

Florida v Island Securing and Maintenance, Inc.

2010 NY Slip Op 33574(U)

December 14, 2010

Sup Ct, Richmond County

Docket Number: 103532/06

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:103532/06
Motion No.:001**

**GIUSEPPE FLORIDIA and
ANN FLORIDIA,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

ISLAND SECURING AND MAINTENANCE, INC.,

Defendant

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support	2
Answering Affidavits	3
Replying Affidavits	4
Replying Memorandum of Law	5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant moves for an order granting it summary judgment dismissing the plaintiffs' complaint. The defendant's motion is denied in its entirety.

Facts

The plaintiff, Giuseppe Floridia, alleges that he was injured while employed by the defendant at the New York Container Terminal, located at Howland Hook on Staten Island, New York as a longshoreman. The plaintiff testified that he was a member of the International Longshoremen's Association, AFL-CIO, Local 920. After the accident that allegedly caused the

plaintiff's injuries, he filed for and received, workers compensation benefits pursuant to Section 905(a) of the Long Shore Act¹ from New York Container Terminal, Inc. ("NYCT")

The plaintiff claims that he sustained his injuries when the lashers, employed by the defendant Island Securing and Maintenance, failed to remove a lashing bard during the discharge of a container from a vessel at NYCT. Based on this theory the plaintiff sued ISM alleging one cause of action that he is a seaman under the Jones Act,² and a second cause of action alleging that the defendant failed to provide him with a seaworthy vessel and failed to provide proper medical attention under the Long shore and Harbor Workers Compensation Act.³

During depositions, the representative for the defendant Island Securing and Maintenance ("ISM"), John Atkins, the Chief Operating Officer of GCT USA, the parent corporation of NYCT, as well as the Chief Operating Officer of the defendant ISM testified that ISM is a ". . . mechanism, a department . . ." of NYCT. Atkins testified as follows:

- Q. Now, are you also familiar with a company by the name of Island Securing and Maintenance, Inc.?
- A. I'm familiar with Island Securing, yes.
- Q. And what is your familiarity with that company?
- A. Island Securing is a mechanism, a department let's say, that processes and records payroll for ILA, International Longshoremen's Association, members that are covered under a particular collective bargaining agreement.

In a subsequent affidavit submitted in support of the defendant's motion for summary judgment, Atkins avers that NYCT is the sole shareholder of the defendant. Atkins also testified that:

¹ 33 USC § 905(a).

² 46 USC § 30104.

³ 33 USC § 901.

. . . Island Securing is merely a department or mechanism that segregates and processes payroll for a collective bargaining contract that is used at this terminal. There are two ILA contracts. There is a Deepsea contract that covers the Longshoremen that move cargo to and from the ship. Their benefits are paid by the shippers that use this terminal. So the payroll needs to be kept in one box. There is another collective bargaining agreement within the ILA that covers certain type work lashing, maintenance and repair of equipment. That collective bargaining agreement benefits for those people that perform that work are paid by the employer. Not the steamship line. So those hours and that payroll need to be kept in a separate box. So at the end of the month, it is known and this is a generally accepted practice in port of New York with two collective bargaining agreements that the marine terminals must abide by. So at the end of the month, it is very clear accounting of, okay, we as the employer need to pay the benefits for these hours. And the steamship line pays the benefits for the hours of these gentlemen that perform this particular type of work.

In short NYCT employed labor that was governed under two separate collective bargaining agreements, one for longshoremen, known as the Deepsea agreement, which was between the New York Shipping Association and the New York Shipping Association. This agreement covered those workers who were longshoremen that were part of ILA Local 920, like the plaintiff. The second collective bargaining agreement was for workers performing maintenance and repair, which would include lashers working at the terminal who belong to ILA Local 1814. That labor pool is covered by the Metropolitan Maintenance Contractor's Association ("MMMCA").

Atkins testified that while he was not sure if there would be a breach of either of the collective bargaining agreements to pay the longshoremen and the maintenance workers out of the same account; he testified that because of accounting purposes it was necessary to maintain two payroll mechanisms due to the reporting requirements of the labor associations.

As a result of these reporting requirements, NYCT provides the monetary funding for ISM to pay the lashers. Atkins testified that ISM functions as a payroll account where at the end

of each week its accounts are devoid of funds. He further stated that ISM has no assets and did not have any vendors.

