

Wasek v New York City Health & Hosps. Corp.

2010 NY Slip Op 32101(U)

August 2, 2010

Sup Ct, NY County

Docket Number: 108974/06

Judge: Barbara Jaffe

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: JAFFE BARBARA JAFFE J.S.C.

PART 5

Index Number : 108974/2006

WASEK, MACIEJ

vs
HEALTH & HOSPITAL

Sequence Number : 004

DISMISS

INDEX NO. 108974/06
MOTION DATE 6/15/10
MOTION SEQ. NO. 004
MOTION CAL. NO. 111

... papers, numbered 1 to _____ were read on this motion to/for dismiss

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits _____

2, 3, 4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
AUG 10 2010
NEW YORK
CLERK'S OFFICE
DECIDED IN ACCORDANCE WITH COUNTY
ACCOMPANYING DECISION / ORDER

Dated: 8/2/10
AUG 02 2010

37
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
MACIEJ WASEK,

Plaintiff,

-against-

Index No.: 108974/06

Argued: 6/15/10
Mot. Seq. Nos.: 004,

DECISION AND ORDER

NEW YORK CITY HEALTH & HOSPITALS
CORPORATION and THE CITY OF NEW YORK,

Defendants.

-----X
NEW YORK CITY HEALTH & HOSPITALS
CORPORATION and THE CITY OF NEW YORK,

Third-Party Plaintiffs,

-against-

CONSTRUCTION FORCE SERVICES INC.,
CONSTRUCTION FORCE SERVICES LLC, and
C FORCE SYSTEMS LLC,

Third-Party Defendants.

-----X
BARBARA JAFFE, J.:

For plaintiff:
Daniela Henriques, Esq.
Leav & Steinberg, LLC
120 Broadway 18th fl.
New York, NY 10271
212-766-5222

For defendants/third-party plaintiffs:
Sabita Krishman, ACC
Michael A. Cardozo
100 Church Street room 20-91
New York, NY 10007
212-442-0588

For C Force LLC:
Debra Seidman, Esq.
Quirk & Bakalor PC
845 Third Avenue 15th fl.
New York, NY 10022
212-319-1000

For Construction Services Inc.:
Leonard Toker, Esq.
Hoey, King, Toker & Epstein
55 Water Street 29th fl.
New York, NY 10041
212-612-4200

FILED
AUG 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff was employed by C Force Systems LLC (C Force) as a marble mechanic and was

allegedly injured while performing work at a project for defendant/third-party plaintiff New York City Health & Hospitals Corporation (HHC), located at 346 Broadway, New York, New York. He claims to have been injured when he fell into a hole which caused a drill bit to dislodge and enter his eye. (Reply Affirmation of Leonard Toker, Esq., dated June 7, 2010 [Toker Reply Aff.], Exhs. A, B).

HHC and City instituted the instant third-party action seeking: (1) indemnification and/or contribution if they are found liable for plaintiff's accident; (2) indemnification if they are found not to have been negligent; and (3) breach of an agreement to defend them. (Affirmation in Support of Motion of Debra E. Seidman, Esq., dated Mar. 3, 2010, Exh. C). They allege in their third-party complaint that: (1) plaintiff was employed by all of the third-party defendants; (2) if plaintiff sustained a grave injury while employed by third-party defendants, then such injury was caused by third-party defendants' negligence; (3) if negligent, third-party defendants must indemnify and/or contribute to them; (4) if they were not negligent, third-party defendants must indemnify them; (5) if third-party defendants are not required to defend them, then third-party defendants breached their agreement to provide insurance coverage to them. (*Id.*).

