

Espinal v Custom Care Contr., LLC

2012 NY Slip Op 30379(U)

February 2, 2012

Sup Ct, Nassau County

Docket Number: 23644/09

Judge: Thomas A. Adams

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 25
NASSAU COUNTY

ONESIMO ESPINAL,

Plaintiff(s),

MOTION DATE: 12/14/11

INDEX NO.: 23644/09

-against-

SEQ. NO. 3

CUSTOM CARE CONTRACTING, LLC and DENISE
M. TONTI,

Defendant(s).

CUSTOM CARE CONTRACTING, LLC,

Third-Party Plaintiff,

-against-

NOEL CONSTRUCTION,

Third-Party Defendant.

DENISE M. SPAMINATO s/h/a DENISE M. TONTI,

Second Third-Party Plaintiff,

-against-

NOEL CONSTRUCTION,

Second Third-Party Defendant.

The third-party defendant Noel Construction's motion, pursuant to CPLR 3212, for summary judgment is determined as hereinafter provided.

On September 25, 2009 the plaintiff fell off a ladder while installing aluminum siding at the defendant/third-party plaintiff Denise M. Tonti's 574 Pauley Drive residence in West Hempstead. On November 19, 2009 he filed this personal injury action against the purported general contractor, the defendant Custom Care Contracting, LLC (hereinafter Custom Care) (see movant's Exhibit C, plaintiff's 11/15/10 bill of particulars, para.13), and Ms. Tonti alleging negligence and violation of Labor law §§240, 240(1) and 241(6) (see movant's Exhibit A). Issue was joined on or about January 26, 2009

(Custom Care) and March 4, 2010 (Tonti) (see movant's Exhibit B). On or about April 22, 2010 Custom Care impleaded the alleged subcontractor, Noel Construction, seeking contractual indemnification (see movant's Exhibit D). Noel Construction interposed an unverified answer to Custom Care's third-party complaint on or about June 24, 2010 (see movant's Exhibit E). Finally, Ms. Tonti likewise impleaded Noel Construction on or about August 26, 2010 (see movant's Exhibit F) and she joined issue on or about October 20, 2010 (see movant's Exhibit G). The action was discontinued as against Ms. Tonti on or about May 23, 2011 (see movant's Exhibit O).

Upon the completion of disclosure, the case was certified for trial on May 12, 2011 and on August 3, 2011 a note of issue was filed. The movant's October 25, 2011 motion is therefore timely (see CPLR 3212[b]). It alleges, in sum, that the plaintiff was not operating as a subcontractor at the time of his injury (or that, in the absence of the original contract, he and Custom Care are precluded from establishing that relationship) and therefore no obligation to indemnify Custom Care exists. Alternatively, in the event the plaintiff was working as Custom Care's employee, he is allegedly unable to recover against his employer because he did not sustain a "grave injury" (see Workers' Compensation Law §11).

The testimony of the plaintiff and Custom Care's owner, Robert B. Franza, with respect to the plaintiff's employment status is hardly a model of clarity. Initially, consistent with his bill of particulars, the plaintiff testified that, in his capacity as the sole owner and proprietor of Noel Construction (see movant's Exhibit I, p.11,L9), he was working for (p.21,L14) and supervised and directed by (p.20,L7-p.21,L2) Custom Care, the general contractor. Moreover, he repeatedly identified his signature on two (1/1/08 - 12/31/08 and 1/1/09 - 12/31/09) annual subcontracting agreements with Custom Care (p.24,L3;p.25,L16;p.72,L4; see movant's Exhibits J & K). However, he only recalled executing the earlier (2008) agreement (p.24,L7;p.25,L24). Nevertheless, he subsequently testified that a June 26, 2008 subcontractor's agreement he executed (see movant's Exhibit L) - of unspecified duration - was the only contract Noel Construction entered into with Custom Care (p.69,L13;p.69,L25). According to the plaintiff, that agreement was "[s]upposedly, for a year" (p.70,L11). Finally, despite his earlier testimony, he concluded by asserting that he did not recall signing the 2008 contract (p.71,L13-18) and that Custom Care, rather than he, dated the 2009 agreement (p.71,L22-p.72,L5).

