

Moreno v MSMC Residential Realty LLC
2016 NY Slip Op 31422(U)
July 21, 2016
Supreme Court, New York County
Docket Number: 158886/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
WILLIAM MORENO, JR.,

Plaintiff,

Index No: 158886/12

-against-

MSMC RESIDENTIAL REALTY LLC and
ROSE ASSOCIATES, INC.,

Defendants,
-----X

Joan A. Madden, J.

In this personal injury action arising out of a workplace accident, defendant Rose Associates, Inc., (“Rose”) moves for summary judgment dismissing the complaint on the ground that Workers’ Compensation is plaintiff’s exclusive remedy, or, alternatively, that Rose had no notice of the defect allegedly causing plaintiff’s injuries. Plaintiff opposes the motion and cross moves for summary judgment, and seeks to strike the defendants affirmative defense alleging the exclusivity of Workers’ Compensation as a remedy.

Background

Plaintiff was injured on March 4, 2012, when, while walking down the steps leading to the basement of the building located at 72 East 97th Street, one of the steps suddenly gave away, causing plaintiff to fall and sustain injuries. At the time of the accident, plaintiff was employed by non-party Mount Sinai Hospital (“Mt. Sinai”) as the superintendent of thirteen residential buildings (“Buildings”) owned by MSMC Residential Realty LLC, an entity closely affiliated with Mt. Sinai.¹ Mt. Sinai entered into a Management Agreement with Rose for the provision of property management services for the Buildings, including overseeing the Buildings’ daily operations. At the time of the accident, plaintiff, in his capacity as the Buildings’

¹ While MSMC Residential Realty LLC. was initially named as a defendant, the action was discontinued against it with prejudice by stipulation dated January 3, 2013.

superintendent, was escorting Con Edison employees to check for a gas leak. After the incident, plaintiff elected to receive Workers' Compensation benefits.

At his deposition, plaintiff testified that he had been employed by Mt. Sinai in various capacities since 1983, and that he had been a superintendent since 1998, which was his position at the time of the accident (Plaintiff dep at 26). Plaintiff described his duties as "making sure the work was done" and testified that by work he meant "the garbage, the boilers, complaints, the streets to make sure they are clean" (*Id.* at 28). He also testified that he was responsible for 13 buildings and oversaw the work of four porters and handymen, who worked under him (*Id.*, at 28-29). According to plaintiff, he wore Mt. Sinai uniform and his ID said Mt. Sinai Real Estate; Mt. Sinai also issued his paychecks, and paid for his fringe benefits (*Id.* at 25, 33-35, 38). Plaintiff also testified that he reported to the property manager David Cordova ("Cordova"), a Rose employee, whom he referred to as his supervisor (*Id.* at 29-30, 40). Every Monday he would turn in his time card to Cordova (*Id.* at 37). If anything needed to be done in one of the buildings, plaintiff would tell Cordova (*Id.* at 40). Cordova also set his schedule, gave him authorization to purchase tools or equipment, or acquired them for him (*Id.* at 41-42).

If Cordova found out about a complaint in an apartment, he would tell plaintiff about it, and plaintiff would fix it (*Id.* at 45). If plaintiff ever made a mistake on the job, Cordova would talk to him about it (*Id.* at 43). When asked if Cordova oversaw the work of the porters and the handymen, plaintiff responded "yes" (*Id.* at 43-44). Plaintiff did not hire the porters or handymen, and did not know who did (*Id.*). Cordova held meetings with all the superintendents of the Buildings once a week (*Id.* at 47). Plaintiff spoke to Cordova at least every day (*Id.* at 46). If there was any problem, or if plaintiff ever found an unsafe condition in a building, he would report it to Cordova including by filling out a complaint form (*Id.* at 48-49). Any heavy repairs were done by an outside company hired by Cordova while minor repairs, such as a clogged toilet, clogged sink, washer, leaky pipe were handled by plaintiff and staff (*Id.* at 50).

