

Dominguez v Jerrico Constr., Inc.
2017 NY Slip Op 32869(U)
April 20, 2017
Supreme Court, Dutchess County
Docket Number: 2016-50165
Judge: James V. Brands
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SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. JAMES V. BRANDS

Justice.

SUPREME COURT: DUTCHESS COUNTY

FRANCISCO DOMINGUEZ, x

Plaintiff,

-against-

JERRICO CONSTRUCTION, INC.,

Defendant. x

DECISION AND ORDER
ON TWO MOTIONS
Index No: 2016-50165
Motion Seq. Nos. 1, 2

The following papers were read and considered on plaintiff's motion to dismiss defendant's counterclaim and sanctions (Motion Seq. No. 1), and plaintiff's motion for summary judgment (Motion Seq. No. 2).

NYSCEF Docs. No. 4-14 filed as Motion Seq. No. 1
NYSCEF Docs. No. 16-32 filed as Motion Seq. No. 2

Background Facts:

This action arises out of personal injuries sustained by plaintiff during the scope of his employment with non-party subcontractor Madeira Drywall. Subcontractor Madeira was hired by defendant, a general contractor, in connection with a construction and renovation project in Purchase, New York. It is alleged that the plaintiff was conducting drywall work at the job site when he used a saw provided by defendant which did not have a properly-guarded blade. After using the saw, plaintiff placed the saw on the ground, however the unguarded blade continued to rotate causing injury to plaintiff's foot.

Pleadings were filed on January 25, 2016, after which defendant interposed an answer with affirmative defenses and a counterclaim for malicious prosecution. As regards the counterclaim, defendant alleged that plaintiff's employer Madeira was in control of the work site on the date of the incident and plaintiff has obtained full recovery for his injuries from Madeira through worker's compensation benefits.

Motion Seq. No. 1

Plaintiff filed a motion pursuant to CPLR §3211[a][7] for dismissal defendant's counterclaim for malicious prosecution. It is plaintiff's contention that defendant failed to state a cause of action for malicious prosecution, having only alleged that defendant did not have control

of the work site and plaintiff received recovery by way of worker's compensation benefits from his employer.

Plaintiff argues that defendant had a non-delegable duty to control and supervise the work site as well as provide adequate protection for those working at the construction site (*citing* Labor Law §200, §241[6]). Counsel contends that defendant's control of the work site is not a prerequisite for liability under the circumstances, and nonetheless the building permit lists defendant as the general contractor in charge of the work site.

As regards worker's compensation, plaintiff argues that his recovery from his employer/subcontractor Madeira is separate from plaintiff's right to recovery from a third-party general contractor and the law contemplates both avenues of recovery by providing for a worker's compensation lien on any award to plaintiff as against defendant (*citing* Worker's Compensation Law §39).

Defendant opposed the motion based on its contention that defendant's counterclaim is not frivolous so as to warrant sanctions imposed against defendant. Rather, defendant argues that it has the right to assert any defenses and counterclaims including one sounding in malicious prosecution which is premised on the fact that plaintiff already obtained full recovery from its employer Madeira.

Motion Seq. No. 2

Plaintiff filed a separate motion for summary judgment on the issue of liability. Plaintiff contends that he made a prima facie showing that his injuries were proximately caused by defendant's breach of its non-delegable duty to provide adequate protection and safety to plaintiff in accordance with Labor Law §241[6] by virtue of defendant having provided a saw with an unguarded blade. According to plaintiff, the saw owned and provided by defendant had a blade with a blade guard locked in an upward position so that it cannot be retracted thus leaving the bottom half of the blade completely exposed in violation of 12 NYCRR §23-1.12[c][1],[2] and §23-1.4[b][13].

Plaintiff proffers the verified complaint and the building permit naming defendant as the general contractor in charge of the work site in support of the motion. Also submitted is a photograph of a saw purported to be the saw used by plaintiff. The saw depicted bears the label "Jerrico" with the blade guard retracted so as to expose the lower portion of the blade.

Defendant opposed the motion. It contends that plaintiff has not sustain its initial burden that there are no genuine material issues of fact solely based upon plaintiff's unsubstantiated account of the incident. Further, defendant argues that there are issues of fact related to how the accident happened (since the defendant contends there were no witnesses to the incident), ownership of the saw that caused injury (since defendant claims plaintiff may have been using a saw owned by Madeira), and comparative negligence based upon plaintiff's testimony that he watched someone else use the saw then place it to the ground and plaintiff used that saw knowing that the blade was unguarded.

Defendant proffers the supporting affidavits of Joshua Indorf and its employee Ernesto Manzano. Indorf, the President of Defendant construction company, stated that all saws owned by defendant have a proper blade guard, defendant's direct employees are the only persons permitted to use defendant's saws, and Madeira employee needed to use a knife or screw gun to perform drywall work (and did not need to use a wood saw). He also states that there is no proof that plaintiff used defendant's saw, albeit he admits he was not present at the site on the date of the incident.

Manzano, an employee of defendant, stated that he was present at the site on the date of the incident. He states he works in a supervisory capacity, and concurs with Indorf that all saws owned by defendant have a proper guard and defendant's direct employees are the only persons trained and permitted to use defendant's saws. Manzano states that he is not aware of any witnesses to the occurrence and although he did not observe the actual occurrence, he did see plaintiff post-incident in the kitchen area holding his toes and he did see the defendant's saw with the guard in place and no signs of blood thereon.

DECISION:

Motion Seq. No. 1

A proponent of a malicious prosecution claim in this context must allege: (1) the initiation of a prior proceeding; (2) its termination favorably to proponent; (3) lack of probable cause; (4) actual malice; and (5) special damages incurred by proponent. (*See generally Du Chateau v Metro-North Commuter R. Co.*, 253 AD2d 128 [1st Dept. 1999]; *The Purdue Federick Co. v Steadfast Insurance Co.*, 40 AD3d 285 [1st Dept. 2007]); *Loeb v Teitelbaum*, 77 AD2d 92 [2nd Dept. 1980]).

Defendant failed to sufficiently allege a counterclaim for malicious prosecution. Even when accepting the facts alleged in the complaint as true and according defendant the benefit of every possible favorable inference, the facts asserted in defendant's counterclaim fail to assert a malicious prosecution claim. Defendant's counterclaim only alleges that plaintiff received recovery via a worker's compensation claim as against his employer, Madeira. However, plaintiff's worker's compensation claim against his employer (the subcontractor Madeira Drywall) does not preclude plaintiff from commencing a separate claim under the applicable provisions of the Labor Law against a non-employer (the general contractor Jerrico Construction) (*see* N.Y. Workers' Comp. Law §11, *see also Matter of Ovadia v Office of the Indus. Bd. of Appeals*, 19 NY3d 138, 143 [2012]). Notably, Worker's Compensation Law §39 contemplates same by providing for a worker's compensation lien on any award to plaintiff as against defendant. Furthermore, defendant failed to allege any actual malice or special damages.

Motion Seq. No. 2

Summary judgment is warranted where the proponent establishes entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Upon such showing, the burden then shifts to the non-moving party to demonstrate by evidentiary facts that genuine issues

of fact exist to preclude summary judgment. (*Id.* at 324; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

As a preliminary matter, the motion papers do not attest as to whether discovery is complete, as the parties rely on brief affidavits of plaintiff and agents for defendants to support this dispositive motion. (*See generally* CPLR §3212[f]). Further, the motion papers and competing factual affidavits raise issues of fact as to the happening of the incident including whether plaintiff used defendant's saw, whether plaintiff was permitted to use defendant's saw, whether plaintiff was required to use a wood saw for the drywall work, whether the saw blade was functional and properly guarded, and whether there is any contributory negligence by plaintiff who states he watched someone else use the same saw and chose to use that saw having seen it in use with an unguarded blade.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for dismissal is granted to the extent that defendant's counterclaim for malicious prosecution is dismissed. (Motion Seq. No. 1). It is further

ORDERED that plaintiff's motion for summary judgement is denied since there are issues of fact regarding the happening of the incident, permissive use of defendant's saw, functionality of the saw blade guard, and contributory negligence based on plaintiff's statement that he previously witnessed a worker use that saw unguarded saw. (Motion Seq. No. 2). It is further

ORDERED that a status conference is scheduled for **May 24, 2017 at 9:15a.m.** to apprise this court on the status of discovery and, to the extent discovery is complete, the filing of a Note of Issue.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this court.

Dated: April 20, 2017
Poughkeepsie, New York

ENTER:



HON. JAMES V. BRANDS, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Brands' Chambers, please do not submit any copies. Submit only the original papers.