Jung Hyun Yu v Taek S. Yoon
2020 NY Slip Op 31973(U)
May 12, 2020
Supreme Court, Queens County
Docket Number: 704327/2018
Judge: Cheree A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No. 704327/2018
JUNG HYUN YU,

Plaintiff,

Motion
Date: March 11, 2020

-against-

Motion Cal. No.:

TAEK S. YOON, MODU TRADING INC., Motion Sequence No.:4
GUY PROPHETE and FAYEZ AHMED, MD,

Defendants.
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The following papers numbered EF 53-67 submitted and considered on this motion by defendants TAEK S. YOON (individually referred to as "Yoon") and MODU TRADING INC., (individually referred to as "Modu") (collectively referred to as "Defendants"), seeking an Order pursuant to Civil Practice Law & Rules (hereinafter referred to as "CPLR") 3212 dismissing the Complaint and cross-claims against them on the grounds that the undisputed evidence establishes that the claims and cross-claims asserted against them are barred under New York Workers Compensation Law §§ 11 and 29(6) and for such other and further relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	EF 53-63
Affirmation in Opposition-Affidavits-Exhibits.....	EF 64-65
Reply Affirmation.....	EF 66-67

Facts

This is a negligence action that arises out of a car accident that occurred on August 19, 2016 on Nostrand Avenue in Kings County. Jung Hyun Yu (hereinafter referred to as "Plaintiff") commenced this action on March 14, 2018 by the filing the of the Summons and Complaint. Plaintiff was in the car owned by Modu and operated by Yoon. Now, Defendants seek summary judgment alleging Plaintiff's claims are barred by Worker's Compensation Law §§ 11 and 29(6).

Law and Application

New York Workers Compensation Law § 11 states in part:

> The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom, except that if an employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his or her legal representative in case of death results from the injury, may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury;...For purposes of this section the terms "indemnity" and "contribution" shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered. An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

New York Workers Compensation Law § 29(6)

> The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in case of death his or her dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ, the employer's insurer or any collective bargaining agent of the employer's employees or any employee, of such insurer or such collective bargaining agent (while acting within the scope of his or her employment). The limitation of liability of an employer set forth in section eleven of this article for the injury or death of an employee shall be applicable to another in the same employ, the employer's insurer, any collective bargaining agent of the employer's employees or any employee of the employer's insurer or such collective bargaining agent (while acting within the scope of his or her employment). The option to maintain an action in the courts for

> damages based on the employer's failure to secure compensation for injured employees and their dependents as set forth in section eleven of this article shall not be construed to include the right to maintain an action against another in the same employ, the employer's insurer, any collective bargaining agent of the employer's employees or any employee of the employer's insurer or such collective bargaining agent (while acting within the scope of his or her employment).

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

Where there are no material and triable issues of fact, the motion for summary judgment should be granted....[t]he party making the motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issue of fact and the party must do so by tender of evidentiary proof in admissible form." (*See Dougherty v Kinard*, 215 AD2d 521 [2d Dept 1995]; *see also Friends of Animals, Inc. v Assoc. Fur Mfrs*., 46 NY2d 1065 [1979].) "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party." (*See Adams v Bruno*, 124 AD3d 566 [2d Dept 2015].)

Defendants allege that Plaintiff was employed by Modu and acting within the scope of his employ. Defendants point to Plaintiff's testimony, Yoon's testimony, that Plaintiff filled out a worker's compensation claim and that Plaintiff stipulated to discontinue this action against the Defendants.

Plaintiff testified in part as follows:
Q: Where were you coming from before the accident occurred?
A: I met one of my customers and I was on my way to see another customer.
Q: Do you remember the name of the customer or the business that you were coming from?
A: I think it was St. Johnson that I started from.
Q: Who were you working for at the time of the accident?
A: Modu, M-O-D-U, Trading.
(Page 10 lines 4-15)

Q: You were employed by Modu Trading at the time of the accident?
A: Yes.
Q: When did you first begin working for Modu Trading; not that day, in your career?
A: 2008.
(page 39 lines 16-22)

Defendant Yoon testified as follows:
Q: Are you currently employed?
A: Yes
Q: Where are you employed?
A: Modu Trading.
Q: How long have you been employed there?
A: Six years.
Q: And what do you do at Modu Trading currently?
A: Salesperson.
Q: And were you employed by Modu Trading on August 19. 2016?
A: Yes.
Q: Were you a salesperson at that time?
A: Yes.
(Page 6- 7line 24-25, 2-10 and 13-18)

Q: Who was the owner of that vehicle?
A: Modu Trading.
Q: Were you in the course of your employment at the time of the accident?
A: Yes.
(Page 9 lines 10- 15)

The Stipulation

Defendants point to the stipulation annexed to their papers as an exhibit and also e-filed as document number nine. The stipulation is dated July 26, 2018 and is signed by prior counsel to Plaintiff on behalf of Plaintiff. The stipulation states that Plaintiff voluntarily discontinued this action "with prejudice and without costs as to defendants TAEK S. YOON AND MODU TRADING INC. only."

