

Mauro v Zorn Realities, Inc.

2017 NY Slip Op 33448(U)

September 25, 2017

Supreme Court, Nassau County

Docket Number: Index No. 609578/2016

Judge: Karen V. Murphy

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Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

ANGELO MAURO,

Plaintiff,

-against-

ZORN REALTIES, INC.,

Defendant.

_____ x

Index No. 609578/2016

Motion Submitted: 07/14/17

Motion Sequence: 001

The following papers read on this motion:

- Notice of Motion/Order to Show Cause..... X
- Answering Papers..... X
- Reply..... X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Defendant moves this Court for an Order granting summary judgment in its favor and dismissing the complaint on the ground that the Workers' Compensation Law § 11, *et. seq.* precludes plaintiff from pursuing his claims. Plaintiff opposes the requested relief.

Plaintiff seeks to recover damages for physical injury allegedly suffered on December 10, 2013 as the result of a dangerous and defective condition that he claims existed at 4321 Hempstead Turnpike, Bethpage, New York. Specifically, plaintiff alleges that he slipped and fell due to a defective condition of the floor area of those premises.

In its answer, defendant asserts as its fourth affirmative defense the exclusivity clause of the New York Workers' Compensation Law (WCL).

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). Summary judgment should only be

granted where the court finds as a matter of law that there is no genuine issue as to any material fact (*Cauthers v. Brite Ideas, LLC*, 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

Defendant contends that, although plaintiff's nominal employer is Zorn's Poultry Farms, Inc., the WCL also protects entities, such as itself, that are alter egos of the entity that employs the plaintiff, pursuant to WCL § 29 (6). Defendant asserts that it is an alter ego of Zorn's Poultry Farms, Inc. (Poultry Farms), thereby entitling it to the protection of the WCL.

Defendant also contends that plaintiff was subject to its direction and control, thereby making plaintiff its special employee, and entitling defendant, as plaintiff's special employer, to the protection of the WCL.

No Preliminary Conference has yet been held in this matter, and no depositions have been taken.

In support of its motion, defendant submits the verified complaint, the answer, copies of the insurance policies in question, documentation from the New York Workers' Compensation Board (WCB), and a brief affidavit from Merrill S. Zorn, an owner of Zorn Realities, Inc.

It is undisputed that plaintiff applied for workers' compensation benefits from Poultry Farms, and that his employer is stated on the submitted WCB paperwork as "Zorn's Poultry Farms, Inc." The WCB disapproved the proposed medical treatment by final decision dated October 14, 2015. Specifically, "physical therapy 3 X 6 weeks" was not approved because "the provider did not meet the burden of proof and failed to support the need to vary from the guidelines. There is no documentation provided of specific objective functional gains from treatment already provided that is related to activities of daily living and work activities, specific anticipated objective functional gains from continued treatment, objective goals with endpoint values related to specific functional abilities or rationale of why treatment outside the recommendations of the guidelines would be appropriate in the absence of documented patient response. . ."

Defendant's answer admits only to owning the premises where plaintiff's accident occurred. Merrill Zorn avers in her affidavit dated April 6, 2017 that she is one of four equal owners of defendant corporation, that she is familiar with the business records, structure and operations of defendant, "based upon Zorn Poultry Farms, Inc.'s interaction with [defendant]." Zorn does not explain what that "interaction" consists of between the

two companies. Zorn further states that she is also the owner of Zorn Poultry Farms, Inc., that they are “both family businesses,” that she runs the day to day operations of both businesses, and that both businesses are located at/operate out of the subject premises.

Merrill Zorn also states that defendant corporation’s sole function “is acting as owner of said premises, which includes paying the property taxes.” According to the affidavit, Poultry Farms occupied the subject premises without a written lease, and Merrill Zorn also maintained an office at the subject premises. Merrill Zorn’s affidavit establishes that plaintiff was an employee of Poultry Farms on the date of his accident, and had been so employed by Poultry Farms as a counterperson for approximately one year prior to the accident date.

Defendant submits the workers’ compensation insurance policy secured and maintained by Poultry Farms, on behalf of Poultry Farms and defendant. According to the Zorn affidavit, Poultry Farms pays for that workers’ compensation policy. The affidavit does not annex the policies, nor does the affidavit even refer to defendant’s Exhibit D; therefore, the policies are not actually authenticated by a member of defendant. In any event, the cover page of the policy indicates that the policy was prepared for “Zorns Poultry Farms Inc.” The renewals state that the named insured is Poultry Farms. The name “Realty Inc Zorns Franchise Ventures Inc Clayton Trust” appears on the named insured schedule annexed to the policy; presumably, this is the defendant named in this action, but the name appearing on the schedule is not a precise match to defendant’s.

Assuming *arguendo* that defendant is the insured appearing on the policy’s schedule, defendant’s submissions are, nonetheless, insufficient to entitle it to summary judgment as a matter of law.

“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” (*Quizhpe v. Luvin Construction Corp.*, 103 AD3d 618, 619 [2d Dept 2013]). “However, a mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other” (*Samuel v. Fourth Avenue Associates, LLC*, 75 AD3d 594, 595 [2d Dept 2010]; *see also Batts v. IBEX Construction, LLC*, 1121 AD3d 765 [2d Dept 2013]).

