Salcedo v Demon Trucking
2014 NY Slip Op 33843(U)
August 8, 2014
Supreme Court, Kings County
Docket Number: 27288/10
Judge: Larry D. Martin

At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 8th day of August, 2014.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

MARCO SALCEDO,

PLAINTIFF,

-VS-

DEMON TRUCKING,

DEFENDANT(S).

Motion Sequence #3

INDEX No. 27288/10

The following papers numbered 1 to 4 read on this motion — Papers Numbered

Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed	1-2
Answering Affidavit (Affirmation)	3
Reply Affidavit (Affirmation)	4

Upon the foregoing papers, defendant Demon Trucking ("defendant") moves for an order, pursuant to CPLR 2221(d), granting leave to reargue that portion of this court's December 16, 2013 decision and order ("the prior order") denying that branch of its motion for summary judgment ("the prior motion") on the exclusivity provision of the Workers' Compensation Law and, upon reargument, vacating that portion of the prior order and granting that branch of its prior motion dismissing the complaint herein.

As noted in the prior order, plaintiff Marco Salcedo ("plaintiff"), a truck driver employed by non-party Windmill Distributing Company, L.P.("Windmill"), commenced the instant action to recover damages for personal injuries he allegedly sustained when he hurt his hand while checking the bay door of a truck owned by defendant.

It is well settled that a motion for reargument is addressed to the sound discretion of the trial court (*see Biscone v JetBlue Airways Corp.*, 103 AD3d 158, 180 [2d Dept 2012]). On a motion for reargument, the movant has to demonstrate that there are matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (*see* CPLR 2221[d][2]; *see also Central Mortg. Co. v McClelland*, – NYS2d –, 2014 WL 3732901 [2d Dept 2014]).

"'As a general rule, when an employee is injured in the course of his [or her] employment, his [or her] sole remedy against [the] employer lies in his [or her] entitlement to a recovery under the Workers' Compensation Law" (*Len v State of New York*, 74 AD3d 1597, 1599 [3d Dept 2010] quoting *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 156 [1980]; see *Workers' Compensation Law §11*). "Generally, the exclusivity rule of the Workers' Compensation Law applies to insulate a person or entity from liability to a worker for tortious conduct where the person or entity is the alter ego of the worker's direct employer, or exercises such control of that employer as to retain ultimate decision-making authority and financial responsibility over it ..." (109 NY Jur 2d, Workers' Compensation §88).

"A defendant moving for summary judgment based on the exclusivity defense of the Workers' Compensation Law must show, prima facie, that it was the alter ego of the plaintiff's employer" (*Cappella v Suresky at Hatfield Lane, LLC*, 55 AD3d 522 [2d Dept 2008]). For two corporations to constitute alter egos, "there must be direct intervention by the parent in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored" (*Billy v Consolidated Mach. Tool Corp.*, 51 NY2D 152, 163 [1982] rearg denied 52 NY2d 829 [1980]). " 'A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity,' and a mere showing that the entities are related is insufficient to demonstrate

that one controlled the day-to-day operations of the other" (*Masse v Parrella*, 2012 WL 951548 [Sup Ct, New York County 2012, quoting *Samuel v Fourth Avenue Associates, LLC*, 75 AD3d 594 [2d Dept 2010]). An indispensable element of a joint venture is an understanding "to share in the profits of the business and submit to the burden of making good the losses " (*Bruno v Dynamic Enters.*, 132 AD2d 964, 965 [4th Dept 1987]).

Critical to the court's determination in the prior order was a finding that the extent of the financial relationship between Windmill and defendant was unclear. In the exercise of its discretion and upon a further review of the deposition testimony of Rodney Brayman ("Brayman"), defendant's president, the court hereby grants defendant leave to reargue.

Notably, at his pre-trial deposition, Brayman testified that Windmill set the wages of defendant's employees (Deposition of Brayman, p. 71, line 18) and that "Windmill would transfer money to Demon" to pay the health care benefits and wages for defendant's employees and then defendant would issue the check to pay for same (Deposition of Brayman, p. 72, line 21-23). Moreover, Brayman further testified that both entities, Windmill and defendant, shared the same controller (Deposition of Brayman, p. 80, line 9). In this regard, Brayman's testimony indicates that while defendant and Windmill were separate legal entities, the healthcare benefits and wages of defendant's employees were ultimately borne by plaintiff's employer, Windmill (*see Ramnarine v Memorial Ctr. for Cancer & Allied Diseases*, 281 AD2d 218, 218219 [1 Dept 2001]; *see also Anduaga v AHRC NYC New Projects, Inc.*, 57 AD3d 925 [2d Dept 2008], lv denied 12 NY3d 707[2009]). In light of the foregoing, the court finds that defendant on its prior motion satisfied its initial burden of proof demonstrating as a matter of law (*see* CPLR 3212 [b]) that it is Windmill's alter-ego.

In opposition, plaintiff failed to submit sufficient evidence in admissible form to raise a triable

issue of fact. Plaintiff has not disputed Brayman's deposition testimony. As such, the exclusivity provision of the Workers' Compensation Law is applicable to the case at bar.

Accordingly, upon reargument, that portion of the prior order denying that branch of defendant's motion for summary judgment dismissing the complaint on the basis of the exclusivity provision of the Workers' Compensation Law is vacated and that branch of defendant's motion to dismiss the complaint is hereby granted.

The foregoing constitutes the decision, order and judgment of the court.

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For Clerks use only
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MD___
Motion Seq. #
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HON. LARRY D. MARTIN
J.S.C.

AUG 0 8 2014

NANCY T. SUNSHINE
Clerk

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