Plaintiff's Bill of Particulars

Plaintiff alleges he sustained permanent injuries to his neck, lower back and mouth/teeth. Plaintiff specifically claims that as a result of this accident he sustained disc herniations, cervical and lumbar sprains and strains, radiculopathy, and open fracture of his tooth.

Defendants argue Plaintiff's Bill of Particulars fails to identify a "grave injury", that the deposition testimony of Plaintiff and defendant Yoon indicate that both were co-workers acting within the scope of their employment under Modu,therefore, New York Workers Compensation

Law bars relief.

In opposition, Plaintiff alleges Defendants have not satisfied their burden. According to Plaintiff Defendants failed to provide proof of employment such as records or proof of wages that would establish that both Plaintiff and Yoon were employee's rather than contractors. Plaintiff alleges reliance on the deposition transcript is insufficient because an interpreter was used and it is not clear that the parties understood the legal definitions of terms and phrases like "employee" or "acting in the course of employment". Furthermore, Plaintiff alleges Defendants failed to plead such a defense in their answer and therefore, cannot prevail on their motion for summary judgment pursuant to CPLR 3018 (b).

There is no evidence to suggest that Plaintiff and Yoon were unaware of the definition of "employee" or "acting in the course of employment," the argument that the use of a translator coupled with their status as lay people suggests they may not have understood the legal definition of the aforementioned terms or phrases is unpersuasive. In the beginning of Plaintiff's examination before trial the following instructions were given:

Q: If you don't understand the question, please let the interpreter know and I'll rephrase it for you.
A: Okay.
(Page 6 lines 6-9).

Therefore, Plaintiff's testimony that he was working for Modu at the time of the accident, that he was leaving one customer and on his way to see another customer at the time of the accient is sufficient evidence to establish Defendant's prima facie entitlement to summary judgment.

CPLR 3018(b) states:

> (b) Affirmative defenses. A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages as set forth in article fourteen-A, discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds, or statute of limitation. The application of this subdivision shall not be confined to the instances enumerated.

In response, Defendants' point to *Kathleen Murray as Administratrix of the Estate of James F. Murray, Deceased v City of New York, Appellant, et al.* (43 NY2d 400, 404 [1977]) the decedent plaintiff was a pedestrian at the time of the accident when he was hit by defendant Virzi. Plaintiff was acting within the scope of his employment with the City of New York at the time of the accident (*id*). The City of New York was a named defendant and failed to plead workers compensation law as an affirmative defense in its pleadings. During the trial, after Plaintiff rested the City of New York moved for dismissal claiming the action was barred as against them due to the workers compensation law (*id*). After the City presented its witnesses the trial court notified the

parties that it would dismiss as against the City and allow the plaintiff to re-open, however, the attorneys requested that the trial go to its fulfillment. A verdict was returned for Plaintiff with 25% of liability going to the City and the remaining 75% to Virzi (*id*). The trial court granted the City's motion to conform the pleadings to the proof and set aside the verdict as against the City. The appellate court reversed (*id*).

The Court of Appeals looked to CPLR 3025(b)where a party may amend the pleadings at anytime with leave of court, such leave may be freely given upon such terms as may be just (*id* at 405). The Court of Appeals found that plaintiff was not prejudiced by the amendment because the pleadings were merely conformed to the proof (*id*). Plaintiff, itself, called to the stand a witness that on direct examination provided proof that plaintiff was working within the scope of his employment for the City of New York at the time of the accident. Therefore, the Court of Appeals held Plaintiff could not claim surprise and the appellate court abused its discretion in disturbing the trial courts decision to grant the motion to amend the pleading and set aside the verdict (*id* at 406). "Workmen's compensation is an exclusive remedy as a matter of substantive law and, hence, whenever it appears or will appear from a plaintiff's pleading, bill of particulars or the facts that the plaintiff was an employee of the defendant, the obligation of alleging and, in any event, of proving noncoverage falls on the plaintiff. Although the issue may be waived, as plaintiff here argues, such waiver is accomplished only by a defendant ignoring the issue to the point of final disposition itself and, in this sense, it is not the kind of subject-matter jurisdiction deficiency which ousts a court of competence to decide the case. Here, the issue was raised by the motion to dismiss and then by the application to amend" (*id* at 407 [citation omitted]).

While it is essentially Defendants' argument that Plaintiff through his testimony provides evidence that he worked for Modu, unlike the City of New York in *Murray,* Defendants have not moved pursuant to CPLR 3025 (b) to amend the pleadings and Plaintiff has not had the opportunity to raise an argument in opposition. Therefore it is,

ORDERED, that Defendants' motion is denied with leave to renew.

The foregoing constitutes the decision and Order of the Court.

Dated: May 12, 2020

Hon. Chereé A. Buggs, JSC