

Gonsalves v 35 W. 54 Realty Corp.

2013 NY Slip Op 31835(U)

July 12, 2013

Supreme Court, Queens County

Docket Number: 223462011

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE

IA PART 24

ANDREW GONSALVES, x
Plaintiff,

Index
Number 22346 2011

-against-

Motion Dates April 16, 2013 and
May 17, 2013

35 W. 54 REALTY CORP. AND PERIMETER
BRIDGE & SCAFFOLD CO. INC.,

Motion Seq. No. 4, 5, and 6

x

The following papers numbered 1 to 21 read on this motion by third party defendant KG Building Maintenance, Inc. (KG) for an order dismissing the third party complaint and all cross claims and counterclaims. Third party defendants G.R. Construction Inc., Geiger Construction LLC, Geiger Restoration LLC, and Geiger Roofing Company Inc. separately move, in two separate motions, for an order dismissing the complaint and all cross claims.

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Upon the foregoing papers these motions are consolidated for the purpose of a single decision and are determined as follows:

Background:

Plaintiff Andrew Gonsalves alleges that he sustained personal injuries during the course of his employment on August 3, 2011, at 35 West 54th Street, New York, New York, when he

fell from a scaffold or sidewalk bridge. He sustained a fracture of his left elbow, and had surgery performed on said elbow on August 10, 2011. Plaintiff commenced an action for violations of Labor Law §200, 240 and 241 on September 27, 2011 against 35 W. 54 Realty Corp. (Realty) and Perimeter Bridge & Scaffold Co. Inc. (Perimeter), and issue has been joined as to these defendants.

Realty commenced a third party action on July 23, 2012 against G.R. Construction, Inc., Geiger Construction LLC, Geiger Restoration, LLC, Geiger Construction Company Inc., KG., and Geiger Roofing Company Inc. and asserted causes of action for common law indemnification, contribution, contractual indemnification, and for breach of contract based upon the failure to secure liability insurance. Third party defendant KG served an answer to the third party complaint and interposed nine affirmative defenses, a counterclaim against Realty, and a cross claim against Perimeter and the third party co-defendants.

Legal Standards:

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently 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 showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR 3212, subd. [b].)” (*Zuckerman*, 49 NY2d at 562.)

KG’s motion for summary judgment:

Third party defendant KG seeks an order granting summary judgment dismissing the third party complaint on the grounds that it was Mr. Gonsalves’ employer at the time of the accident and Gonsalves did not sustain a grave injury within the meaning of Worker’s Compensation Board §11.

Workers' Compensation Law § 11 prohibits third-party claims for indemnification or contribution against an employer unless the employee has sustained a “grave injury,” or when there is a “written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant” (Workers' Compensation Law § 11; *see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 367 [2005]; *LaFleur v MLB Indus., Inc.*, 52 AD3d 1087 [2008]). Absent an express indemnification agreement, or a “grave injury” as enumerated in Workers' Compensation Law § 11, an employer's liability for an employee's on-the-job injury is ordinarily limited to workers' compensation benefits (*see Fleming v Graham*, 10 NY3d 296 [2008]; *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

It is undisputed that the injured plaintiff did not sustain a grave injury as defined by the

statute. Therefore, Mr. Gonsalves' employer may not be held liable for direct or third-party claims stemming from his injury. The issue raised here is whether KG was Gonsalves' employer for purposes of Worker's Compensation Law §11.

Mr. Gonsalves filed a Workers' Compensation claim, and Kevin Geiger on behalf of KG submitted an employer's report, dated August 8, 2011, stating that Gonsalves was employed by KG. The Board sent a Notice of Case Assembly dated August 24, 2011, to the State Insurance Fund and to Mr. Gonsalves which identified the employer as KG. The Board also sent the State Insurance Fund and Mr. Gonsalves a Notice of Proposed Decision, which became final on March 8, 2012, directing the employer, identified as KG, and/or the insurance carrier to make payments to Mr. Gonsalves. The Board, in a second Notice of Proposed Decision, which became final on January 15, 2013, stated that Mr. Gonsalves has a "25.00% schedule loss of the use of the left arm" entitling him to 78 weeks of benefits, found that he has a "Permanent Partial Disability" and identified the employer as KG.

"The [Workers' Compensation] Board's decision finally determines the controversy between the parties to the hearing who are normally the injured employee and the employer or his workers' compensation carrier" (*Liss v Trans Auto Systems, Inc.*, 68 NY2d 15 [1986][internal citations omitted]). It is well settled that such a "decision could not have a res judicata or collateral estoppel effect against [a party if that party] was not a party to the compensation proceeding, and the issue whether [that party] was an employer of plaintiff was not presented to or determined by the Workers' Compensation Board." (*Bradford v Air La Carte, Inc.*, 79 AD2d 553 [1st Dept 1980]).

To impose collateral estoppel with respect to a quasi-judicial determination "two basic conditions [must be] met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal." (*Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]).

Here, the identity of Mr. Gonsalves' employer at the time of his injury was not contested at the proceedings before the Compensation Board. Rather, the Board accepted Mr. Gonsalves' claim and the documentary evidence presented by KG in which it stated it was Gonsalves' employer at the time of his injury. The insurance carrier made no objections to said claim, and the Board, awarded compensation to Mr. Gonsalves. Therefore, while the Board necessarily found that KG was Gonsalves' employer, it made no determination as to whether Mr. Gonsalves was also an employer of any other entity. A worker may have more than one employer for the purposes of section 11 of the Workers' Compensation Law(*Bradford v Air La Carte, Inc.*, 79 AD2d at 553) .