Even accompanied by the workers’ compensation insurance policy, and accepting that Zorn is the owner of both corporations, the vague and conclusory affidavit that the businesses are “family businesses,” each owned by her, and that Merrill Zorn runs the day-to-day operations of both businesses provides little to no evidentiary support for the alter ego theory advanced by defendant (*see Alvarez v. Denihan Hospitality Group*, 2016

NY Slip Op 30772[U] [Sup Ct New York County 2016]; *Cheng v. E&N Development NY, LLC*, 2011 NY Slip Op 33296 [U][Sup Ct Queens County 2011]). Notably, Zorn does not state that *defendant* runs the day-to-day operations of Poultry Farms, or vice versa. There is simply no evidence presented upon the instant application establishing that one of the entities controls the other, or that they operate as a single integrated entity. For example, the Zorn affidavit is silent as to whether the two entities file a single or separate income tax return(s), have a single or separate budget(s), and/or issue a single or separate financial report(s) (see *Guminiak v. VGFC Realty II, LLC*, 2017 NY Slip Op 06165 [2d Dept 2017]; *Kaplan v. Bayley Seton Hospital*, 201 AD2d 461 [2d Dept 1994]; *Cruz v. Regent Leasing Limited Partnership*, 14 Misc3d 307 [Sup Ct Bronx County 2006]).

“Closely associated corporations, even ones that share directors and officers, will not be considered alter egos of each other if they were formed for different purposes, neither is a subsidiary of the other, their finances are not integrated, assets are not commingled, and the principals treat the two entities as separate and distinct” (*Longshore v. Paul Davis Systems of the Capital District*, 304 AD2d 964, 965 [3d Dept 2003]; see also *Queens West Development Corporation v. Nixbot Realty Associates*, 121 AD3d 903, 906 [2d Dept 2014]; *Lopez v. Mount Kisco Country Club Realty Corporation*, 10 Misc3d 1079[A] [Sup Ct Westchester County 2006]). Merrill Zorn’s brief statement that defendant’s sole function is to act as owner of the subject premises, without more, fails to establish the purposes of the two businesses, fails to establish whether they are subsidiaries of each other, and fails to establish whether their finances and assets are integrated. Based upon the fact that defendant’s sole function is to operate as owner of the premises, it seems unlikely that defendant’s business activities have any relation to the business of Poultry Farms, which appears to be a food-oriented concern. Thus, defendant has failed to establish its *prima facie* entitlement to summary judgment as a matter of law with regard to its assertion that it is an alter ego of Poultry Farms.

As to defendant’s additional contention that plaintiff is its special employee, the Court recognizes that, “as a general proposition. . . 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 workers’ compensation and other employee benefits” (*Thompson v. Grumman Aerospace Corporation*, 78 NY2d 553, 557 [1991]). “A special employee is described as one who is transferred for a limited time of whatever duration to the service of another” (*Id.*) “We recognize that a person’s categorization as a special employee is usually a question of fact” (*Id.*).

“[A]s an exception to the general approach and analysis. . . that determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact

[citations omitted] [as when] the undisputed facts establish that the general employer was performing no work for the special employer and did not retain control over the special employee. This, when combined with other factors, allows a determination of special employment status as a matter of law. Many factors are weighed in deciding whether a special employment relationship exists, and generally no one is decisive [citation omitted]. While not determinative, a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work" (*Thompson, supra* at 557-558).

Additionally, it must be demonstrated that the employee had knowledge of, and consented to the special employment relationship (*Zupan v. Irwin Contracting, Inc.*, 145 AD3d 715 [2d Dept 2016]).

In this case, the affidavit of Merrill Zorn does not address any of the factors necessary to make a determination concerning the special employee issue as a matter of law. Aside from stating that plaintiff was employed by Poultry Farms as a counterperson and that he fell in the attic of the subject premises, defendant fails to demonstrate what plaintiff was doing in the attic when he fell, or why he was there, or at whose direction he was present inside the attic. There is simply no showing made that defendant controlled and directed the manner, details and ultimate result of plaintiff's work, in any capacity, either as a counterperson, or in whatever capacity he may have been acting inside the attic. There is also no showing made as to the "working relationship with the injured plaintiff sufficient in kind and degree" such that defendant may be deemed plaintiff's employer for purposes of invoking the protection of WCL exclusivity (*Fung v. Japan Airlines, Co., Ltd.*, 9 NY3d 351, 359 [2007]; *Samuel, supra* at 595-596).

Moreover, defendant fails to demonstrate whether there was any transfer of plaintiff, for a limited time of whatever duration, to the service of defendant, or whether plaintiff was even aware of and consented to any such circumstance.

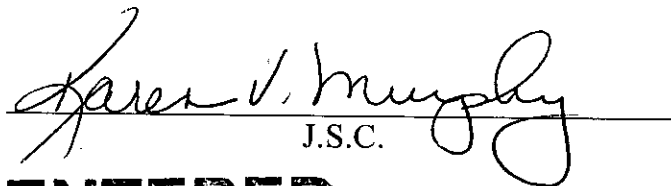
Defendant's submissions presented in support of its motion are conclusory and woefully inadequate, thereby failing to establish its *prima facie* entitlement to summary judgment as a matter of law on the issue of a special employment relationship (*Bostick v. Penske Truck Leasing Co., L.P.*, 140 AD3d 999 [2d Dept 2016]; *Abreu v. Wel-Made Enterprises, Inc.*, 105 AD3d 878 [2d Dept 2013]; *Gonzalez v. Woodbourne Arboretum, Inc.*, 100 AD3d 694 [2d Dept 2012]).

Since the defendant has failed to meet its *prima facie* burden, it is unnecessary to determine whether the plaintiff's papers submitted in opposition are sufficient to raise a triable issue of fact (*See Levin v. Khan*, 73 AD3d 991 [2d Dept 2010]; *Kjono v. Fenning*, 69 AD3d 581 [2d Dept 2010]).

Defendant's summary judgment motion is denied.

The foregoing constitutes the Order of this Court.

Dated: September 25, 2017
Mineola, NY


J.S.C.

ENTERED

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