Plaintiff testified that he would make small repairs, such as changing a washer in the sink without telling Cordova (*Id.* at 54). If a tenant made a complaint he would write it on a complaint form and give the form to Cordova (*Id.*). As for the routine tasks such as taking out garbage and checking the boiler, plaintiff testified that when Cordova first came on the job he discussed the routine with him and Cordova did not change it; however, he also testified that if the routine needed to be changed he would tell Cordova about it (*Id.* at 52). On the accident date, the general manager of Rose, Jay Schofield (“Schofield”), who contacted plaintiff and told him escort the Con Edison employees to the basement of the Buildings to check for a gas leak,, and that he fell on the stairs to the basement of the building at 72 East 97th Street ((*Id.* at 60-61, 67-69, 198-222).

At his deposition, Schofield testified that, among other things, Rose was responsible for the day-to-day operations of the building where the accident happened (Schofield dep at 8-9). He also testified that plaintiff as superintendent would be responsible “for directed supervision of the staff that was hired that was part of his team...inspection of the building, answering any tenant complaints, waling the buildings, addressing and identifying anything that needs to be addressed. If need be, to report it to the property managers so that we can assist him in addressing any conditions” (*Id.* at 11). Schofield also testified that while Rose did not issue written schedules to plaintiff, Rose directed plaintiff’s work on a daily basis, including the details of his work (*Id.* at 13). He also testified that Rose provided plaintiff with equipment and supplies, although not on a daily basis (*Id.* at 14-15). With respect to Mt. Sinai, Schofield testified that plaintiff was employed by Mt. Sinai and was paid by Mt. Sinai but he was supervised only by Rose (*Id.* at 20). He also testified that Rose took over the responsibility of maintaining plaintiff’s employment profile when it became the property manager (*Id.* at 19-20).

Rose argues that it is entitled to summary judgment as plaintiff was its “special employee,” and thus plaintiff is barred from bringing this action as workers’ compensation is his

sole remedy, citing New York State Workers' Compensation Law §§ 11 and 29(6). In addition to the deposition testimonies of plaintiff and Schofield, in support of its position, Rose relies on the affidavits of its employee, Cordova, and Sharon L. Willard ("Willard"), an Associate Director of Real Estate at Mt. Sinai, whose job duties include overseeing Rose.

In his affidavit, Cordova states that he oversaw a staff of four building superintendents, including plaintiff, and three other staff members, all of whom reported directly to him (Cordova aff., ¶2). He further states that he relies upon his staff of building superintendents to "inspect, maintain, and repair the buildings to which they were assigned and to communicate the status of their work to me on a daily basis" (*Id.*). He also states that he "conducted periodic routine reviews of the superintendents' performance, and had authority to discipline them for poor performance" (*Id.*). According to Cordova, he supervised all of plaintiff's day-to-day activities, directed plaintiff to perform various tasks on a day-to-day basis, coordinated his work schedule, vacation schedule and his days off, and handled plaintiff's requests for tools and equipment (*Id.*, ¶3). Cordova further states that the plaintiff was not supervised by Mt. Sinai employees (*Id.*, ¶3).

In her affidavit, Willard states that Rose has been responsible for overseeing building superintendents employed by Mt. Sinai, including plaintiff, since January 1, 2011, and through the time of the incident (Willard aff., ¶4). She further states that in connection with these duties, Rose was responsible for conducting periodic routine reviews of plaintiff's work performance, had authority to discipline him for poor performance and to recommend that plaintiff be terminated, if necessary (*Id.*, ¶5). Willard also states that during the relevant period, plaintiff reported directly to Rose, and Mt. Sinai paid plaintiff's wages and benefits, but did not supervise him. (*Id.* at ¶4).

Alternatively, Rose argues that it cannot be held liable for plaintiff's injuries as there was no defect and/or plaintiff failed to identify a defect, and that Rose did not have actual notice of the condition causing plaintiff's injuries.

