

Reyes v 2272 7 Ave LLC

2010 NY Slip Op 33378(U)

December 6, 2010

Supreme Court, New York County

Docket Number: 115465/2006

Judge: Louis B. York

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: YONK
Justice

PART 2

JOSE LUIS ROYER
- v -
2272 9th LLC

INDEX NO. 115465/06
MOTION DATE _____
MOTION SEQ. NO. 8
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED

DEC 09 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

Dated: 12/6/10

Jim
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):

**NEW YORK
J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
JOSE LUIS REYES,

Plaintiff,

-against-

2272 7 AVE LLC,

Defendant.
-----X

Index No. 115465/2006

FILED

DEC 09 2010

NEW YORK
COUNTY CLERK'S OFFICE

As the arguments in both matters are the same, this opinion is identical to the opinion for Jose Luis Reyes v. Migdol Realty Management, LLC, Sup Index No.: 111792/2008. The opinions are not consolidated because of prior concerns about the status of discovery.

LOUIS B. YORK, J.:

Defendant 2272 7 AVE LLC ("2272") is a limited liability corporation which owns and controls a building located at 2272 Adam Clayton Powell Boulevard in New York City. 2272 is managed by third party Defendant Midgol Realty Management ("MRM"), which is a corporation that manages real estate properties held under the Migdol Organization, LLC ("Migdol Organization"). The Migdol Organization is an umbrella entity owned by Mr. Gerald Migdall that controls several other business entities involved in the ownership, development and management of residential and mixed use buildings in New York City. Mr. Migdall creates a new and distinct limited liability corporation for each real estate property which is owned and controlled by the Migdol Organization to shield and limit the building's liability to the building itself, such as 2272. Tower Construction Services ("Tower") is also one such business entity created by Mr. Migdall.

Plaintiff Jose Luis Reyes is a carpenter's apprentice who is employed by Tower as an independent contractor. On July 26, 2006, Plaintiff was working on an apartment renovation project located at 2272 Adam Clayton Powell Boulevard. Plaintiff, who was installing metal frames onto the ceiling, was standing on a six foot metal A-frame ladder. There were no safety devices to secure the ladder and no one held it. As he was about to install a screw, he alleges that

the ladder suddenly moved from side to side and tipped over, causing him to fall and sustain severe injuries. Plaintiff claims that he complained to his supervisor, Mr. Yunass Hosein, about how the ladder was shaky and asked if someone could hold the ladder for him while he was on it.

Plaintiff commenced this action on August 25, 2008, claiming that because Defendant negligently breached its duty to keep the worksite reasonably safe, Plaintiff is entitled to damages. Defendant, however, argues that it had no such duty. Plaintiffs filed a motion for partial summary judgment pursuant to Labor Law §240(1) and to strike Defendant’s affirmative defenses that Plaintiff’s claims are barred by Worker’s Compensation Law §29(6). Defendants filed a cross-motion for summary judgment pursuant to Worker’s Compensation Law §29(6) based on Plaintiff’s special employee relationship with Defendant. For the reasons below, the Court grants Plaintiff’s motion for partial summary judgment and denies Defendant’s motion for summary judgment.

ANALYSIS

Summary Judgment and Labor Law §240(1)

To prevail on summary judgment, the burden rests with the moving party to establish its claim sufficiently to enable a court to conclude that it is entitled to judgment as a matter of law (*see Finding Group, Inc., v. Water Chef, Inc.*, 19 Misc 3d 483, 486, 852 NYS2d 736, 739 [Sup. Ct. N.Y. Cty. 2008]). If the moving party has made a prima facie showing of entitlement to judgment, the burden shifts to the opposing party to provide evidence of material issues of fact. (*see Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y. 3d 316, 320, 880 NYS2d 869, 871 [2009]). Therefore, to prevail here, Plaintiff Reyes must establish a prima facie case that Defendant had and breached a duty to keep the worksite reasonably safe. (*see Gallagher v. New York Post*, 14 NY3d 83, 88, 896 NYS2d 732, 732 [Ct. App. 2010]).

Plaintiff Reyes made a prima facie case when it showed that Plaintiff’s fall was caused by Defendant’s failure to provide proper protection or any safety devices to support Plaintiff while he

[* 4]

was on a ladder. Under Labor Law §240(1), “all contractors, owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering... of a building or structure [have a non-delegable duty to] furnish or erect...scaffolding, hoists, stays...and other devices...to give proper protection to a person so employed.” A building owner, construction contractor and their agents are absolutely liable under Labor Law 240(1) if they “fail to provide or erect safety devices necessary to give proper protection to a worker to a worker who sustains injuries proximately caused by that failure.” (*Bland v. Manocherian*, 66 NY2d 452, 459, 497 NYS2d 880, 882 [Ct. App. 1985]). To prove liability, Plaintiff only needs to show that the statute was violated and that the violation was the proximate cause of the injuries. (*see Id.*) The injured worker’s negligence is irrelevant to showing a prima facie case under Labor Law 240(1); Plaintiff “does not need to demonstrate the precise manner in which the accident happened.” (*Rodriguez v. Forest City Jay St. Assocs.*, 234 AD2d 68, 68-69, 650 NYS2d 229, 230 [1st Dept. 1996]). If the harm is based on a falling object, however, liability is limited only to those objects which were improperly hoisted or inadequately secured. (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501, 601 NYS2d 49, 52-53 [Ct. App. 1993]).