To further corroborate the deposition testimony of Atkins, the defendants annex the affidavit of Anthony Roselle, the Vice President of Finance for NYCT and ISM. In that affidavit Roselle avers that NYCT is the sole shareholder of ISM; that it does not have any assets nor does it own any property; that it does not have a contract or agreement with NYCT, and all relevant times ISM never filed a federal income tax return. As exhibits to his affidavit, Roselle annexes bank statements from JP Morgan Chase Bank for NYCT and ISM. These records corroborate Atkins's testimony that NYCT funds ISM's account for the sole purpose of paying workers under the collective bargaining agreement within the ILA that covers workers performing the duties of lashing, maintenance and repair of equipment.

The defendant moves for an order granting it summary judgment dismissing the complaint arguing that it is the alter ego of NYCT; or in the alternative, that Giuseppe Florida is a "special employee" of NYCT.

Discussion

The plaintiff argues that the documentary evidence submitted by the defendant in reply may not be considered by the court to support its motion for summary judgment. The plaintiff cites the Appellate Division, Second Department's decision in *Constantine v. Premiere Cab Corp.* to support his position.⁴ In *Constantine* an employee brought an action to recover against his employer for injuries allegedly sustained in the course of his employment. Similar to the case before this court, the defendant moved to dismiss the plaintiff's complaint arguing that it was the alter ego of the parent corporation from and the plaintiff would be limited to any Workers' Compensation recovery against the parent corporation. In that case, the defendant supported its

⁴ *Constantine v. Premier Cab Corp.*, 295 AD2d 303, [2d Dept 2002].

motion for summary judgment dismissing the plaintiff's complaint solely with affidavits. The Appellate Division, Second Department found that affidavits alone were not enough to establish the exclusivity provisions of the Workers' Compensation Law and refused to consider those documents submitted by the defendant in reply which supported its motion; therefore, it denied the defendant's motion for summary judgment.

Here, the defendant does not rely solely on the affidavit of its principal to demonstrate that it is the alter ego of NYCT. But rather it relies on the deposition testimony of a corporate witness noticed for deposition by the plaintiff—Atkins. While Atkins submits an affidavit clarifying his deposition testimony, this court finds that the subsequent affidavit conforms with that testimony taken by the plaintiff during the deposition. Atkins' deposition testimony and subsequent affidavit, proffers the argument that ISM was a wholly owned subsidiary of NYCT that had no other function than to provide the account to pay those employees governed under the MMMCA collective bargaining agreement. The testimony elicited from Atkins at the deposition conducted by plaintiff's attorney revealed that ISM's board and corporate officers are identical to that of NYCT; and that ISM owns no property and has no assets of its own. In short Atkins's testimony revealed that ISM exercised only those functions permitted by NYCT.

In reply, to the plaintiffs' opposition the plaintiff submitted, among other things, copies of the Deepsea collective bargaining agreement governing labor through ILA Local 920; the MMMCA collective bargaining agreement governing labor provided through ILA Local 1814; copies statements from ISM and NYCT from JP Morgan Chase Bank evidencing the funding of the ISM account by NYCT for payment of MMMCA employees; and the affidavit of Anthony Roselle, the Vice President of Finance for NYCT and ISM, that authenticated those banking statements.

The defendant argues that these documents submitted in reply are admissible for consideration by this court because they do not raise new arguments for the first time in reply. The defendant cites the Appellate Division, First Department's decision in *Sanford v. 27-29 W.*

181st Street Association, wherein it permitted the submission of material not originally included in its motion papers in reply. The Appellate Division, First Department reasoned as follows:

The prohibition against accepting material in reply papers was established in *Ritt v. Lennox Hill Hosp.* . . . and its progeny is directed at the introduction of ‘new arguments in support of, or new grounds for the motion’ . . . at a point in the proceedings when the opposing party has no opportunity to respond.⁵

However, the Thirteenth Judicial District is bound by the holdings of the Appellate Division, Second Department which held in *Constantine* that affidavits alone submitted in support of a motion for summary judgment cannot demonstrate control of a parent over a subsidiary. The failure of the defendant to annex those evidentiary materials to its original motion papers prevented the defendant from establishing the applicability of the exclusivity provisions of the Workers’ Compensation law on summary judgment. Here, the deposition testimony relied upon by the moving defendants is akin to those affidavits relied upon by the defendants in *Constantine*. As such, the court cannot consider the documentary evidence submitted in reply by the defendants. Therefore, ISM cannot prove its entitlement to summary judgment.

Accordingly, it is hereby:

ORDERED, that the Island Securing and Maintenance, Inc.’s motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED, that the parties return to **DCM Part 3 (130 Stuyvesant Place, 3rd Floor) on Monday, January 31, 2011 at 9:30 a.m.**

ENTER,

⁵ 300 Ad2d 250, [1st Dept 2002](internal citations omitted).

DATED: December 14, 2010

Joseph J. Maltese
Justice of the Supreme Court