I. CONTENTIONS

In motion sequence number 004, which is consolidated with motion sequence 005 for disposition, Construction Force Services Inc. (Construction Inc.) moves, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the third-party complaint as against it, or, in the alternative, pursuant to General Obligations Law (GOL) § 15-108(c) for an order dismissing the third-party action on the ground that the main action has been settled and third-party plaintiffs are not entitled to indemnification or contribution. It denies having employed or supervised plaintiff,

or that it has any written contract with HHC or City and submits the affidavit of its vice-president, David Terlinsky (Affirmation of Leonard Toker, Esq., dated Feb. 22, 2010, Exh. D), along with a print-out from the New York Department of State's website, indicating that Construction Force Services LLC (Construction LLC), which has not answered the third-party complaint, and C Force are two separate corporate entities (*id.*, Exh. C), as well as a certified copy of its own certificate of incorporation (*id.*, Exh. E). It contends that third-party plaintiffs are not entitled to either indemnification from it, having settled with plaintiff, or contribution, having obtained a release, and denies that it was negligent. (Toker Reply Aff.). In their opposition papers and at oral argument held on the record, City and HHC discontinued their cause of action for contribution against all three third-party defendants.

In motion sequence number 005, C Force moves pursuant to CPLR 3212 for an order summarily dismissing the third-party complaint as against it. It contends that, as plaintiff's employer, it is not liable for common-law indemnification absent the employee's grave injury, as defined in section 11 of the Workers' Compensation Law, and that according to plaintiff's uncontradicted testimony, taken at a deposition held on September 25, 2007, the accident resulted in the removal of his left eye, which does not constitute a grave injury. C Force concedes, however, that an employer might be liable for indemnification for a worker's injury pursuant to a written contract so specifying, although according to its vice-president, there is no written contract between C Force and third-party plaintiffs. (Affidavit of Andrew Terline, dated Feb. 19, 2010).

In opposition, HHC submits the affidavit of Salvatore Cantatore, the senior director of its Construction and Maintenance Division (CMD), who alleges that since at least 1997, HHC has

utilized temporary workers from a company known to him as Construction Force Services, and that, whereas it is CMD's policy to execute written contracts, he could not locate one for any of the named third-party defendants. (Affidavit of Salvatore Cantatore, dated May 6, 2010). He asserts that for the past 12 years, it has been CMD's policy to call Construction Force Services for temporary workers, and that it selects workers from resumes submitted to it by Construction Force Services. Annexed to Cantatore's affidavit are certain employment documents relating to plaintiff, which are variously headed "Construction Force Services" and "Construction Force Services LLC" (*id.*, Exh. 7), along with "Construction Force Services" invoices for plaintiff's work which reflect the address listed for Construction LLC. It has always been Cantatore's understanding that Construction Force Services included in each of its invoices a charge for liability insurance in order to satisfy its obligation to procure liability insurance that covers HHC. (*Id.*).

Construction Force Services's correspondence with CMD reflects Construction LLC's address. There are letters from Tia M. Bertototti, Terline, Construction LLC's account manager and vice-president, also identified as C Force's vice-president in C Force's motion papers, and Terlinsky, also Construction LLC's account manager. Although there is no reference to any written agreement, Cantatore infers that one existed. (*Id.*, Exh. 1).

City denies, through counsel, that plaintiff was its employee. Rather, his services were obtained through an entity called Construction Force Services and City argues that third-party defendants are three related entities that operate collectively as Construction Force Services, which also led City to believe that HHC was an additional insured under a policy of insurance issued by the Chubb Insurance Company. (Affirmation of Sabita Krishnan, Acc, dated May 6,

2010). It maintains that since at least 2003, Construction Force Services or its insurance brokers have provided HHC with Certificates of Insurance indicating that HHC was an additional insured under a commercial general liability policy issued to Construction Force Services. The Certificates list the primary insured as Construction Force Services with Construction LLC's address and HHC is listed as an additional insured. (*Id.*, Exh. A). City thus maintains that absent a contract to provide coverage, there would be no need for this insurance.

City also argues that although both Construction Inc. and C Force deny any written agreements with HHC, C Force concedes that HHC is one of its customers to whom it provides temporary workers, and whereas Construction Inc. denies that it agreed to provide insurance to cover HHC, City relies on a "Labor Proposal" it received from Construction Force Services listing LLC's rates for liability insurance to be charged to HHC. (Cantatore Aff., Exh. 7).

In reply, Construction Inc. observes that the third-party complaint is bereft of allegations sufficient to support a cause of action for piercing third-party defendants' corporate veils in order to find that they operate as a single entity. (Toker Reply Aff.).

