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

PRESENT: EMILY JANE GOODMAN Justice PART 17

Index Number : 115992/2007
STAMPONE, NICOLA
vs
CONSOLIDATED EDISON
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 10/27/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

...l on this motion to/for _____

	PAPERS NUMBERED
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Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum Decision and Order.

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

FILED
JAN 30 2012
NEW YORK COUNTY CLERK'S OFFICE

Dated: Jan 23, 2012

J.S.C.
EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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NICOLA STAMPONE AND GAETANA STAMPONE,

Plaintiffs,

-against-

CONSOLIDATED EDISON, INC. AND CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

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Index No.: 115992/2007

DECISION & ORDER

EMILY JANE GOODMAN, J.:

In this case, plaintiff, Nicola Stampone,[1] a gas mechanic, seeks to recover for injuries that he alleges he suffered when he slipped on mud in a trench. Defendants (together, Con Edison) move to amend their answer to include the affirmative defense that plaintiff's claim is barred based on the exclusive remedy provisions of the Workers' Compensation Law (Workers' Compensation Law §§ 11 and 29 [6]), because he is a special employee (CPLR 3025 [b]), and for summary judgment dismissing the complaint on that and other grounds (CPLR 3212).

The Motion for Leave to Amend

Con Edison moves to amend its answer. "Leave to amend a pleading is freely given . . . absent prejudice or surprise resulting directly from the delay" (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]). A proposed pleading that fails to state a claim or that plainly

[1] Plaintiff Gaetana Stampone has discontinued her claims in this action.

lacks merit will not be permitted (*id.* at 405). "The decision to allow or disallow an amendment is committed to the court's sound discretion" (*Leonardi v City of New York*, 294 AD2d 408 [2d Dept 2002]).

"[A]n employee, although generally employed by one employer, may be specially employed by another employer, and . . . a special employer may avail itself of the Workers' Compensation Law to bar negligence claims against it for injuries sustained by a special employee in the course of special employment" (*Bellamy v Columbia Univ.*, 50 AD3d 160, 161 [1st Dept 2008]). A special employee is defined as "one who is transferred for a limited time of whatever duration to the service of another" and "may . . . be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991] [citations omitted]; *Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 550 [1st Dept 2008]).

The main factors in determining the existence of the special employee relationship "include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business" (*Ugijanin v 2 W. 45th St. Joint Venture*, 43 AD3d 911, 913 [2d

Dept 2007]). In *Thompson* (78 NY2d at 558), the Court of Appeals noted that "[w]hile not determinative, a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work." However, a determination of a special employment relationship is "'justified only where the special employer exerts complete and exclusive control over the purported special employee, as to whom the general employee has relinquished all control'" (*Fox v Brozman-Archer Realty Serv.*, 266 AD2d 97, 99 [1st Dept 1999], quoting *Sanfilippo v City of New York*, 239 AD2d 296, 296 [1st Dept 1997]). Otherwise, "[g]eneral employment is . . . presumed to continue, and special employment will not be found" (*Bellamy*, 50 AD3d at 161).

Con Edison provides evidence that plaintiff reported to a Con Edison work site daily, for many years, to work on Con Edison jobs, including on the date of the alleged incident. Con Edison also provides evidence demonstrating that plaintiff used Con Edison's tools. It is undisputed that plaintiff received training from Con Edison, and that Con Edison had control over the ultimate work product that plaintiff produced. This showing is sufficient to demonstrate that amendment of the answer is warranted, and plaintiff does not argue surprise or prejudice. Therefore, Con Edison's motion to amend is granted.

The Motion for Summary Judgment

Workers' Compensation Law §§ 11 and 29 (6)

Con Edison argues that it is entitled to summary judgment dismissing the complaint as plaintiff's claim is barred by the exclusive remedy provisions of Workers' Compensation Law (Workers' Compensation Law §§ 11 and 29 [6]), because plaintiff was Con Edison's special employee. It is well-known that summary judgment must be denied where a party demonstrates the existence of a genuine triable issue of fact (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002]). "[W]hether a special employment relationship exists is fact-laden and generally presents an issue for the trier of fact" (*Bautista*, 54 AD3d at 550).

Plaintiff submits an affidavit in which he states that his general employer (Petmar) provided some of the tools, including the truck pump that he used on the day that he was injured, thereby disputing Con Edison's contention that the tools used by Petmar employees belonged to Con Edison. Plaintiff's testimony, upon which Con Edison relies (Def. Mov. Aff., Exh, E, at 38), in context, and reasonably interpreted in plaintiff's favor as the non-moving party (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]), is that Con Edison told him the job to be performed. However, plaintiff did not testify that Con Edison directed him as to the manner and means, or details, in performing his work. Plaintiff also avers that he reported to a supervisor from Petmar, Patrick Sheedy, in the morning and at the end of each day.

