

Cruz v National Convention Servs., LLC
2020 NY Slip Op 31471(U)
May 20, 2020
Supreme Court, New York County
Docket Number: 156230/2016
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

DAVID CRUZ,

Plaintiff,

- v -

NATIONAL CONVENTION SERVICES, LLC,

Defendant.

-----X

INDEX NO. 156230/2016
MOTION DATE _____
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 63-80, 82-88, 90, 91, 93-96

were read on this motion for summary judgment.

By notice of motion, defendant moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

In his complaint, plaintiff alleges that on October 11, 2015, while he was on the premises at 655 West 34th Street in Manhattan, which is owned by non-party Jacob Javits Convention Center (Javits), he fell to the ground due to a dangerous condition. At the time of the accident, plaintiff was employed by Javits and was working at the premises. (NYSCEF 70).

A. Plaintiff's deposition and records (NYSCEF 71, 79)

Plaintiff testified that in 2015, he was employed as a Javits supervisor in the environmental services department. When he arrived at the premises on the day of his accident, he gave his staff members their assignments and tools and sent them to perform their work. As it was the last day of the Comic Con Show, the employees began to move the show around and dismantle it. While plaintiff was walking within the premises, he was struck by a ladder and

beam which had fallen while being used by Javits's staff to dismantle an exhibition booth.

Following the accident, plaintiff applied for and received workers' compensation payments to cover his lost wages and medical expenses. When plaintiff filed his claim, he listed Javits as his only employer.

B. Torres deposition (NYSCEF 73)

Torres, a carpenter who was paid for his work that day by Javits, testified at his deposition, as pertinent here, that on the date of plaintiff's accident, he was dismantling an exhibition booth with a coworker. He had worked for defendant outside of his work for Javits and did not know if his work that day was connected to defendant, or if defendant had paid Javits for the work he did on the booth.

Torres and his coworker worked alone and without supervision in dismantling the booth that day. Torres used a ladder, which he then left leaning against the booth as he started work on another part of the booth. Before the accident, he or his coworker had taken apart the beams of the booth, leaving the vertical beam momentarily in place.

At the time of plaintiff's accident, Torres was not working on the ladder or on the booth against which the ladder leaned, did not see the accident, and did not know why the beam fell. He was later told by his coworker that the beam had fallen and hit the ladder, knocking it over and onto plaintiff.

Javits's site safety supervisor interviewed Torres about the accident. In a report prepared by the supervisor, Torres and his coworker were working for "National IND" that day, although his paycheck for that day reflects that he was paid by Javits.

C. Scura testimony and evidence (NYSCEF 72, 74, 75)

Torres's coworker Scura testified that while working at Javits's premises, he was

employed by defendant as a carpenter, and has been employed by defendant since 2008. He and Torres were defendant's sole employees working at the premises on the date of plaintiff's accident; there was no supervisor there that day. (NYSCEF 72).

Before the accident, as Scura was dismantling a beam on an exhibition booth, he heard a loud bang and saw plaintiff on the ground; he did not see anything fall on plaintiff. (*Id.*).

By affidavit dated September 7, 2018, Scura supplemented his deposition testimony as follows:

- (1) he receives calls from various companies to work on certain trade shows and events, including defendant, as well as other general contractors;
- (2) when he works at Javits's premises, he is an employee of Javits, otherwise known as New York Convention Center Operating Corp. (NYCCOC);
- (3) he has worked at the premises for years and is always paid by NYCCOC;
- (4) his paycheck for the week of plaintiff's accident reflects that he was employed and paid by NYCCOC;
- (5) when he works at the premises, his supervisors and forepersons are also employed by Javits;
- (6) while the booth he was dismantling at the time of plaintiff's accident was owned by defendant's client, he was working on it as a Javits's employee;
- (7) no supervisors or others employed by defendant were overseeing his work on the booth;
- (8) when he worked at other locations, he was paid directly by defendant; and
- (9) although he testified that he worked for defendant on the date of plaintiff's accident, he meant to say he was dismantling a booth belonging to a client of defendant, but was employed by NYCCOC/Javits, and he was not supervised or directed by defendant that day.

(NYSCEF 74). Scura's pay stub bears the heading of NYCCOC. (*Id.*).

Scura was again deposed. He testified that he has several employers, but his main employer is Javits, and he receives a paycheck from NYCCOC. Contrary to what he had testified

to previously, when he works at the premises, he is employed by Javits, whereas when he works outside the premises, he is employed by defendant. For his work at the premises, a company such as defendant books him through Javits and defendant pays Javits for his work there, including his union benefits, vacation time, and taxes, after which Javits pays him.

Scura knew that he was working on a booth owned by defendant's client because when he signed in to work at the premises that day, he saw defendant's name next to his name, indicating that he would be performing work for defendant on the booth.

If more than four employees are working for defendant at the premises, a supervisor will normally be present. No one employed by Javits directed or instructed him on his work there. There are four forepersons employed by Javits who direct Scura where to work on a particular day or project; otherwise they give him no other directions or instructions.

D. Defendant's deposition (NYSCEF 78)

In December 2018, defendant's owner and president testified that defendant provides labor for trade shows, conventions, exhibits, etc., and its clients request labor for a particular show or exhibit and determine how many are needed.

For an event at Javits's premises, in order to request laborers, defendant would fill out a form provided by Javits and Javits would then send the laborers to defendant's sign-in desk. There, the laborers would sign in for the day's work and sign out at the end of the day, and defendant's City Manager would assign the work, process paperwork for defendant and Javits, filling out billing and time sheets and assist defendant's clients as needed. The Manager stays at the desk and does not generally or usually supervise any work; it is not his responsibility to supervise or give instructions to the laborers. Normally, the client does the supervision and instruction, and the Manager would and should defer to the client. Other than occasionally

providing ladders, defendant provides no tools or equipment to the laborers for use at the premises.

Scura is defendant's employee when he works outside Javits's premises, and when at Javits, he is employed by Javits. While Javits pays Scura's salary and benefits, defendant reimburses Javits for them. Javits bills defendant for an employee's time and marks up his payroll and benefits; defendant further marks up the employee's labor cost when it bills its clients.

E. Javits's deposition (NYSCEF 85)

Javits's Health and Safety Supervisor testified that his responsibilities for Javits include the prevention and investigation of accidents on the premises. He investigated plaintiff's accident the day it occurred and spoke to Scura and Torres after the accident. He believed that both of them worked for defendant.

II. CONTENTIONS

A. Defendant (NYSCEF 68)

Defendant asserts that the Scura and Torres were solely employed by Javits on the date of plaintiff's accident and were therefore plaintiff's co-workers. Given plaintiff's allegation that the accident was negligently caused by Scura and Torres, it maintains that plaintiff is barred by Workers' Compensation Law (WCL) §§ 11 and 29(6) from suing for injuries sustained in an on-the-job accident arising from the conduct of his co-workers. Moreover, as defendant did not direct, supervise, or control the work being performed when plaintiff's accident occurred, it may not be held liable for common-law negligence.

B. Plaintiff (NYSCEF 83)

According to plaintiff, Torres and Scura were defendant's special employees. He explains

that even if they were “employed” by Javits on the date of the accident, they were generally employed by defendant but transferred to Javits’s employment for that work. And, as a special employer, defendant is liable for the negligence of its special employees.

Plaintiff denies that he must prove that defendant directed and supervised the work that caused his accident, but even if he must, evidence shows that defendant had the ability to direct and control its employees’ work for Javits and that the employees took their direction from defendant’s supervisors and that defendant provided them with ladders. Moreover, no one from Javits supervised their work.

Plaintiff further observes that defendant did not plead an affirmative defense based on WCL in its answer and thus may not rely on it in moving for summary judgment.

C. Reply (NYSCEF 94)

Defendant observes that plaintiff does not dispute that Scura and Torres were not under its supervision, direction, or control at the time of the accident, and denies that they were its special employees, contending that the evidence reflects that they were employed by Javits on the date of plaintiff’s accident, including the testimony of all of the witnesses and Scura’s paystub.

Defendant explains that it failed to plead a WCL defense because none of the parties to this action is its employee. Nevertheless, its failure to plead it is not fatal to moving to dismiss on it, as an affirmative defense may be added by amendment at any time absent surprise or prejudice to the opposing party. Here, there is no surprise or prejudice as defendant’s relationship to Scura and Torres has been in issue from the start of the action. In any event, defendant requests that the amendment be granted, *sua sponte*, and considered on its merits.

III. ANALYSIS

A. Failure to plead WCL as affirmative defense

That defendant did not assert an affirmative defense related to the WCL in its answer is not fatal to its motion to dismiss on that ground. (*See e.g., Raptis v Juda Constr., Ltd.*, 26 AD3d 153 [1st Dept 2006] [WCL affirmative defense waived only if not raised before final disposition of action]; *see also Bank of N.Y. v River Terrace Assoc. LLC*, 23 AD3d 308 [1st Dept 2005] [defendant could raise defense not pleaded in answer, as it raised defense in moving for summary judgment and plaintiff opposed it without claiming prejudice]). Thus, absent any prejudice articulated by plaintiff, defendant's answer is, *sua sponte*, deemed amended to add the defense.