II. DISCUSSION

A. Construction Inc.'s motion to dismiss

Pursuant to CPLR 3211(a), a party may move for judgment dismissing one or more causes of action asserted against him on the grounds, *inter alia*, that (1) a defense is founded upon documentary evidence; or (7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff accepted as true, and all inferences drawn in the plaintiff's favor (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court determines only whether

the alleged facts “fit within any cognizable legal theory.” (*Id.* at 87-88). However, “[a]llegations consisting of bare legal conclusions . . . are not presumed to be true [or] accorded every favorable inference.” (*Biondi v Beekman Hill House Apartment Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

Here, Construction Inc. has established, *prima facie*, that it neither employed plaintiff nor had a contract with City or HHC and is thus not required to indemnify them or provide them with insurance coverage.

In general, affiliated corporations are treated separately and independently and will not be held liable for each other’s torts or contractual responsibilities. (14 NY Jur 2d, Business Relationships § 41 [2010]). However, a court may “pierce the corporations’ corporate veil and hold two corporations to constitute a single legal unit where one is so related to the other as to be its instrumentality or alter ego . . .” (*Id.*; *see also Ioviero v Ciga Hotels, Inc.*, 101 AD2d 852 [2d Dept 1984]). Factors to be considered, as pertinent here, include: (1) an overlap in ownership, officers, directors, and personnel; (2) common office space, address, and telephone numbers of corporate entities; and (3) whether the corporations are treated as independent profit centers. (14 NY Jur 2d, Business Relationships § 42 [2010]).

In *Mangan v Terminal Transp. Sys., Inc.*, a case arising from a motor vehicle accident, the offending taxicab bore a particular name and insignia. In affirming the denial of summary judgment to the defendant, the court found that as four taxicab corporations were managed by the defendant and as all of the taxicabs bore the same name and insignia, the four operating corporations were the “agents and instrumentalities through [which] the defendant carried on its business, that their operation was controlled by the defendant and that it is liable for the

negligence of the driver of the cab involved.” (247 App Div 853, 853 [3d Dept 1936]; see *Walkovszky v Carlton*, 18 NY2d 414, 418 [1966] [in discussing *Mangan*: “The operating companies were simply instrumentalities for carrying on the business of the defendant without imposing upon it financial and other liabilities incident to the actual ownership and operation of the cabs.”]). Thus, when a corporation is a fragment of a larger corporate combination which actually conducts the business, the larger corporate entity is held financially responsible for the total operation. (*Id.* at 418).

However, in *Walkovszky*, notwithstanding the relationship among the corporate entities, the Court dismissed the claim against the individual defendant, holding that the plaintiff had failed to set forth any allegations in the complaint sufficient to state a cause of action to hold the defendant individually liable on the theory of piercing the corporate veil, and gave the plaintiff leave to serve an amended complaint. (18 NY2d at 418-421).

Similarly, in *East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122 (2d Dept 2009), the court dismissed the complaint for failure to state a cause of action as the plaintiff had not alleged a material element of a cause of action against the individual defendant under the theory of piercing the corporate veil, rejecting the argument that dismissal was inappropriate absent discovery of evidence which would justify piercing the corporate veil. The court held that it would be improper to permit “an insufficient cause of action to survive, at least to the summary judgment stage, merely on the plaintiff’s hope that something will turn up.” (*Id.* at 128-129; see also *Ward v Cross County Multiplex Cinemas, Inc.*, 62 AD3d 466 [1st Dept 2009] [dismissing complaint as it failed to allege facts needed to pierce corporate veil to hold parent corporation liable for subsidiary]; cf *Gateway I. Group, Inc. v Park Ave. Physicians, P.C.*,

62 AD3d 141 [2d Dept 2009] [plaintiff adequately stated cause of action against defendant to hold it liable for other company's obligations under theory of piercing corporate veil by alleging that they shared common address and number, used same equipment, and shared employees]; *M & A Oasis, Inc. v MTM Assocs., L.P.*, 307 AD2d 872 [1st Dept 2003] [court properly sustained cause of action to pierce corporate veil of other company to reach defendant, given allegation that defendant dominated other company and did not observe proper corporate formalities]).

