazio should be able to prevail on their respective motions for summary judgment when it is their failure, purposeful or not, to provide court directed discovery which has impaired the plaintiff's ability to demonstrate that a *bona fide* issue of fact exists and where, as here, the court is permitting the amendment of the pleadings as well as affording the plaintiff the right to seek additional discovery which might disclose the existence of an issue of fact. See, Ortiz v. Batash, 36 A.D.3d 678, 826 N.Y.S.2d 578. The foregoing principle is closely analogous to situations where the court denies a movant's application for summary relief, when the information needed to defeat the motion is either within the exclusive knowledge or control of the movant and the movant has failed to provide such discovery to the party opposing the motion. See, Conciatori v. Port Authority of New York and New Jersey, 46 A.D.3d 501, 846 N.Y.S.2d 659; William v. City of New York, 40 A.D.3d 847, 835 N.Y.S.2d 717; Levy v. Board of Ed. Of the City of Yonkers, 232 A.D.2d 377, 648 N.Y.S.2d 141

Additionally, the court notes that other aspects of the plaintiff's opposition are based on evidence that may not be admissible on trial due to its hearsay nature or its potential violation of CPLR §4519. The movants request that the court exclude this proof in rendering this decision. However, evidence that may otherwise be inadmissible at trial may, nonetheless, be considered in opposition to a motion for summary judgment where such proof is an indicia of the existence of a *bona fide* issue of fact. See, Phillips v. Joseph Kantor & Co., 31 N.Y.2d 307, 338 N.Y.S.2d 882; In Re Cavallo, 6 A.D.3d 434, 774 N.Y.S.2d 371; Coury v. Acuri, 262 A.D.2d 268, 689 N.Y.S.2d 648. In this case, the record shows that an issue of fact exists as to whether the decedent suffered injuries as a result of the negligent or intentional conduct of the carpenters in the scissor lift and whether such employees were subject to the supervision and control of Concept or the defendant Fazio (an issue that might have been negated by the production of the log records for the date of the accident).

Based on the foregoing, the motions submitted are decided as follows: Motion #11 by Concept seeking summary judgment is denied. Motion # 12 by the defendant Fazio seeking summary judgment is denied. Motion #13 by the plaintiff to stay the court's consideration of these motions is denied as moot. Motion #14 by the plaintiff is granted to the sole extent that the branch of that motion that grants the plaintiff leave to amend its complaint to bring a direct action against Concept and to amend its bill of particulars is granted. Those branches of motion #14 that seeks summary judgment, or alternatively, an extension of the plaintiff's time to make a motion for summary judgment are both denied. That branch that seeks to strike the pleadings of the other movants is denied. Motion #15 by Pyramid is denied as being untimely. See, Brill v. City of New York, supra.

So Ordered.

Dated: October 28, 2009


A.J.S.C.

ENTERED
NOV 02 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE