

Barongi v Duralee Fabrics, Ltd.

2013 NY Slip Op 32237(U)

September 12, 2013

Sup Ct, Suffolk County

Docket Number: 11-14160

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 4-16-13
ADJ. DATE 5-21-13
Mot. Seq. # 002 - MG
003 - MG; CASEDISP

-----X

SUSAN BARONGI,

Plaintiff,

- against -

DURALEE FABRICS, LTD. and LESLIE
STEIN,

Defendants.

-----X

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Upon the following papers numbered 1 to 60 read on these motions for summary judgment : Notice of Motion/
Order to Show Cause and supporting papers 1 - 26; 38 - 54 ; Notice of Cross Motion and supporting papers ; Answering
Affidavits and supporting papers 29 - 32; 55 - 57 ; Replying Affidavits and supporting papers 33-35; 58 - 60 ; Other 27 - 28;
36 - 37 Memoranda of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by defendant Leslie Stein and the motion (#003) by defendant Duralee Fabrics, Ltd. are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Leslie Stein for an order granting summary judgment in her favor is granted; and it is

ORDERED that the motion by defendant Duralee Fabrics, Ltd., for an order granting summary judgment in its favor is granted.

Plaintiff Susan Barongi commenced this action to recover damages for personal injuries allegedly suffered as a result of an incident that occurred on June 15, 2010 while at work. On that date, plaintiff, who was employed as a receptionist by defendant Duralee Fabrics, Ltd., allegedly was pushed twice in the back by her supervisor, defendant Leslie Stein. By her bills of particulars, plaintiff alleges, in relevant part, that Stein “intentionally, recklessly, willfully and/or negligently” assaulted and committed battery against the plaintiff, and that she “intentionally, recklessly, willfully and/or negligently “pushed the plaintiff into a door or other solid object.” Plaintiff further alleges that Duralee Fabrics, “acting through its officer, agent, servant and/or employee Leslie Stein, intentionally, recklessly, willfully and/or negligently” assaulted, battered, struck and pushed her. She allegedly sustained various injuries due to the incident, including a disc herniation at level L4-L5, and lumbar sprain and strain, and has not worked at Duralee Fabrics since the date of the incident. Plaintiff subsequently applied for and was awarded workers’ compensation benefits for lost wages and medical treatment upon a finding of temporary disability due to a back injury.

Stein now moves for summary judgment in her favor on the complaint, arguing that plaintiff’s claim against her is precluded by the Workers’ Compensation Law. More specifically, Stein asserts that there is no evidence in the record that she intended to injure plaintiff or that plaintiff was injured as a result of the June 2010 incident at work. In support of the motion, Stein submits, among other things, copies of the pleadings and the bill of particulars; transcripts of the deposition testimony of plaintiff, Patricia Fletcher and Louise Lupo; sworn medical reports of Dr. A. Robert Tantleff; an unsworn medical report of Dr. Damanhuri Daniel Alkaitis; and photographs of the work area where the alleged incident happened. At Stein’s request, Dr. Tantleff, a radiologist, reviewed films obtained from an x-ray examination and from magnetic resonance imaging (MRI) examinations of plaintiff’s lumbar region. Dr. Alkaitis, a neurologist, conducted an examination of plaintiff in August 2012 on Stein’s behalf. Plaintiff opposes the motion, arguing that Stein’s intent to injure plaintiff may be inferred from the alleged act of pushing her from behind. Plaintiff also contends triable issues exist as to whether the incident occurred when Stein was “in something of a rage,” and whether it caused her physical injuries. In opposition, plaintiff submits an affidavit of Ana Frias, a former employee of Duralee Fabrics, averring that she saw Stein “shove Susan Barongi in the direction of the doorway to the vestibule.” She also submits uncertified medical records of her treating physician, Dr. Andrew T. Serpe, relating to her alleged injuries.

Duralee Fabrics moves for summary judgment in its favor on the ground that the workers’ compensation benefits paid for lost wages and medical treatment is plaintiff’s exclusive remedy for the injuries she allegedly sustained due to the incident with Stein. Duralee Fabrics also asserts that the allegations in the complaint are insufficient to state a legally cognizable claim outside the ambit of the Workers’ Compensation Law, and that the evidence in the record establishes that the exception for injury caused by an employer’s intentional tort is not applicable. Duralee Fabrics’ submissions in support of the motion include transcripts of the parties’ deposition testimony, a copy of its workers’ compensation policy at the time of the accident, an affidavit of Joanne Helfgott, and various documents related to plaintiff’s claim for workers’ compensation benefits. Plaintiff opposes the motion, arguing that Duralee Fabrics’ intent to cause injury to her can be inferred from “the defendant’s supervisory employee’s [act of] deliberately shoving” plaintiff, and submits a copy of Ana Fria’s affidavit.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

