Gonzalez v Five Star Foods Intl., Inc.
2020 NY Slip Op 34607(U)
December 3, 2020
Supreme Court, Bronx County
Docket Number: Index No. 21178/2020E
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

GENARO GONZALEZ,

Plaintiff,

-against-

FIVE STAR FOODS INTERNATIONAL, INC. D/B/A GOURMET GURU, FIVE STAR FOODS INTERNATIONAL, INC., D/B/A GOURMET GURU, INC., GOURMET GURU, INC., UNITED NATURAL FOODS, INC. AND JEFF LICHTENSTEIN,

Defendants.

INDEX NUMBER: **21178/2020E**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of **11/20/20**

Notice of Motion-Exhibits, Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendants Five Star Foods International, Inc. D/B/A Gourmet Guru, Five Star Foods International, Inc., D/B/A Gourmet Guru, Inc., Five Star Foods International, Inc. (collectively "Five Star") Gourmet Guru, Inc. ("Gourmet"), United Natural Foods, Inc. ("United") and Jeff Lichtenstein ("Lichtenstein") motion for summary judgment is denied, with leave to renew, for the reasons set forth herein.

This personal injury action involves plaintiff's claim that he was injured from a slip and fall accident on March 15, 2017 at 1123 Worthen Street, Bronx, New York. As a result of the accident, plaintiff filed a Workers' Compensation claim under defendant United's policy of insurance where he was designated as

an employee and has been paid Workers' Compensation benefits.

Laura Daly, Senior Director Associate General Counsel for United, submits an affidavit stating that she is familiar with the corporate history and structure of United. Ms. Daly states that United purchased Gourmet on August 11, 2016, and Gourmet has been and remains the parent company of United. Gourmet has been and remains a wholly owned subsidiary of United since August 11, 2016. United controls the operations and has complete ownership over the assets of Gourmet. United and Gourmet share the same Chief Executive Officer ("CEO"), officers, and members of the board of directors, as well as a common business purpose. On the alleged date of accident, March 15, 2017, all employees of Gourmet were also employees of United. United and Gourmet shared the same insurance policy on the alleged date of loss. As a wholly owned subsidiary, Gourmet was covered under United's insurance policies on the alleged date of loss. Lichtenstein was the President of Gourmet, a wholly owned subsidiary of United. The entity Gourmet was formally known as Five Star. Five Star legally changed its name with the New York State Division of Corporations to Gourmet on January 18, 2002.

Defendants argue that plaintiff's action should be dismissed, pursuant to New York State Workers' Compensation Law, as against 1) United as it was plaintiff's employer on the date of the accident; 2) Gourmet as a wholly owned subsidiary and alter ego of plaintiff's employer, United; 3) Lichenstein, a prior CEO of Gourmet, a wholly owned subsidiary and alter ego of plaintiff's employer, United; and, 4) Five Star, the former name of Gourmet, a wholly owned subsidiary and alter ego of plaintiff's employer, United.

Pursuant to §11 and §29(6) of the Workers' Compensation Law, plaintiff may not maintain an action against his employer for work related injuries. Billy v. Consolidated Machine Tool Corp., 51 N.Y.2d 152, 156 (1980). Plaintiff's exclusive remedy against their employer for injuries sustained in the course of their employment is Workers' Compensation. See, Martinez v. Canteen Vending Service Roux Fine Dining Chartwheel, 795 N.Y.S.2d 16 (1st Dept. 2005); Johnson v. Eaton Corp., 577 N.Y.S.2d 1 (1st Dept. 1991). It is well settled that once the Workers' Compensation Board has exercised jurisdiction over a claim, the Courts are precluded from entertaining an action against the employer arising out of the same incident. See, Cunningham v. State of New York, 60 N.Y.2d 248 (1983); O'Connor v. Midiria, 55 N.Y.2d 538 (1982).

Defendants move to dismiss the action pursuant to CPLR §3211(a)(1), (3) and (7). Pursuant to CPLR §3211(a)(1), a party may move to dismiss the action on a defense is founded upon documentary evidence;

(3) the party asserting the cause of action has not legal capacity to sue; and, (7) the pleading fails to state a cause of action. Defendants also move for summary judgment in favor of defendants.

Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations", Goshen v. Mutual Life Insurance Co. of N.Y., 98 N.Y.2d 314 (2002); Green apple v. Capital One, N.A., 939 N.Y.S.2d 351 (1st Dept.2012), and conclusively establishes a defense to the asserted claims as a matter of law". Weil, Gotshal, Manges, LLP, 780 N.Y.S.2d at 593; Mill Fin., LLC v. Gillett, 992 N.Y.S.2d 20 (1st Dept. 2014). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR §3211(a)(1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action. See, McGuire v. Sterling Doubleday Enters., L.P., 799 N.Y.S.2d 65 (1st Dept. 2005). On a motion to dismiss pursuant to CPLR §3211(a)(7), the complaint survives when it gives notice of what is intended to be proved and the material elements of each cause of action. Rovello v. Orofino Realty Co., Inc. 40 N.Y.2d 633 (1976); Underpinning & Foundation Construction v. Chase Manhattan Bank, 46 N.Y.2d 459 (1979).

The court's function on a motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York,49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet

its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Defendants' motion for dismissal and summary judgment must be denied. While it is true that a grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant information, (Bailey v. New York City Transit Authority, 704 N.Y.S.2d 582 (1st Dept 2000); Jeffries v. New York City Housing Authority, 780 N.Y.S.2d 1 (1st Dept. 2004)), here the motion is premature as there has been no discovery in this matter. Moreover, there is another pending action (Action 1) under Index No. 22466/2018, commenced by plaintiff relating to the same accident against several other defendants under Index No. 22466/2018. Plaintiff was granted a default judgment against one of the defendants in that action, Barry Worthen, and defendant New York City Industrial Development Agency's motion for summary judgment was denied. Currently pending in Action 1 is a motion to vacate the default judgment against Barry Worthen. There has been very little discovery in Action 1, depositions are still outstanding and the actions have yet to be consolidated.

Additionally, defendants' documentary evidence does not conclusively establish the relationship between the party defendants. Defendants' submission in support of its contention that it is entitled to dismissal and summary judgment is an affidavit by its general counsel, which does not constitute documentary evidence for purposes of a motion to dismiss pursuant to CPLR 3211(a)(1), (Tsimerman v. Janoff, 835 N.Y.S.2d 146 (1st Dept. 2007), and is not properly considered pursuant to CPLR 3211(a)(7). Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1997). Ms. Daly's affidavit contains generalized conclusions as to the relationship between the defendants. Ms. Daly does not explain the responsibilities, if any, of each of the defendants regarding the property where plaintiff was allegedly injured. Ms. Daly states that her "investigation"included speaking with key United personnel as well as reviewing "pertinent records and documentation". However, Ms. Daly does not identify who she spoke with and the nature of those conversations. Moreover, Ms. Daly does not identify what "pertinent records and documentation" she reviewed. The only documentary evidence that Ms. Daly submits is a copy plaintiff's 2017 W-2 which lists plaintiff's employer as "United Natural Foods Inc." This sole document does not warrant the dismissal of the action at this juncture.

Plaintiff is entitled to discovery on issues regarding control, supervision, direction or maintenance of the property where the alleged accident took place. "A determination of whether an individual is a general or special employee turns on a consideration of several factors, including which employer controls and

'directs the manner, detail and ultimate result of the employee's work'. Consideration is also given to which entity controls the employee's salary and has the right to hire or fire the employee." Hutchinson v. Fahs-Rolston Paving Co., 732 N.Y.S.2d 116 (3d Dept. 2001) quoting Matter of Johnson v. New York City Health & Hospitals Corp., 625 N.Y.S.2d 698 (3d Dept. 1995). Plaintiff is also entitled to any contracts, leases, insurance policies and other documentation between the defendants in order to identify the entity that was plaintiff's employer.

Accordingly, the motion to dismiss and for summary judgment is denied as premature, with leave to renew, once discovery has been had in this action.

This constitutes the decision and Order of this Court.

Dated: 12/3/20

Hon. Alison Y. Tuitt