Mr. Franza testified, inter alia, that the plaintiff only worked for Custom Care as a subcontractor (see movant's Exhibit M, p.19,L13). He denied seeing the 2008 contract previously (p.56,L17 - p.57,L2), but acknowledged that his former office manager, Jean Yovino (p.10,L4), was authorized to use a signature stamp bearing his name (p.57,L2-25). The current office manager, Kristen, has custody of the 2009 files (p.59,L13-21). He also identified his signature (or signature stamp) on each of the three contracts (p.72,L4; p.74,L13; p.77,L3). Although he didn't know if the 2009 subcontract still existed (p.83,L3), he expected that both the 2008 and 2009 agreements were still available (p.83,L11-17) and they, or any other contract with Noel Construction related to this job, should still be in Custom Care's files (p.84,L14). Lastly, Ms. Yovino, his 2009 office manager, may also have personal knowledge as to any contracts Noel Construction executed with Custom Care in that year (p.75,L24). Conversely, his subsequent May 15, 2011 affidavit avers, in pertinent part, that Custom Care "is not in possession of the original" contracts (see movant's Exhibit Q).

More recently, in support of the present motion, the plaintiff has supplied a July 15, 2011 affidavit averring that he executed the June 26, 2008 agreement which was allegedly "to be effective for the period of one year only", i.e., until June 26, 2009 - but that his company was reportedly "not working [for Custom Care] pursuant to any written contract" on September 25, 2009 (see movant's Exhibit P). In addition, the movant's expert, Dennis J. Ryan, a "certified forensic document examiner" opines "with a reasonable degree of forensic certainty" that the 2009 contract "is an alteration of" the June 26, 2008 agreement, i.e., that Custom Care merely altered the dates on the 2008 contract.

Curiously, the plaintiff, who bears the burden of proof as to his employment status on September 25, 2009, has not opposed the motion. However, Mr. Franza's November 16, 2011 affidavit in opposition (see Custom Care's Exhibit 1) reiterates his assertion that "any work" the plaintiff performed for it was performed in his capacity as a subcontractor (para.4).

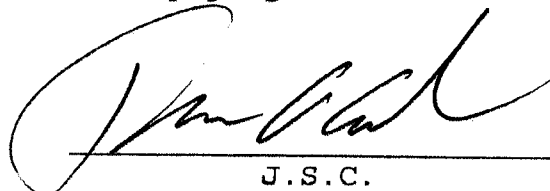
"The 'oft-mentioned and much misunderstood' best evidence rule simply requires the production of an original writing where its contents are in dispute and sought to be proven" (Schozer v Wm. Penn Life Ins., 84 NY2d 639,643; see gen. Martin and Capra, "New York Evidence Handbook [2d ed.]", §§10.1, 10.2.1 and 10.3). Here, in view

of the convoluted record as to the plaintiff's employment status on September 25, 2009, including, but not limited to, his own contradictory testimony, the movant has failed to demonstrate its prima facie entitlement to summary judgment (see CPLR 3212).

Preliminarily, in view of the plaintiff's repeated (p.25,L16; p.72,L4) acknowledgment that he executed the January 1, 2009 - December 31, 2009 contract, the best evidence rule may not be implicated (see Billiny v Blagrove, 84 AD3d 848; Commercia Bank v Benedict, 39 AD3d 456,458). In any event, the movant has failed to establish that Custom Care is incapable of adequately explaining the unavailability of the original contract at trial (e.g., through Ms. Yovino's non-party testimony) which would permit it to rely upon secondary evidence (see Schozer supra at 644; cf. Lipschitz v Stein, 10 AD3d 634,637-638). Alternatively, the plaintiff consistently acknowledged signing the June 26, 2008 agreement whose duration is unspecified. Parol evidence, including the plaintiff's characterization of its length (i.e., "[s]upposedly, a year") (p.70,L11), is admissible to explain, but not contradict, any ambiguous terms (see Babikian, Inc. v TMA Realty, LLC, 78 AD3d 1088; Yellow Book of NY, Inc. v Shelley, 74 AD3d 1333). Moreover, in the absence of an express term fixing the duration of a contract, a Court may inquire into the intent of the parties and supply the missing term if a duration maybe fairly and reasonably fixed by the surrounding circumstances and the parties intent (see Better Living Now, Inc. v Image Too, Inc., 67 AD3d 940,941 quoting Haines v City of New York, 41 NY2d 769,772). Here, in view of Custom Care and Noel Construction's custom and practice of renewing subcontracting agreements annually, it can not be presently determined as a matter of law that it was their intent to terminate their contractual relationship on June 26, 2009 or prior to the plaintiff's September 26, 2009 accident.

Accordingly, the third-party defendant Noel Construction's motion, pursuant to CPLR 3212, for summary judgment is denied.

Dated: FEB 02 2012



J.S.C.

ENTERED
FEB 07 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE