

Leonard v Wenz

2020 NY Slip Op 34540(U)

June 23, 2020

Supreme Court, Broome County

Docket Number: EF17-802

Judge: Jeffrey A. Tait

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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 12th day of June 2020.

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CORTLAND

Judith Leonard,

Plaintiff,

DECISION AND ORDER

-against-

**Index No. EF17-802
RJI No. 2018-0862-C**


**David M. Wenz, Individually and/or d/b/a David
Wenz Construction,**

Defendant.

APPEARANCES:

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	DECISION + ORDER ON MOTION Elizabeth Larkin, County Clerk

HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on the motion of the defendant David M. Wenz, Individually and/or d/b/a David Wenz Construction (Mr. Wenz) for reargument of the motion for summary judgment and the resulting Decision and Order dated February 13, 2020 (Decision) denying summary judgment dismissing the complaint in this action. The plaintiff Judith Leonard opposed the original motion and opposes this motion.

The background of this action and the procedural history are set forth in the Court's Decision deciding the motion and will not be restated here.

In support of the motion, Mr. Wenz submits his attorney's affidavit, exhibits, and a memorandum of law. In opposition to the motion, Ms. Leonard submits her attorney's affirmation. Mr. Wenz submitted his attorney's affidavit in reply.

The motion was heard on June 12, 2020 with counsel appearing via Skype for Business.

Law

Pursuant to CPLR 2221(d), a motion for leave to reargue:

- “1. shall be identified specifically as such;
2. shall be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include matters of fact not offered on the prior motion; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.”

“[A] motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision”

(*Guidarelli v. City of Schenectady*, 167 AD3d 1402, 1403 [3d Dept 2018], quoting *Loris v. S & W Realty Corp.*, 16 AD3d 729, 730 [3d Dept 2005]).

The motion

The motion seeks reargument of the denial of summary judgment to Mr. Wenz on the issue of special employment and the claim that Ms. Leonard suffered a low back injury or aggravation of an injury to her low back.

On the special employment issue, Mr. Wenz contends he was a special employee at the time Ms. Leonard was injured which bars her from maintaining a personal injury action against him, leaving her with remedies under the workers' compensation law. On the low back injury aggravation claim, Mr. Wenz contends Ms. Leonard did not suffer an injury or aggravation of an injury to her low back.

Ms. Leonard opposes the motion.

Analysis

The Court grants the motion to reargue to consider the points raised by Mr. Wenz. However, upon consideration of the points raised, the Court adheres to its original Decision denying Mr. Wenz's motion for summary judgment.

On a motion for summary judgment, the Court will grant the motion only if there are no disputed issues of material fact and the undisputed material facts establish the moving party is entitled to judgment as a matter of law.

The special employment issue turns on a number of factors, some of which are entitled to more weight than others. Mr. Wenz asserts the Court failed to accord sufficient weight to the most important factor – “who controls and directs the manner, details and ultimate result

of the employee's work." Case law does establish this is a key and important factor (*see Salinas v. 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1221 [2d Dept 2019]).

It is noteworthy that any time one must weigh multiple factors to make a determination, it is likely to be the very rare case where those factors weigh so heavily in one direction that judgment for one party as a matter of law is evident. In fact, courts have held in this specific situation that determining whether someone is a "special employee" is typically a fact issue (*see Thompson v. Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991] [recognizing that a person's categorization as a special employee is usually a question of fact]).

Mr. Wenz's counsel states the record presents clear support for the fact that Ms. Leonard's employer controlled and directed the manner, details, and ultimate result of Mr. Wenz's work. The record does contain evidence that this might well be the case – but it also contains evidence that this was not the case. Weighing the competing evidence is a matter for a trier of fact.

On the low back injury or aggravation issue, Mr. Wenz's counsel submitted an affidavit of a physician who performed a medical examination on Ms. Leonard. He completed a report of his June 19, 2019 exam of Ms. Leonard in which he stated, "It is this examiner's opinion that the lumbosacral spine disease that predated the incident which occurred on 9/17/2014 is the overwhelming issue in the claimant's current lumbosacral spine pain and left leg pain" (*see DiChristina report at p 8*). His affidavit submitted for the original motion states "I am clarifying the opinions expressed in my report as follows: Lumbar Spine: All of Ms. Leonard's current complaints are causally related to her preexisting lumbosacral spine disease and I find no injuries to her lumbosacral spine caused by the September 17, 2014 accident"

(see DiChristina affidavit at ¶ 7). However, his affidavit does not explain the reason for this change.

It does, though, provide some insight. Ms. Leonard was less than forthcoming about her history of medical issues involving her spine and back. While this calls into question her veracity or memory, it also presents a classic issue of credibility. Was Ms. Leonard intentionally misleading or less than truthful or is there a benign explanation?

The issue, in any event, is whether she has a back injury or aggravation of a back injury that was caused by the accident. As noted in the prior Decision, there is no threshold for making such a claim in this action as there is in a motor vehicle accident where a plaintiff must show the injury qualifies as a “serious injury” under Insurance Law § 5102.

Mr. Wenz’s counsel points out that Ms. Leonard did not provide a sworn affidavit from a medical expert or her treating physician to counter its expert. The medical records from her treating physician note at some points that her complaints are causally related to the subject accident. Later portions of the records question or cast some doubt on the extent of that causation.

The medical records, at certain points, support the claim that Ms. Leonard’s back injury complaints are causally related to the accident. Mr. Wenz’s counsel points out this is due in large part to Ms. Leonard’s statements to her physician. In most personal injury claims, the statements of the injured person are key to forming an opinion on causation. The patient describes her physical complaints and condition and states they followed a particular incident. The physician forms an opinion on causation based on that history. It is possible that the patient was injured in some other undisclosed incident or is attributing what were pre-existing

complaints and conditions to the incident. In such circumstances, the physician is left to evaluate whether the current complaints and condition could have been caused by the incident.

Which of these alternatives is the situation here requires consideration of the entire record and history. That is a determination which requires weighing all of the facts and circumstances. It is not something that lends itself to summary determination, as weighing the competing evidence is a matter for a trier of fact.

Conclusion

The motion to reargue is granted and, for the reasons stated herein, the Court adheres to the prior Decision and Order.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: June 23, 2020
Binghamton, New York



HON. JEFFREY A. TAIT
Supreme Court Justice