In opposition, plaintiff argues that the affidavits of Cordova and Willard should not be considered, because neither of these individuals were disclosed as witnesses during discovery, and Rose's affirmative defense that this action is barred by the exclusivity provision of the Workers' Compensation law should be stricken, on the grounds that defendant refused to provide such information during discovery. Plaintiff also argues that he was not a special employee of Rose, since Mt. Sinai never surrendered "complete control" over him, and that, at the very least, there are issues of facts as to whether plaintiff was Rose's special employee, based on evidence that plaintiff retained autonomy in performing his job, the management agreement between Mt. Sinai and Rose, which stipulates that plaintiff is an employee of Mt. Sinai,² and the Workers Compensation Board's determination that Mt. Sinai was plaintiff's employer.

Discussion

A motion for summary judgment shall be granted if "there's no genuine issue as to any material fact and the moving party's entitled to a judgment as a matter of law." See *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). The movant bears the initial burden of showing his entitlement to summary judgment. *Id.* at 851. Once this showing has been made, the burden shifts to the opposing party who must proffer evidence in admissible form, rather than conjecture, suspicion or speculation, sufficient to establish the existence of material issues of fact thereby warranting a trial. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1985).

A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557 (1991). 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 maintaining

² The Management Agreement provides in relevant part, that "Agent (i.e. Rose)...shall...[c]ause to be hired, paid by Owner and supervised, all persons necessary to be employed (i.e. Superintendants, Handypersons, Doorpersons and Porters, etc) in order to properly maintain and operate the Buildings, who in each instance, shall be employees of Owner and not Agent's employees..." See, Exhibit B.

workers' compensation and other employee benefits. *Id.* When an employee elects to receive workers' compensation benefits from his general employer, his special employer is also shielded from an action at law commenced by the employee. *Ugijanin v. 2 W. 45th St. Joint Venture*, 43 A.D.3d 911, 912 (2d Dept 2007); see also, *Faulk v. Rockaway One Co., LLC* 107 A.D. 3d 475 (1st Dept. 2013).

Many factors are weighed in deciding whether a special employment relationship exists, and generally no one is decisive. *Thompson*, 78 N.Y.2d at 558. Principal factors in determining whether a special employment relationship exists include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business. *Ugijanin*, 43 A.D.3d at 913. While not determinative, the most significant factor is "who controls and directs the manner, details and ultimate result of the employee's work." *Thompson*, 78 N.Y.2d at 558; see also *Ayala v. Mutual Housing Assoc.*, 33 A.D.3d 343 (1st Dept 2006).

Here, Rose has made a prima facie showing that the plaintiff was its special employee based on evidence that plaintiff reported to a Rose supervisor who exclusively supervised plaintiff's work on a daily basis, including the details of his work. The record also shows that Rose maintained comprehensive control over plaintiff's work, by, *inter alia*, maintaining plaintiff's employee profile, setting his schedule, furnishing him with equipment, and possessing right to discipline him for poor performance.

As Rose has come forward with indicia showing that it controlled and directed the manner, details and ultimate result of plaintiff's work, it has established its prima facie entitlement to judgment as a matter of law on the ground that it was plaintiff's special employer. See *Thompson*, 78 N.Y.2d at 558; *Ugijanin*, 43 A.D.3d at 912.