Plaintiff has established a prima facie case that his fall from the ladder violated Labor Law 240(1). He has presented evidence that the accident occurred when the ladder upon which he stood moved, causing him to fall and sustain injuries. The ladder was unsecured and had been placed on a bare plywood floor without anything to secure it. When Mr. Reyes complained that the ladder shifted from side to side as he stood on it, he was not given any safety equipment to prevent or cushion a fall, nor was he given any safety equipment to secure the ladder. Plaintiff has thus presented a prima facie case that the lack of safety equipment thus proximately caused his fall and injuries. Since Defendant owns and controls the building in which the accident took place, Defendant is absolutely liable for Plaintiff’s injuries. (*see Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 521, 493 N.Y.S.2d 102, 105 [Ct. App. 1985]).

5]

Defendant, who has the burden to show evidence of material issues of fact, has not done so. First, Defendant claims that Plaintiff has not identified anything about the ladder, site conditions or failure to provide adequate safety equipment that caused him to fall and sustain injuries. However, a defect does not have to be established in order to make out a prima facie violation of Labor Law 240(1). (*see Hernandez v. Bethel United Methodist Church*, 49 AD3d 251, 253, 853 NYS2d 305, 307-308 [1st Dept. 2008]). This Department has held that a plaintiff is not obligated to show that a ladder was defective in some manner or to prove that the floor was slippery to make out a Labor Law 240(1) violation.” (*Bonanno v. Port Auth. of N.Y. & N.J.*, 298 AD2d 269, 270, 750 NYS2d 7, 8 [1st Dept. 2002]; *see Montalvo v. J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174-175, 780 NYS2d 558, 560 [1st Dept. 2004]).

Second, Defendant claims that inconsistencies in Plaintiff’s account of the proximate cause of the accident warrant dismissal of the complaint because they raise issues of fact as to Plaintiff’s credibility and as to whether an unsecured ladder caused Plaintiff’s fall. (*see Muhammad v. George Hyman Constr.*, 216 AD2d 206, 206, 628 NYS2d 681, 682 [1st Dept. 1995]). Plaintiff counters that “the fact that [Mr. Reyes] offered different versions of [the] accident makes no difference with respect to Defendant’s liability under Labor Law 240(1) where Defendant would be liable under either version.” However, it has been held that where the injured worker’s version of the accident is inconsistent with either his own previous account or that of another witness, a triable question of fact may be presented. (*Rodriguez v. New York City Hous. Auth.*, 194 AD2d 460, 462, 599 N.Y.S.2d 263, 264 [1st Dept. 1993]). In this case, MGM notes that while Plaintiff claimed that his fall was caused by an unsecured ladder in the Worker’s Compensation C-2 form, he claimed he fell off the ladder because he was hit by a hanging joist in the FDNY certified Prehospital Care Report. Therefore, as the inconsistency is not minor or immaterial, a “bona fide issue exists as to Plaintiff’s credibility.” (*Muhammad v. George Hyman Constr.*, 216 AD2d 206, 206, 628 N.Y.S.2d 681, 682 [1st Dept 1995]).

Summary Judgment and Worker's Compensation

The moving party must make a prima facie case that it is entitled to judgment as a matter of law to prevail on summary judgment. (*see Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 305, 786 NYS2d 382, 390 [Ct. App. 2004]). If the moving party has done so, the opposing party must provide evidence of material issues of fact. (*see Id.* at 312). Thus, the cross-motion of Defendant 2272 must establish a prima facie case that Plaintiff is barred from bringing a personal injury action. (*see Bautista v. David Frankel Realty, Inc.*, 54 AD3d 549, 550, 863 NYS2d 638, 639 [1st Dept. 2008]).

Defendant attempts to satisfy this by citing the Workers' Compensation Law. Under the Workers' Compensation Law, a "special employee" is a general employee of one employer who works for some period of time for a third-party employer where the working relationship is such that the third-party employer" can be deemed the plaintiff's actual employer. (*see Thompson v. Grumman Aerospace Corp.*, 78 NY2d 553, 557, 578 NYS2d 107, 107 [Ct. App. 1991]). A special employee is barred from bringing an action against the "special employer" for injuries suffered while working for the special employer; this is because of the exclusive remedy of workers' compensation benefits provided by the general employer. (*see Id.*; NY CLS Work Comp 29(6) [2010]). An individual's "special employee" status is considered an issue of fact, although the Court has found it to be a matter of law "where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact. (*see Grumman*, 78 NY2d at 558).