B. Special employment/employer status

Pursuant to WCL §§ 11 and 29(6), the WCL is the exclusive remedy for an employee to recover for injuries caused by the employee's employer or coworker. (*Fung v Japan Airlines Co., LTD*, 9 NY3d 351 [2007]). One moving to dismiss a claim based on the exclusivity provisions must establish that the plaintiff was either its general employee or special employee, or that the plaintiff was injured by her co-worker. A third person may be deemed to be a plaintiff's coworker if that person, while employed by another employer, is also a special employee of the plaintiff's employer. A "special employee" is one that is transferred for a limited time of any duration to the service of another. A "significant" and "weighty" consideration as to whether a special employment exists is who controls and directs the employee's work. Moreover, for a special employee to be considered a coworker, she must have been acting within the scope of her employment as a coworker at the time of the injury. (*Fung*, 9 NY3d at 364-365).

Here, it is undisputed that:

- (1) plaintiff was employed by Javits;

- (2) when defendant receives a request from a client for laborers for a particular show and exhibit, and if it is taking place at the premises, defendant fills out a labor form with Javits and requests laborers;
- (3) Javits asks laborers to perform the work;
- (4) on a work day, Javits sends the laborers to a desk maintained by defendant at the premises for the laborers to sign in and out;
- (5) defendant's City Manager is stationed at a desk to assign work to laborers and does not otherwise supervise the work, nor is it the manager's responsibility to supervise or instruct the laborers;
- (6) the client usually supervises or directs the laborers' work;
- (7) defendant provides no tools for the laborers, except occasionally ladders if they have them at the premises;
- (8) Javits first bills defendant for the laborers' salaries and defendant pays Javits, after it has billed its clients and taken out a percentage of the money received as its profit;
- (9) on the date of plaintiff's accident, Scura and Torres were employed by Javits, after having been contacted directly by Javits to perform the work;
- (10) Javits paid the salaries for the work of Scura and Torres on that date, and defendant reimbursed Javits;
- (11) no Javits employee directed, controlled, or instructed their work at the premises;
- (12) on the date of the accident, no person employed by defendant directed, controlled, or instructed Scura and Torres, and none of defendant's supervisors was present;
- (13) defendant did not provide Scura and Torres with any work equipment; and
- (14) when Scura and Torres were not working at the premises, they were employed by defendant or other contractors, and when they did so, defendant paid them directly.

Based on these undisputed facts, defendant sufficiently establishes, *prima facie*, that even if Scura and Torres were its employees for work performed at places other than Javits's premises, on the date of the accident and while working at the premises they were either employed by Javits or were special employees of Javits, having been transferred to perform the

work from defendant to Javits. (*See e.g., Thompson v Grumman Aerospace Corp.*, 178 NY2d 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 workers' compensation and other employee benefits”]).

For example, in *Hammond v Toy Indus. Assn., Inc.*, the plaintiff, employed by a trade show exhibitor, was injured during a trade show by the alleged negligence of an employee supervised by a contractor at Javits's premises. The contractor would submit orders to Javits to provide laborers and Javits would provide the laborers, who were its employees, as it did with the negligent employee. The contractor would pay Javits the costs associated with using the laborers, and Javits would then pay the laborers' salaries. After observing that it was well-settled that an employee may be employed by both a general and special employer, the Court held that Javits was the negligent employee's employer as, among other factors, he received his salary from Javits, before beginning a workshift Javits would call him to work and direct him to work for the contractor, and such employees were employed by Javits to provide them to contractors for exhibition-related labor work. (8 F Supp 3d 484 [SD NY 2014]).

Griilikhes v Intl. Tile & Stone Show Expos. is inapposite. While the plaintiff there was also a carpenter working at Javits's premises on booths during a trade show, the contractor, which was hired by a client to erect a booth, gave the plaintiff a list of tasks to complete each day and supplied him with all necessary work and safety equipment. The plaintiff and the contractor each regarded the plaintiff as being under the contractor's supervision and control while working at the premises. The Court found that the plaintiff was the contractor's special employee as it directed, supervised, controlled, and directed the manner and details of his work, furnished his work equipment, and had the authority to request or reject particular employees. (190 AD3d 480

[1st Dept 2011)].

None of those factors is present here. Defendant did not control, direct or supervise the work of Scura or Torres or provide them with equipment, and there is no evidence that defendant had any role in hiring or firing them other than requesting from Javits that it provide defendant with laborers for a specific project. Plaintiff thus fails to establish that any triable issues of fact remain as to his relationship to Scura and Torres or their relationship to defendant on the date of his accident.

Therefore, as Scura and Torres were employed, generally or specially, by Javits, and thus were plaintiff's coworkers at the time of the accident, he is barred by the WCL from recovering for injuries he sustained due to their alleged negligence.

C. Supervision and control

To the extent that this issue needs to be addressed, given the above determination, defendant establishes, *prima facie*, that it did not supervise or control or have the authority to supervise and control Scura's and Torres's work. Thus, plaintiff raises no triable issue in opposition.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is granted, and the complaint is dismissed, and the clerk is directed to enter judgment accordingly.

202005201037285FAFFE83741CA2953A438EA83B91F3445F2E23

BARBARA JAFFE, J.S.C.

5/20/2020
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