Workers' compensation is intended to be the exclusive remedy for unintentional injuries sustained during the course of employment (Workers' Compensation Law §§ 11, 29 [6]; *see Macchirole v Giamboi*, 97 NY2d 147, 736 NYS2d 660 [2001]; *Burlew v American Mut. Ins. Co.*, 63 NY2d 412, 416, 482 NYS2d 720 [1984]; *Kruger v EMFT, Inc.*, 87 AD3d 717, 930 NYS2d 11 [2d Dept 2011]; *Hyman v Agtuca Realty Corp.*, 79 AD3d 1100, 913 NYS2d 579 [2d Dept 2010], *lv denied* 16 NY3d 711, 923 NYS2d 415 [2011]; *Pereira v St. Joseph's Cemetery*, 54 AD3d 835, 864 NYS2d 491 [2d Dept 2008]). However, the workers' compensation exclusivity will not bar an injured plaintiff from seeking damages from an employer for injuries resulting from a tort intended to cause harm to the injured employee "perpetrated by the employer or at the employer's direction" (*Acevedo v Consolidated Edison Co. of N.Y.*, 189 AD2d 497, 500, 596 NYS2d 68 [1st Dept 1993], *quoting Finch v Swingly*, 42 AD2d 1035, 1036, 348 NYS2d 266 [4th Dept 1973]; *see Miller v Huntington Hosp.*, 15 AD3d 548, 792 NYS2d 88 [2d Dept 2005]; *Orzechowski v Warner-Lambert Co.*, 92 AD3d 110, 460 NYS2d 64 [2d Dept 1983]; *Thompson v Maimonides Med. Ctr.*, 86 AD2d 867, 447 NYS2d 308 [2d Dept 1982]; *Myroie v GAF Corp.*, 81 AD2d 994, 440 NYS2d 67 [3d Dept 1981], *affd* 55 NY2d 893, 449 NYS2d 21 [1982]). Similarly, the Workers' Compensation Law will immunize a coemployee from liability when both the plaintiff and the defendant were acting within the scope of their employment at the time of injury (*Macchirole v Giamboi*, 97 NY2d 147, 150, 736 NYS2d 660). The protection afforded by the Workers' Compensation Law § 29, therefore, does not extend to a coemployee who commits an intentional tort outside the scope of his or her employment (*see Hanford v Plaza Packaging Corp.*, 2 NY3d 348, 778 NYS2d 768 [2004]; *Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535, 429 NYS2d 622 [1980]; *Botway v National Response Corp.*, 51 AD3d 704, 858 NYS2d 311 [2d Dept 2008]). Furthermore, to constitute an intentional tort, the conduct by the employer or coemployee "must be engaged in with the desire to bring about the consequences of the act. A mere knowledge and appreciation of a risk is not the same as an intent to cause injury . . . A result is intended if the act is done with the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue" (*Finch v Swingly*, 42 AD2d 1035, 1036, 348 NYS2d 266).

Initially, the Court notes that the unsworn medical report of Dr. Alkaitis was not in admissible form and, therefore, was not considered in the determination of Stein's summary judgment motion (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Kirbis v LPCiminelli, Inc.*, 90 AD3d 1581, 935 NYS2d 783 [4th Dept 2011]; *Kotlyar v Strogov*, 58 AD3d 693, 871 NYS2d 662 [2d Dept 2009]; *1212 Ocean Ave. Hous. Dev. Corp. v Brunatti*, 50 AD3d 1110, 857 NYS2d 649 [2d Dept 2008]; *Municipal Testing Lab., Inc. v Brom*, 38 AD3d 862, 833 NYS2d 562 [2d Dept], *appeal dismissed* 8 NY3d 1004, 839 NYS2d 444 [2007]; *Mazzola v City of New York*, 32 AD3d 906, 821 NYS2d 247 [2d

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Dept 2006]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). The Court also did not consider the unaffirmed report and uncertified office records of Dr. Serpe submitted by plaintiff, as they were not in admissible form (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178; *Kirbis v LPCiminelli, Inc.*, 90 AD3d 1581, 935 NYS2d 783; *Kotlyar v Strogov*, 58 AD3d 693, 871 NYS2d 662; *Matter of Kai B.*, 38 AD3d 882, 834 NYS2d 216 [2d Dept 2007]; *Kashman v Flushing Hosp. & Med. Ctr.*, 224 AD2d 590, 638 NYS2d 687 [2d Dept 1996]).

Duralee Fabrics' motion for summary judgment dismissing the complaint against it is granted. The determination by the Workers' Compensation Board that plaintiff was entitled to workers' compensation benefits is a final and conclusive determination barring this action against Duralee Fabrics for personal injuries (*see O'Connor v Midiria*, 55 NY2d 538, 450 NYS2d 455 [1982]; *Werner v State of New York*, 53 NY2d 346, 441 NYS2d 654 [1981]; *Hyman v Agtuca Realty Corp.*, 79 AD3d 1100, 913 NYS2d 579; *Orzechowski v Warner-Lambert Co.*, 92 AD2d 110, 460 NYS2d 64). Moreover, there is no allegation in the complaint and no evidence in the record that Duralee Fabrics directed, instigated or participated in the alleged incident against plaintiff (*see Doe v State of New York*, 89 AD3d 787, 933 NYS2d 688 [2d Dept 2011]; *Martinez v Canteen Vending Servs. Roux Fine Dining Chartwheel*, 18 AD3d 274, 795 NYS2d 16 [1st Dept 2005]; *see also Pereira v St. Joseph's Cemetery*, 54 AD3d 835, 864 NYS2d 491; *cf. Kruger v EMFT, Inc.*, 87 AD3d 717, 930 NYS2d 11 [2d Dept 2011]). Plaintiff's unsubstantiated and conclusory assertion that Stein's alleged conduct is evidence of Duralee Fabrics' intent to cause her injury is insufficient to defeat Duralee Fabrics' motion for summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

Stein's motion for summary judgment dismissing the complaint against her also is granted. When questioned about the alleged pushing incident at an examination before trial, plaintiff testified that Stein had become angry with her the morning of the incident after learning plaintiff had disregarded Stein's direction to not forward phone calls to Duralee Fabrics' phone number made by an employee's husband to the employee, Patricia Fletcher. Plaintiff testified that Stein became "very angry" and was "yelling at the top of her lungs" when she heard a call from Fletcher's husband had been put through to Fletcher by plaintiff, and that Stein directed she and Fletcher leave their work stations and meet with her in the vestibule. Plaintiff testified that after she left the reception desk, as she was opening the door to the vestibule, Stein, who was walking behind her, pushed on her lower back and she "jolted forward." Plaintiff testified that after the first push she realized she still was wearing the headphones used at the reception desk when answering phone calls, and that, before she could turn around to return them, Stein pushed a second time on her lower back. She testified that she "jolted forward" and her hands came in contact with the door to the vestibule following the second push. Further, plaintiff testified that after the second push to her back, she returned the headphones to the reception area, met with Stein and Fletcher in the vestibule, and then returned to her work station. She testified that she reported the incident to a supervisor, Joanne Helfgott, and then worked the rest of the day. In addition, she testified that she felt pain in her lower back the next day and sought treatment for the pain from her physician later that same week.

In contrast, Louise Lupo, an employee of Duralee Fabrics who was present when the subject incident occurred, testified at an examination before trial that Stein, not plaintiff, opened the door to the

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vestibule and held it open as plaintiff walked from the work area into the vestibule. Lupo testified that after walking from her desk to the door to the vestibule door, plaintiff returned to the reception desk with the headphones and then walked back, through the door, to the vestibule. She testified that she did not observe Stein push plaintiff in the back or any other physical contact between them. Fletcher testified at an examination before trial that as Stein was holding open the door to the vestibule, plaintiff walked to the door and then began walking backwards when she realized the headphones she was wearing were still connected to the switchboard. She testified plaintiff and Stein collided in the doorway, as plaintiff was walking backwards toward the reception desk and Stein was walking into the vestibule.

Stein met her burden on the motion by establishing that plaintiff received workers' compensation benefits for her alleged injuries and that she was acting within the scope of her employment at the time of the incident (*see Macchirole v Giamboi*, 97 NY2d 147, 736 NYS2d 660; *DiTommaso v Marino*, 6 AD3d 572, 774 NYS2d 816 [2d Dept 2004]; *Gagliardi v Trapp*, 221 AD2d 315, 633 NYS2d 387 [2d Dept 1995]). Stein further established a lack of intent to cause physical injury to plaintiff (*cf. Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535, 429 NYS2d 622; *Botway v National Response Corp.*, 51 AD3d 704, 858 NYS2d 311; *Matter of Wanji W.*, 277 AD2d 243, 715 NYS2d 676 [2d Dept 2000]). In opposition, plaintiff failed to submit evidence raising a triable issue as to whether Stein intended to cause her physical harm (*see Bulis v Di Lorenzo*, 142 AD3d 707, 531 NYS2d 107 [2d Dept 1988]). Contrary to the assertion by plaintiff's counsel, the evidence in the record, viewed in the light most favorable to plaintiff (*see Green v Quincy Amusements, Inc.*, 108 AD3d 591, 2013 NY Slip Op 05188 [2d Dept 2013]; *Giraldo v Twins Ambulette Serv., Inc.*, 96 AD3d 903, 946 NYS2d 871 [2d Dept 2012]; *Boyd v Rome Realty Leasing Ltd. Patnership*, 21 AD3d 920, 801 NYS2d 340 [2d Dept 2005]), demonstrates that any physical contact that may have occurred between Stein and plaintiff involved merely petty shoves that did not cause plaintiff to fall or even stumble. The Court notes that while plaintiff's deposition testimony that Stein was angry at the time of the incident may be evidence as to the question of motive, it does not, as plaintiff's counsel argues, constitute evidence of intent to cause harm (*see People v Molineux*, 168 NY 264, 297, 61 NE 86 [1901]).

Accordingly, the motions by Stein and Duralee Fabrics for summary judgment dismissing the complaint are granted.

Dated: September 12, 2013

W. Gerard Arley
 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION