

Rowe v RWDSU Realty Corp.
2012 NY Slip Op 32613(U)
October 12, 2012
Sup Ct, New York County
Docket Number: 115206/2009
Judge: Doris Ling-Cohan
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ORDER

Rowe

*RWDSU Rity Corp.,
etal.*

INDEX NO. *115206/2009*
MOTION DATE
MOTION SEQ. NO. *001*
MOTION CAL. NO.

The following papers(1 to) were read on this motion to/for

Papers

Notice of Motion/Order to Show Cause - Affidavits - Exhibits

Answering Affidavits - Exhibits

Replying Affidavits

Cross-Motion: [] Yes [] No

Numbered

1, 2

3, 4

5

Upon the foregoing papers, it is ordered that

defendants' motion for

*Summary judgment is denied in accordance
with the attached memorandum decision.*

FILED

OCT 16 2012

COUNTY CLERKS OFFICE
NEW YORK

Dated:

10-12-11



J.S.C.

DORIS LING-COHAN

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ 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: IAS PART 36

----- X

RALPH A. ROWE and DESIREE ROWE,
Individually and as Husband and Wife,

Plaintiffs,
-against-

Index No.:
115206/2009

RWDSU REALTY CORPORATION, RWDSU REALTY
CORPORATION C/O RETAIL WHOLESALE AND
DEPARTMENT STORE UNION and CAMPANILE
INC.,

Motion Seq. No.:
001

FILED

OCT 16 2012

Defendants.

----- X

DORIS LING-COHAN, J.:

COUNTY CLERK'S OFFICE
NEW YORK

In this action for negligence and violations of the New York State Labor Law, defendants RWDSU Realty Corporations, RWDSU Realty Corporation c/o Retail Wholesale And Department Store Union, and Campanile Inc. move, pursuant to CPLR § 3212, for summary judgment dismissing all causes of actions in the verified complaint submitted by plaintiffs Ralph A. Rowe ("Rowe") and Desiree Rowe (jointly as "Plaintiffs").

In their opposition papers, plaintiffs have consented to withdraw their fifth cause of action which asserts labor law claims, pursuant to NYS Labor Law §§ 200, 240(1), and 241(6). ¶3, Affirmation in Opposition.

Background and Factual Information

Rowe, an independent contractor specializing in kitchen equipment repair, was hired by Slavko Dunic ("Dunic"), the owner of Campanile, an Italian restaurant, to inspect and repair a belt for the kitchen's exhaust system. On the date of the incident,

January 21, 2009, Rowe had been a kitchen equipment technician for over ten (10) years. See Notice of Motion, Ex. F, pp. 11-14.

It is undisputed that, when Rowe arrived at Campanile, Dunic told him that the belt for the exhaust system was "making a lot of noise," and that "the exhaust was turned off" and to "check the belt." See Notice of Motion, ¶ 15 and Ex. F, pp. 27-28. As Rowe was examining the fan, the motor came on, and the fan severed his finger.

Defendants now move, pursuant to CPLR 3212, to dismiss all causes of action in the amended complaint. Defendants argue that they had no duty to Rowe, and therefore could not have breached any duty. Defendants maintain that "[w]hen a worker confronts the ordinary and obvious hazards of his employment, and has at his disposal the time and other resources... to enable him to proceed safely, he may not hold others responsible if he elects to perform his job so incautiously as to injure himself." *Bombero v. NAB Constr. Corp.*, 10 AD3d 170, 172 (1st Dept 2004) (quoting *Marin v. San Martin Rest., Inc.*, 287 AD2d 441 (2d Dept 2001)). Defendants maintain that Rowe held himself out as a kitchen equipment technician with over 10 years of experience; thus, defendants argue that it was Rowe's responsibility to check whether or not the power was on, before he began working on the fan.

Plaintiffs oppose the motion for summary judgment, arguing that the motion should be denied since defendants caused or created the injury producing dangerous condition by turning the

power to the fan on while Rowe was inspecting it and/or representing to Rowe that the power was off when it was not.

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "succinctly to warrant the court as a matter of law in directing judgment." CPLR § 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v NYU Medical Ctr.*, 64 NY2d 851, 853 (1985). To grant summary judgment it must be clear that no material and triable issue of fact is presented. See *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). Issue finding rather than issue determination is the court's function. *Id.* The court should draw all reasonable inferences in favor of the non-moving party, and should not pass on issues of credibility. *Dauman Displays, Inc. v. Masturzo*, 168 AD2d 204 (1st Dept 1990).

Applying such principles herein, defendants' motion for summary judgment is denied. Significantly, it is not disputed that, prior to Rowe's commencement of the work on the belt, Rowe was affirmatively told by Dunic that the power was off, and to go check the belt, and that, ultimately, Rowe's finger was severed by a moving fan. See Notice of Motion, ¶ 15 and Ex. F, p. 33, 11. 6-11. Thus, defendants failed to establish as a matter of law that they did not create the alleged dangerous condition which

. . . caused Rowe's injury. See *Kesselman v. Lever House Restaurant*, 29 AD3d 302 (1st Dept 2006) (defendant failed to establish, as a matter of law, that it did not create the condition which caused plaintiff's accident). Furthermore, defendants had the requisite ownership and control of the instrumentality of Rowe's injury, namely the fan and its power switch, for which a jury could determine that defendant owed a duty to plaintiff Rowe. See *Gibbs v. Port Authority of New York*, 17 AD3d 252 (1st Dept 2005).

CONCLUSION

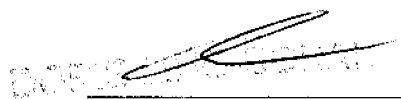
Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted only to the extent that plaintiffs' fifth cause of action asserting labor law claims is withdrawn on consent; and it is further

ORDERED that, within 30 days of entry of this order, plaintiffs shall serve a copy upon all parties, with notice of entry.

Dated:

10/12/12



Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Rowe v RWDSU decision.wpd

FILED

OCT 16 2012

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NEW YORK