

Duchenne v 774 Dev., LLC
2013 NY Slip Op 33714(U)
December 13, 2013
Supreme Court, Bronx County
Docket Number: 21612/01
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY
PART 4

Reginald Duchenne

Plaintiff

Index No. 21612/01

-against-

DECISION/ORDER

774 Development, LLC and
Gotham Construction Co., LLC

Defendants

Present:
Hon. Howard H. Sherman
J.S.C.

The parties to this personal injury, "labor law" lawsuit stipulated to the court holding a hearing on plaintiff's motion to strike defendant Gotham's Workers' Compensation defense. The sole issue to be determined at the hearing was whether or not plaintiff was on May 9, 2006 a "special employees" of defendant Gotham. The relevant factual background is as follows.

Plaintiff Reginald Duchenne was on May 9, 2006 employed by Millennium Masonry Inc. as a mason. Millennium was a subcontractor to Gotham Construction Co. LLC, the general contractor at the worksite. The worksite was located at 6th Avenue between 26th and 27th Streets on both sides of the street. The owner of the property was 774 Development who hired Gotham as the General Contractor. Up until the date of the accident, plaintiff had been performing masonry work for Millennium on the west side of

the 6th Avenue site since approximately January. On the day in question, May 9th, plaintiff's supervisor, Joe Alston, told plaintiff to go across the street to do some masonry work. The work on the east side was not being done by Millennium.

Plaintiff testified that it was Alston who sent him across the street and that Alston had been his supervisor the entire time on the job. He further testified that he had never been sent to work at any other location on this job. He further testified that he was sent to patch up some holes and that when he got to the "east side" site he reported to a Gotham supervisor who generally told him what had to be done regarding patching up some holes. The supervisor didn't point out every hole but plaintiff saw them and knew what had to be done. The supervisor did tell him to use the scaffold do to the work and handed him his tools. Plaintiff himself decided in what order and how to do the work. In fact, plaintiff testified that after telling him to use the scaffold and handing him the tools, the Gotham supervisor left the area.

Joseph Alston, plaintiff's Millennium supervisor also testified. His testimony was consistent with plaintiff's to the extent he had knowledge of any of the day's events. He testified that he and plaintiff were employed by Millennium and always had been, that they never worked for Gotham who, as the General Contractor, hired Millennium. He recalled plaintiff by name and by the accident. He recalled someone from Millennium telling him to send someone across the street and that he, Alston, instructed Duchenne to go. He further stated that when plaintiff went across the street he was still his supervisor.

Finally plaintiff testified that when he got out of the hospital he reported back to Millennium and Alston on the west side of the street.

In addition to the two witnesses' testimony there are other factors which arguably impact on this motion. These include most importantly the fact that plaintiff received approximately \$75,000.00 in Workers' Compensation benefits through a Gotham and 774 Development insurance policy. Apparently the policy was obtained by 774 Development as part of a broad owner controlled insurance program (OCIP) issued by American Protection Insurance Co. (AMPICO). There are other issues stemming from the payment which are somewhat collateral to the immediate issue including the reason why the payment stopped, apparently voluntarily.

The critical issue presented by this motion again is under the facts and circumstances presented was plaintiff, on May 9, 2006, a "special employee" of Gotham.

A general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages, and for maintenance of workers' compensation and other benefits. David Thompson v Grummer Aerospace Corp., 78 NY2d 553 (1991). It is uncontroverted that plaintiff Duchenne was at all times before and on May 9, 2006 a general employee of Millennium and that Millennium and plaintiff had no connection to Gotham or 774 Development other than that of sub contractor.

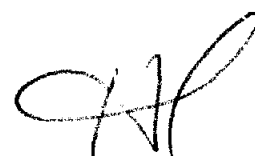
Many factors need to be considered when deciding whether a special employment relationship exists and generally no one of these factors is decisive. While not determinative, one significant consideration that has emerged is a focus on a fact intensive inquiry into who controls and directs the manner, details and ultimate outcome of the employee's work. David Thompson v Grummer, *supra*; Warner v Continuum Health Care Partners, 99 AD3d 636, 1st Dept. (2012).

While the record contains some information concerning Workers' Compensation payments, the payments of which and the termination of which leave other questions posed, it does not contain even a minimum showing of sufficient control by Guardian or any of its agents. On the contrary, the uncontroverted testimony of plaintiff and his Millennium supervisor indicate little if any supervision and/or control by Gotham while Millennium supervision and control continued throughout.

Accordingly, the court finds that plaintiff Reginald Duchenne was not a special employee of defendant Gotham Construction Co. and plaintiff's motion to dismiss the "Workers' Compensation" defense is granted.

This constitutes the decision and order of this court.

Dated: December 13, 2013
Bronx, New York



Howard H. Sherman
J.S.C.