

Doruk-Olsen v Atlantic Assoc. Intl., Inc.

2010 NY Slip Op 31340(U)

May 21, 2010

Sup Ct, NY County

Docket Number: 109125/2007

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

KAI SEBASTIAN DORUK-OLSEN, an infant by his Father and Mother as natural guardians, IB INGEMANN OLSEN and BIGE DORUK, and IB INGEMANN and BIGE DORUK, Individually,

Plaintiffs,

- against -

ATLANTIC ASSOCIATES INTERNATIONAL, INC. T/A HIBRETT PURATEX & BARNETT COMPANY, AMERICAN WATERWORKS CO. and its subsidiary APPLIED WATER MANAGEMENT, MISAEEL CRUZ, RIVER TERRACE ASSOCIATES, LLC d/b/a THE "SOLAIRE", and NORTHWESTERN MUTUAL LIFE,

Defendants.

INDEX NO. 109125/2007
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 3, were read on this motion for summary judgment, pursuant to CPLR 3212, by defendants American Waterworks Co., Inc., Applied Water Management, Inc., River Terrace Associates, LLC and Northwestern Mutual Life.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

FILED
MAY 27 2010
NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

This is a personal injury action by plaintiff Kai Sebastian Doruk-Olsen ("plaintiff"), an infant by his Father and Mother as natural guardians, Ib Ingemann Olsen and Bige Doruk, and Ib Ingemann and Bige Doruk, individually (collectively "plaintiffs"), to recover damages for injuries allegedly sustained when a drum containing sodium hydroxide that was being delivered to a residential building fell off a truck causing the chemical to splash into plaintiff's face. Plaintiffs commenced this action against Atlantic Associates International, Inc. t/a Hibrett Puratex & Barnett Company ("Atlantic"), American Waterworks Co. ("American") and its

subsidiary Applied Water Management ("Applied"), Misael Cruz, River Terrace Associates, LLC d/b/a The "Solaire" ("River Terrace"), and Northwestern Mutual Life ("Northwestern"), asserting claims for negligence, gross negligence and strict liability in transporting an ultra hazardous substance. The parties have completed discovery and a Note of Issue was filed on May 22, 2009. Defendants American, Applied, River Terrace and Northwestern (collectively "defendants") now move for summary judgment, pursuant to CPLR 3212, dismissing the complaint and all cross-claims against them. Plaintiffs have responded in opposition to the motion insofar as it seeks dismissal of the claims against River Terrace and Northwestern, but they do not oppose dismissal as to American and Applied.

BACKGROUND

In support of their summary judgment motion, defendants submit, *inter alia*, the depositions of John P.J. Madden, Misael Cruz, Michael Gubbins and Michael Sarnik. In opposition, plaintiffs submit the deposition of Lucia Manosalvas and photographs depicting plaintiff's injuries.

Atlantic is a chemical company that delivers hazardous chemicals and other products to customers on a daily basis. In 2007, Misael Cruz was employed by Atlantic as a delivery truck driver. Applied, a water treatment company that managed water systems for buildings, was a customer of Atlantic's. Northwestern and River Terrace were the owner and management company of a residential building located at 20 River Terrace known as the "Solaire." They contracted with Applied, a subsidiary of American, to operate a waste water treatment facility at the Solaire.

On March 23, 2007, plaintiff, who was then three years-old, was at a park located directly across the street from the Solaire with his younger brother, another child and two babysitters. Lucia Manosalvas was one of the babysitters. As the two babysitters and three children were leaving the park, Cruz was making a delivery of sodium hydroxide (a/k/a caustic

soda) to the Solaire for use in the building's water filtration system. No warning signs or cones were posted in the area where the delivery was being made, and the area was not blocked off. At least one drum containing sodium hydroxide fell from the back of the delivery truck, causing the drum to crack and splash some of the chemical directly into plaintiff's face resulting in chemical burns.

Plaintiffs allege that Cruz was being assisted by employees of the Solaire at the time of the delivery. Manosalvas testified that she observed two Solaire employees standing on the sidewalk next to the truck helping the driver move containers from the ground to the side. Two containers were already on the ground, and Manosalvas saw one of the employees pick up a container while the other stood there. As the driver was trying to put more containers on the ground, the containers fell. Manosalvas did not remember if the Solaire employees were touching any of the containers that she saw fall before they fell.