Moreover, in his opposition to this showing, plaintiff has failed to raise any material issues of triable fact. *Alvarez*, 68 N.Y.2d at 324. Specifically, plaintiff has failed to submit evidence to controvert Rose's showing that Rose, and not Mt. Sinai, direct and controlled plaintiff's work on a daily basis. In addition, while the record indicates that Mt. Sinai paid for plaintiff's wages and benefits, these facts alone cannot defeat Rose's prima facie showing, as it is well established that even if plaintiff receives his wages and benefit elsewhere, Rose may nonetheless qualify as plaintiff's special employer. *Thompson*, 78 N.Y.2d at 557. As for plaintiff's argument that the management agreement and the Workers' Compensation Board determination demonstrate that Mt. Sinai, and not Rose, is his employer, such argument is unavailing as Mt. Sinai's status as plaintiff's general employer does not preclude Rose from being plaintiff's special employer for purposes of workers' compensation. *Thompson* at 559. Furthermore, contrary to plaintiff's apparent argument, the management agreement cannot otherwise be read as prohibiting plaintiff from being considered a special employee.

In addition, the case law relied on by plaintiff does not provide a basis for denying summary judgment. In *Bautista v. David Frankel Realty, Inc.*, 54 A.D.3d 549 (1ST Dept 2008), the Appellate Division, First Department held that trial court erred in finding that the plaintiff, who was injured while working as a porter in the building, was the managing agent's special employee as a matter of law. The First Department found that the record raised factual questions in this regard based on evidence that plaintiff was supervised by the superintendent, as opposed to the defendant management agent, including with respect to the work he performed on the date of the accident, and that the superintendent exercised autonomy in performing his job. In contrast to the facts in *Bautista*, here, there is uncontroverted evidence that plaintiff was supervised exclusively by the defendant managing agent, and that the injury producing work was done at the direction of the defendant managing agent. In addition, while there is evidence in the record that plaintiff had some autonomy including in making minor repairs, such facts are

insufficient to raise an issue of fact under the circumstances here since such autonomy was not exercised in connection with injury producing incident.

Plaintiff's reliance on *Short v. Durez Division Hooker Chems & Plastic Corp*, 280 A.D.2d 972 (4h Dept 2001) and *O'Brien v. Garden Way Mfg.*, 72 A.D.2d 860 (3d Dept. 1979) is also misplaced, as in these cases, unlike here, issues of fact existed as whether the defendants exercised supervision and control over the injury producing work.

As for plaintiff's argument that Cordova and Willard's affidavits should not be considered by this court, as these individuals were not identified as witnesses during discovery, the court notes that Cordova was mentioned multiple times during both plaintiff's and Schofield's depositions. With respect to Willard, as Rose points out plaintiff knew about Willard since he testified about her as his deposition (Pl. Dep at 192-193).³ Accordingly, it cannot be said that plaintiff was prejudiced by Rose's failure to identify Cordova and Willard. In addition, unlike the case law relied on by plaintiff, here, neither Cordova nor Willard was a witness to the event or had knowledge of the defect. *Compare Rodriguez v. New York City Hous. Auth.*, 304 A.D.2d 468 (1st Dept 2003)(trial court properly refused to consider the affidavit of individual who stated he observed the condition of the stairway prior to accident when plaintiff failed to previously identify the individual during discovery).

In any event, the affidavits are not essential to Rose's prima facie case since the depositions of plaintiff and Schofield contain sufficient facts to demonstrate that plaintiff was Rose's special employee. Finally, plaintiff's argument that Rose's affirmative defense alleging the exclusivity of Workers' Compensation should be stricken as it was not adequately delineated in response to plaintiff's bill of particulars is unavailing, particularly as the affirmative defense provided plaintiff with notice of the defense.

³At his deposition, plaintiff referred to Willard by her maiden name, Gomez.

As court finds that plaintiff is a special employee of Rose and therefore Workers' Compensation is plaintiff's exclusive remedy, Rose's motion is granted, and the court need not reach whether Rose had notice of the condition which caused plaintiff's injuries.

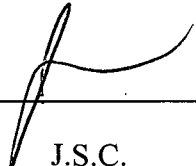
Conclusion

In view of the above, it is

ORDERED that Rose's motion for summary judgment is granted, and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in its entirety.

Dated: July 21, 2016



J.S.C.

HON. JOAN A. MADDEN
J.S.C.