While Con Edison contends that it instructed and supervised all aspects of Stampone's work, it does not provide sufficient evidence to demonstrate that the Con Edison supervisor at the work site controlled the actual manner or details of plaintiff's work. Con Edison submits the affidavit of Patrick Sheedy from Petmar, whom, as mentioned above, plaintiff avers was his supervisor. Sheedy states that he never had occasion to visit a site where plaintiff was working.[2] While Sheedy also states that Stampone's questions at the work site about how the job was to be performed were directed to Con Edison, the basis for his knowledge of this is not stated, and it is not clear how he would know this when he never had occasion to visit plaintiff at a Con Edison worksite. Sheedy's statement that Con Edison controlled every aspect of plaintiff's daily work routine and had complete authority in this manner is also conclusory. While Con Edison cites to the testimony of its employee, Alex Torres, that he was in charge of the job, Torres does not state that he supervised the manner in which plaintiff worked, or that he had the authority to do so.[3]

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[2] Mr. Sheedy does not state that he was or was not plaintiff's supervisor, but only that he gave plaintiff and his plaintiff's work partner instructions on which Con Edison site to go to in the morning when they arrived at the Petmar shed.

[3] Con Edison contends that its foreman, Catillo Chapman, testified that Con Edison crews supervised Petmar employees at various Con Edison worksites, and that Con Edison provided Petmar mechanics with equipment at job sites, but Chapman's deposition

Furthermore, while Sheedy states that Petmar's contract with Con Edison provides for Con Edison's control of plaintiff's work, he does not point to anything in the contract to support that assertion.[4] Unless exclusive control over the manner, details and result is demonstrated by a defendant, summary adjudication of special employment status is not proper (*Bellamy*, 50 AD3d at 162). The record here is not sufficient to determine, as a matter of law, which entity had the right to, or did, in fact, control the manner and details of plaintiff's work.

Furthermore, unlike in *Thompson* (78 NY2d at 555), upon which Con Edison relies, where the special employer (Grumman) could terminate the plaintiff's assignment to its facility, there is no dispute that Petmar, in addition to paying and providing benefits for plaintiff, also retained the ultimate power to discharge him. In addition, in *Thompson*, there was no dispute that the plaintiff reported to a Grumman supervisor, who monitored and directed his work on a daily basis, and whom the

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transcript was not included in the record, and therefore these assertions may not be considered.

[4] Con Edison also does not cite to any portion of the contract. The court's brief perusal of the documents submitted by Con Edison reveals that the bidding material attached to the purchase order states that it is for "SUPERVISION, LABOR, MATERIAL, TOOLS AND EQUIPMENT TO PROVIDE PER DIEM SUPPORT TO CON EDISON" (Def. Mov. Aff., Exh. G [invitation to bid, at 1]), and the Terms and Conditions attached to the invitation to bid defines the work as, among other things, the labor, supervision, equipment and materials needed for the work (id. [second page of "TERMS AND CONDITIONS of CONSTRUCTION CONTRACTS"]).

employee acknowledged was his supervisor (*id.*). Grumman also selected the personnel assigned to its site, and the plaintiff's general employer was contractually precluded from "substituting, reassigning or removing personnel selected by and assigned to work at Grumman" (*id.* at 555-556). There is no indication that this was the case here. In fact, Mr. Sheedy does not discuss which entity determined which workers were to partner on, and go to, jobs. Furthermore, plaintiff avers that in all of his years at Petmar, no one from either Petmar or Con Edison indicated to him that he was a Con Edison employee. Plaintiff also avers that Con Edison required that Petmar employees dress in a manner that distinguished them from Con Edison employees. This may suggest that Con Edison did not assume control of these employees (*see* Bautista, 54 AD3d at 556 ["(t)o rebut the presumption of general employment the putative special employer must clearly demonstrate that the general employer surrendered control over the employee and that the putative special employer assumed such control"]), but wanted to distinguish them as separate from their own. Therefore, on this record, Con Edison's motion for summary judgment dismissing the complaint as barred by the exclusive remedy provisions of Workers' Compensation Law §§ 11 and 29 (6) is denied because there are questions of fact concerning whether plaintiff was a special employee of Con Edison.

Labor Law § 240 (1)

The part of Con Edison's motion which seeks dismissal of

plaintiff's Labor Law § 240 (1) claim is unopposed, and that claim is dismissed. The record does not suggest factual support for this claim, which plaintiff has apparently abandoned.

Labor Law § 200

Con Edison also moves to dismiss plaintiff's common-law negligence and Labor Law § 200 claims. Labor Law § 200 codifies the common-law duty imposed upon owners and contractors to provide workers with a safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). The section provides that

> "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places"

(Labor Law § 200 [1]).

Since the accident allegedly resulted from a dangerous condition of the workplace, Con Edison, as a general contractor, may be held liable for violation of Labor Law § 200 and breach of its common-law duty to provide a safe workplace upon a showing that it either caused, or had actual or constructive notice of, the dangerous condition. Plaintiff testified that Con Edison pumped water out of the trench and that he informed the Con Edison foreman that there was a problem with too much water in the trench. Plaintiff also avers that Con Edison was aware that the trench's muddy, watery condition was unsafe. Con Edison disputes the safety of the trench. Whether the condition was or

was not dangerous is a fact issue. Moreover, summary judgment is not warranted on the record, which contains evidence of Con Edison's knowledge of a dangerous condition.