Although Mr. Gonsalves, at his deposition, initially stated that "Geiger Construction" was his employer, he also equated that entity with KG, and stated that he was paid, by check, by either Kevin Geiger or KG, and that he never received a paycheck from "Geiger Construction".

Mr. Gonsalves' testimony, while somewhat ambiguous, does not negate the Workers' Compensation Board's determination with respect to his employment by KG.

The documentary evidence submitted by Realty does not raise a triable issue of fact as to the identity of Mr. Gonsalves' employer. Realty has submitted a copy of its agreement with "Geiger Construction Co. Inc.", dated September 7, 2010, whereby Realty accepted a proposal to provide labor and materials, and to perform certain work to the front facade of the building located at 35 West 54th Street, New York, New York. Said agreement, however, does not, on its face, raise any issue of fact as to the identity of Mr. Gonsalves' employer.

Realty's reliance on a "Construction Job-Site Incident Report" submitted on a "Metropolitan Risk Advisory" form, is misplaced, as said report, is undated, unsigned and unsworn and, thus, does not constitute admissible evidence. Realty has also submitted a "verbal certification statement" dated December 12, 2012, pertaining to employment record authorizations served on "Geiger Construction", which states that there is "No record of this person". Said statement is unsworn, does not constitute admissible evidence, and does not raise an issue of fact as to the identity of Mr. Gonsalves' employer.

Finally, Realty's counsel, in opposition to KG's motion, asserts that further discovery is required in order to determine whether Mr. Gonsalves was employed by KG, or by one of the co-defendants on the date of the accident. Counsel's argument is based upon the fact that the co-defendants have similar names, and either Kevin Geiger or Karl Geiger are listed as officers of these entities in the Department of State, Division of Corporations, data base. Counsel's arguments in this regard are based upon surmise, conjecture, and suspicion, and are insufficient to warrant the denial of KG's motion for summary judgment (*see Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 769 [2d Dept 2012]; *Grassi & Co., CPAs, P.C. v Janover Rubinroit, LLC*, 82 AD3d 700 [2d Dept 2011], *appeal dismissed* 82 AD3d 700 [2d Dept 2011] ; *Rendon v Castle Realty*, 28 AD3d 532, 533 [2d Dept 2006]).

Defendant KG, thus, has established, *prima facie*, its entitlement to summary judgment dismissing Realty's causes of action for common law indemnification and contribution on the grounds that these claims are barred by Workers' Compensation Law §11. Defendant KG has also established that it is entitled to summary judgment dismissing the third party claims for contractual indemnification and breach of contract, as there is no evidence of any contractual agreement between KG and Realty (*see generally Jamindar v Uniondale Union Free School District*, 90 AD3d 612 [2d Dept 2011]; *Araujo v City of New York*, 84 AD3d 993, 994 [2d Dept 2011]).

Third party defendants G.R. Construction Inc., Geiger Construction LLC, Geiger Restoration LLC, and Geiger Roofing Company Inc.'s motions for summary judgment:

These third party defendants submitted identical motions for summary judgment dismissing the third party complaint (Motion Sequence 5 and 6) . Defendants' counsel assert that as the Workers' Compensation Board necessarily determined that KG was Mr. Gonsalves' employer on the date of the accident, and that as there is no evidence that the plaintiff was employed by G.R. Construction Inc., Geiger Construction LLC, Geiger Restoration LLC, or Geiger Roofing Company Inc., the third party complaint should be dismissed.

Although Motion Sequence No. 5 was marked fully submitted, the court did not receive opposition papers to this motion.

As to Motion Sequence No. 6, counsel for Realty's repeats in his affirmation the same arguments he raised in his opposition to KG's motion to dismiss the third party complaint. Counsel for Realty, however, failed to sign his affirmation, as required by 22 NYCRR § 130-1.1-a. The affidavit of service attached to said affirmation is a undated, unsworn, and unexecuted. Therefore, as there is no evidence that said affirmation was actually served upon the parties, it will not be considered by the court.

Counsel for Geiger Construction Company Inc., in opposition to the within motion, asserts that due to underlying insurance coverage issues he has been unable to ascertain essential facts and information and relevant documents. The court notes, that counsel sought an order to show cause staying the within motion on identical grounds and that on April 26, 2013, the court declined to sign said order to show cause. This co-defendant, however, has not established that facts essential to justify opposition exist, which would warrant the denial of the motion (CPLR 3212[f]).

In the absence of an affidavit or affirmation from an officer or manager of each of the moving co-defendants who has personal knowledge of the facts, third party defendants G.R. Construction Inc., Geiger Construction LLC, Geiger Restoration LLC, and Geiger Roofing Company Inc. have failed to establish, prima facie, their entitlement to summary judgment dismissing the complaint.

Counsel for the moving defendants, in support of his reply affirmation, has submitted an affidavit from Kevin Geiger, the Chief Executive Officer of KG. Mr. Geiger states that he certified to the Worker's Compensation Board that on the date of the accident, August 3, 2011, Andrew Gonsalves was employed by KG. Mr. Geiger now affirms that plaintiff was employed by KG, and that he was not working for any of the moving third party defendants on that date. Mr. Geiger, however, does not set forth his relationship, if any, to the moving third party defendants, and therefore cannot speak on their behalf.

Conclusion:

The motion by Third Party Defendant KG Building Maintenance, Inc. to dismiss the third party complaint and all cross claims and counterclaims, is granted.

The motions by Third Party Defendants G.R. Construction Inc., Geiger Construction LLC, Geiger Restoration LLC, and Geiger Roofing Company Inc. for summary judgment are denied.

Dated : July 12, 2013

HON. AUGUSTUS C. AGATE, J.S.C.