Cruz denied being assisted by employees of the Solaire during the delivery. He testified that he made many prior deliveries to the Solaire, and that employees of the building never assisted him with unloading and would just watch him and escort him to the delivery location. On the day of the accident, he notified the building personnel that he was there and someone came out to meet him. As he was unloading, he put the skid on the lift gate, let the skid down, and one of the drums fell off the skid. The drums were still shrink-wrapped, but for an unknown reason one of them came loose and fell off the truck.

Michael Sarnik, a maintenance supervisor at the Solaire, denied doing anything to assist Cruz with his delivery of the drums that day. Michael Gubbins, the Solaire's resident manager, also testified that no one at the building would ever help or assist delivery people unload trucks or bring any of the containers into the building.

DISCUSSION

River Terrace and Northwestern allege entitlement to summary judgment dismissing all claims against them, as a matter of law, on the grounds that Atlantic was an "independent contractor" and Cruz was acting within the scope of his employment at the time of the accident, and plaintiffs have failed to show that the Solaire employees assisted or controlled Cruz's work or engaged in any affirmative act of negligence. They also claim that their evidence establishes that Cruz was the only person who handled the drum involved in the accident, and that Manosalvas' testimony regarding the Solaire employees' involvement is unreliable.

Plaintiffs contend that summary judgment should be denied because the involvement of the Solaire employees in assisting with the delivery of a "dangerous substance" creates a question of fact as to the standard of care they used and whether they contributed to the accident. They also argue that River Terrace and Northwestern, as the owners of a property accepting delivery of a dangerous substance, were under a duty to protect the public and their failure to post warnings or to block off the area raises an issue of fact.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d

72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Defendants' motion for summary judgment insofar as it seeks dismissal of the claims against River Terrace and Northwestern is denied. There are questions of material fact regarding whether, and to what extent, the Solaire employees contributed to the accident (*see Winegrad*, 64 NY2d at 853). Moreover, even assuming, *arguendo*, that these defendants are correct in their assertion that they should not be held liable for an independent contractor's negligence, an exception to this general rule exists where the contractor is employed to do work that is "inherently dangerous" (*see Tytell v Batter Beer Distrib., Inc.*, 202 AD2d 226, 226 [1st Dept 1994]). Here, there are questions of fact regarding the hazardous nature of the sodium hydroxide and the foreseeability of injuries resulting from its delivery to the Solaire (*see Rufrano v Atlantic Towers Org., Inc.*, 155 AD2d 651, 653 [2d Dept 1989]). There are also issues of fact as to whether, under the particular circumstances, River Terrace and Northwestern had a duty to warn, and if so, whether they failed in that duty (*see Galgano v FDR Serv. Corp.*, 206 AD2d 453, 454 [2d Dept 1994]; *Lockowitz v Melnyk*, 143 NYS2d 135, 135-36 [App. Term 1st Dept 1955], *aff'd* 1 AD2d 138 [1st Dept 1956]).

As defendants' motion with respect to American and Applied is unopposed, summary judgment dismissing all claims against American and Applied is granted.

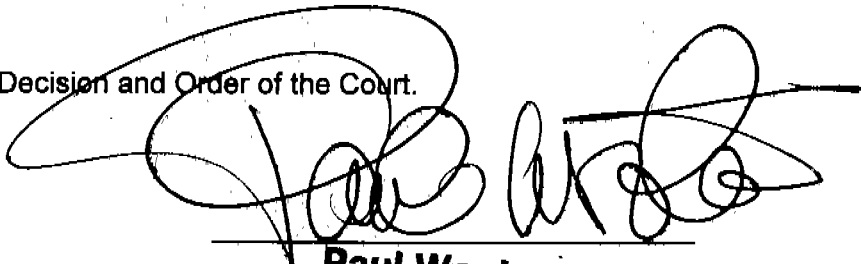
For these reasons and upon the foregoing papers, it is,

ORDERED that defendants' motion for summary judgment dismissing the complaint and cross-claims is granted as to American and Applied, and denied as to River Terrace and Northwestern; and it is further,

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiffs.

This constitutes the Decision and Order of the Court.



Dated: May 21, 2010

Paul Wooten
Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST

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