Next, Con Edison argues that plaintiff's claim fails because the condition was open and obvious. The Court of Appeals has stated that the Labor Law § 200 duty does not extend to "'defects, risks or dangers that may be readily observed by the reasonable use of the senses, having in view the age, intelligence, and experience of the servant'" (*Gasper v Ford Motor Co.*, 13 NY2d 104, 110 [1963], quoting *McLean v Studebaker Bros. Co. of New York*, 221 NY 475, 478 [1917]). However, these circumstances merely "'negate[] any duty that defendant [] . . . owed plaintiff to warn of potentially dangerous conditions'" (*England v Vacri Constr. Corp.*, 24 AD3d 1122, 1124 [3d Dept 2005] [citation omitted]; *see also Maza v University Ave. Dev. Corp.*, 13 AD3d 65, 65 [1st Dept 2004] [liability under section 200 is not negated by the "open and obvious" nature of hazard, as this factor goes to plaintiff's comparative negligence]). Here, there is no claim that Con Edison breached any duty to warn, and the section 200 claim survives.

Labor Law 241 (6)

To prevail on a cause of action under Labor Law 241 (6), a plaintiff must demonstrate a defendant's violation of an applicable rule or regulation of the New York Industrial Code, which sets forth a specific standard of conduct, and not merely a

general reiteration of common law principles (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Con Edison argues that all of the Industrial Code violations alleged by plaintiff should be dismissed because they do not apply. Other than his claim concerning 12 NYCRR 23-1.7 (d), plaintiff does not dispute the argument. Therefore, the portions of the complaint that alleges that Con Edison violated Labor Law § 241 (6), based on violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.7 (with the exception of 12 NYCRR 23-1.7 [d], discussed below) and 12 NYCRR 23-4.2 is dismissed.

Section 23-1.7 (d) governs "Slipping Hazards." It provides:

> Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

(12 NYCRR 23-1.7 [d]). The regulation imposes a duty on employers to provide safe footing for employees by requiring that any "foreign substance which may cause slippery footing *shall be removed . . . to provide safe footing* " (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]).

Con Edison contends that the section 241 (6) claim based on this Industrial Code provision should be dismissed because the provision applies only to an elevated working surface such as a floor, passageway, walkway, platform or scaffold, and not to a trench which is beneath ground level (Def. Mov. Aff., at 23).

Con Edison also argues that the provision applies to a "foreign substance," and that plaintiff alleges that he slipped on muddy ground that was exposed to the elements, a naturally occurring substance. Plaintiff opposes dismissal, arguing that the part of the provision that refers to an "elevated working surface" refers to scaffolds and platforms, and not to all surfaces, and does not mean that the provision only applies to elevated floors, passageways and walkways. Plaintiff argues that the provision's reference to "foreign substances" does not mean that employees shall be permitted to work on a floor, passageway or walkway that is in a slippery condition that does not involve a foreign substance. Plaintiff also argues that the bottom of the excavation was naturally made up of earth, but was only in the dangerous, muddy condition after water was allowed to accumulate there. Plaintiff maintains that the bottom of the trench was not a common, unprotected area as in *Scarupa v Lockport Energy Assoc.* (245 AD2d 1038, 1039 [4th Dept 1997]), where the court found that 12 NYCRR 23-1.7 [d] did not apply.

Plaintiff testified that he slipped in the mud at the bottom of the trench. The muddy bottom of the trench was not a floor or a "passageway, walkway, scaffold, platform or other elevated working surface" and plaintiff did not slip on a foreign substance. Therefore, 12 NYCRR 23-1.7 (d) is not applicable (*Miranda v City of New York* (281 AD2d 403, 404 [2d Dept 2001] ["(t)he sandy ground did not constitute a 'slippery condition' as

contemplated by 12 NYCRR 23-1.7 (d)"]; *see Scarupa*, 245 AD2d at 1039 ["plaintiff did not slip on a foreign substance, but slipped on muddy ground that was exposed to the elements"]; *see also Gielow v Coplon Home*, 251 AD2d 970, 971 [4th Dept 1998] [same]).

Conclusion

In light of the foregoing, it is

ORDERED that defendants' motion is granted to the extent of granting leave to amend the answer to assert an affirmative defense based on the exclusive remedy provisions of Workers' Compensation Law §§ 11 and 29 (6), and granting dismissal of the complaint to the extent of dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, and is otherwise denied; and it is further

ORDERED that counsel appear for a pre-trial conference in Room 422, 60 Centre Street on March 22, 2012 at 10:00 AM.

Dated: 1/23/12

ENTER:

J.S.C.

EMILY JANE GOODMAN