"Many factors are weighed in deciding whether a special employment relationship exists and generally no one is decisive." (*Id.*). General employment is presumed to continue unless there is clear demonstration that the general employer surrendered control and the special employer assumed control. (*see Grumman*, 78 NY2d at 558). A significant feature in deciding whether a special employment relationship exists is evidence showing who "controls and directs the manner, details and ultimate result of the employee's work." (*Bautista*, 54 AD3d at 550). Other important factors include evidence that plaintiff and defendant had an actual employment relationship,

evidence that plaintiff had performed duties on behalf of and under the defendant's direction at the time of the accident, or evidence that the defendant was an alter ego of the managing agent. (*see Cruz v. Regent Leasing Ltd. Partnership*, 39 AD3d 396, 396, 834 NYS2d 163, 164 [1st Dept. 2007]). As to the latter, "this Court has recognized that an employer's organization into separate legal entities does not preclude a finding that an employee is limited to benefits under the Workers' Compensation Law." (*Ramnarine v. Memorial Ctr. for Cancer & Allied Diseases*, 281 AD2d 218, 219, 722 NYS2d 493, 494 [1st Dept 2001]). The fact that corporate entities have related ownerships and share the same directors and officers is insufficient to establish that they are alter egos or joint venturers to bar a Worker's Compensation claim. (*see Huges v. Solovieff Realty Co., LLC*, 19 AD3d 142, 143, 796 NYS2d 354, 355 [1st Dept. 2005]).

Defendant 2272 has not made a prima facie case that Plaintiff is barred from bringing an action against it. First, Defendant claims that Tower, 2272 and MRM are alter egos of one another; because Plaintiff Reyes filed a Workers' Compensation claim with Tower, Reyes is precluded from filing an action against 2272 and MRM as well. Defendant, however, has not presented sufficient evidence to show that the companies are each other's alter egos. 2272 argues that they are alter egos because Gerald Migdall created these business entities for similar purposes and managed the entities from the same address. Mere evidence of related ownership is insufficient to establish that they are alter egos to bar a Workers' Compensation claim (*see Ramnarine*, 281 AD2d at 219). Furthermore, other evidence shows Mr. Migdall treated these limited liability corporations as separate and distinct entities with separate bank accounts, financials and insurance companies. Defendant has not met its burden to sufficiently establish a claim that it is entitled to judgment as a matter of law. (*see Finding Group, Inc.*, 852 NYS2d at 739).

Defendant's second argument is that MRM had assumed control of Plaintiff's employment and supervision of his work. Although Defendant argues that Plaintiff has not offered any evidence to disprove that he was a "special employee," this Court has held that the burden lies with the opposing party to show that the general employer surrendered control and the special employer

assumed control. (*see Grumman*, 78 NY2d at 558). Defendant has not offered sufficient evidence to meet the burden. As Plaintiff points out, there is no evidence that Mr. Migdall had exclusive responsibility to supervise and control the construction activities; Defendant acknowledges that such authority was delegated to Yunass Hosein, Reyes' direct supervisor. Both Hosein and Plaintiff Reyes were independent contractors employed and paid by Tower; their work was not directly supervised by Mr. Migdall. Therefore, there is not enough evidence to show a transfer of control between Tower and Defendant 2272.

Procedural Issues and Summary Judgment

Under CPLR 3116, the deposed party must sign the deposition transcript before it can be used as a deposition. (*Morchik v. Trinity Sch.*, 257 AD2d 534, 536, 684 NYS2d 534, 536 [1st Dept. 1999]; CPLR §3116(a)). An unsigned but certified deposition transcript, however, may be used by the opposing party as an admission in support of a summary judgment motion. (*see White Knight Ltd. v. Shea*, 10 AD3d 567, 567, 782 NYS2d 76, 77 [1st Dept. 2004]). Furthermore, CPLR 3116(a) allows a deposition to be used as fully as though signed if the witness fails to sign and return it within sixty days. (*see Zabari v. City of New York*, 242 AD2d 15, 17, 672 NYS2d 332, 333 [1st Dept. 1998]).

Defendant argues that Plaintiff should be precluded from using Yunass Hosein's deposition transcript as evidence in support of Plaintiff's motion for summary judgment because it is unsigned and was not properly disclosed during discovery. Defendants claim that Plaintiff caused the Defendants irreparable prejudice when Plaintiff allegedly withheld Hosein's deposition transcript. This argument is without merit. Mr. Hosein's transcript was certified by a certified court reporter, Mr. Stephen Carr. Furthermore, the transcript was not "untimely" withheld, as it was served to Defendant's counsel in November 2009, three months after the deposition was held in August 2009.

This Court has considered Defendant's remaining contentions and finds them unavailing.

Based on the above, therefore it is

ORDERED that Defendant's motion for summary judgment is denied; and it is further

ORDERED that Plaintiff's motion for partial summary judgment is denied.

Dated: 12/6/10.

ENTER:



LOUIS B. YORK, J.S.C.



FILED

DEC 09 2010

**NEW YORK
COUNTY CLERK'S OFFICE**