The instant complaint contains no allegations relating to the piercing of the corporate veils of third-party defendants. However, as City and HHC have shown that discovery may lead to evidence indicating that the three third-party defendants are operating as a single legal unit, they have established a ground warranting that leave be granted to amend the third-party complaint.

B. C Force's motion for summary judgment

The proponent of a motion for summary judgment must establish, *prima facie*, its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Walden Woods Homeowners Assn. v Friedman*, 36 AD3d 691 [2d Dept 2007]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Id.*). The burden of proof then shifts to the opposing party to produce admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. (*Zuckerman v New York*, 49 NY2d 557 [1980]).

A defendant moving for summary judgment must submit evidence which negates, *prima*

facie, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." (*Zuckerman*, 49 NY2d 557, 562; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Here, City offers evidence reflecting that HHC dealt only with companies with which it had a written contract, and that it had a long-term business relationship with Construction Force Services. And, notwithstanding Cantatore's inability to locate the contract, the pertinent correspondence between the parties demonstrates that a written understanding had been reached between them and, as noted *supra*, at I., the documentation is signed by officers of both C Force and Construction Inc. In addition, evidence that HHC was named as an additional insured by Construction Force Services tends to prove that Construction Force Services was contractually bound to provide such coverage.

This evidence raises material questions of fact as to whether a written agreement was executed, whereas C Force's and Construction Inc.'s denial of same is supported by the affidavits of corporate officers whose names appear on documentation reflecting the existence of a contract.

That the contract has not been produced does not prove that it does not exist. Where the existence of essential facts, such as the location or terms of an alleged written contract, might be disclosed by depositions and discovery (CPLR 3212[f]; *Baldasano v Bank of New York*, 199 AD2d 184 [1st Dept 1993]), summary judgment may be denied where "the opposing party has not

had a reasonable opportunity for disclosure prior to the making of the motion.” (*Global Minerals and Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]; *cf A & E Stores, Inc. v U.S. Team, Inc.*, 63 AD3d 486 [1st Dept 2009] [defendant submitted affidavit showing that it did not agree to indemnify plaintiff, and plaintiff failed to raise triable issue of fact as to existence of agreement to indemnify, merely speculating that discovery may produce relevant information]).

C Force’s summary judgment motion and Construction Inc.’s alternative requested relief are each based on a written contract, and third-party plaintiffs have provided sufficient evidence, taken in the light most favorable to them, that a written contract likely exists. Moreover, until the question of the existence of a written agreement between the parties is resolved, it cannot be determined whether the relief requested by third-party plaintiffs is precluded under the GOL and the Workers’ Compensation Law. (*Cf Pilato v Nigel Enterprises, Inc.*, 48 AD3d 1133 [4th Dept 2008] [plaintiff’s employer granted summary judgment on ground that plaintiff did not sustain grave injury in loss of eye and there was no written contract authorizing indemnification claim against employer]).

III. CONCLUSION

Accordingly, it is hereby

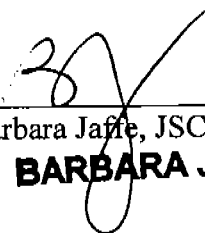
ORDERED, that third-party defendant Construction Force Services Inc.’s motion to dismiss the third-party complaint as against it (motion sequence number 004) is granted unless third-party plaintiffs, within 30 days of service on them of a copy of this order with notice of entry, serve and file an amended complaint setting forth allegations related to piercing the corporate veil of third-party defendants; it is further

ORDERED, that third-party defendant C Force Systems LLC's motion for summary judgment dismissing the third-party complaint as against it (motion sequence number 005) is denied; it is further

ORDERED, that third-party plaintiffs' claims for contribution are dismissed on consent; and it is further

ORDERED, that the parties appear for a preliminary conference on October 5, 2010 at 80 Centre Street, Room 103, at 2 p.m.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: August 2, 2010
New York, New York

FILED
AUG 10 2010
NEW YORK
COUNTY CLERK'S OFFICE