

Garcin v Graham

2020 NY Slip Op 34969(U)

May 7, 2020

Supreme Court, Westchester County

Docket Number: Index No. 53714/2016

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

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SUSAN GARCIN and JOSEPH GARCIN,

Plaintiffs,

DECISION & ORDER
Index No. 53714/2016
Motion Sequence 4

-against-

SCOTT GRAHAM, A&J CIANCIULLI, INC., PCT
CONTRACTING, LLC and PCI INDUSTRIES, CORP.,

Defendants.

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The following papers were read on the motion (Sequence#4) for an order granting Scott Graham (“Graham”) summary judgment, finding that he was employed by the defendant, PCT Contracting, LLC (“PCT”), and therefore, PCT is vicariously liable for the injuries, if any, found to have been caused by Graham’s negligence and for such other and further relief the Court deems just and proper:

- Notice of Motion/Affirmation/Exhibits A-F
- Memorandum of Law in Support
- Affirmation in Opposition
- Memorandum of Law in Reply

Factual and Procedural Background

The plaintiffs, Susan and Joseph Garcin, commenced this action on March 23, 2016, seeking damages for personal injuries Susan Garcin (“Garcin/plaintiff”) allegedly sustained on September 25, 2015, when a crane rolled down the road during a construction project and crashed into a nearby building in which Garcin was working, located at 501 Ashford Avenue, Ardsley, New York. Joseph Garcin has a derivative cause of action for loss of Garcin’s services. The plaintiffs filed an amended complaint on September 6, 2016, and a second amended complaint on March 15, 2018. PCI was added as defendant by the second amended complaint, which was stipulated to by the parties.

On August 15, 2017, Main Street America Assurance Company (“MSAAC”), commenced a subrogation action (Index No. 62310/2017) against PCI, Persico Contracting & Trucking, Inc., and PCT. That matter was consolidated with this matter for the purpose of joint discovery and trial, by So Ordered Stipulation, dated March 23, 2018. The parties

completed discovery, the note of issue was filed and the parties now file the instant motions.

PCT was retained to perform work for the project and rented the crane from the defendant, A&J. Graham was the operator of the crane.

Graham argues that he was acting within the scope of his employment at the time of the incident alleged by the plaintiffs and under New York law, Graham's employer is vicariously liable for the Garcin's injuries, if any, that are found to have been caused by Graham's negligence. Graham states that PCT has unreasonably refused to admit that Graham was its employee at the time of the alleged incident in the plaintiffs' second amended complaint, because the agreement identifies PCI in the agreement and not PCT. Graham argues that his actions with respect to the operation of the crane at the project site, were performed in the course and scope of his employment by PCT, in the furtherance of PCT's interest and/or to further PCT's business and PCT agreed to employ Graham to operate the crane at the project site.

In opposition, PCT states that Graham's name is not listed on the PCT daily time sheets from PCT. However, James Robinson, a manager at A&J, referred to the union crane operators as A&J employees and testified that A&J maintains employee files containing the licenses of its crane operators and it maintained a file for Graham. PCT asserts that A&J paid Graham for his work on September 25, 2015 at the end of that work week, as shown by his employee earnings record and A&J withheld union dues and required taxes. PCT asserts that there was no discussion with PCT about paying Graham for his work on that day.

In reply, Graham asserts that PCT admits in its own opposition, that it was the company that leased the crane from A&J and that the identification of PCI was a mistake. Further, there was testimony from Michael Basilone ("Basilone"), PCT's superintendent, that he ordered the crane from A&J on behalf of PCT and rented the operator. Graham argues that PCT signed the Bare Rental Agreement, which specifically provides in pertinent part that :

It is expressly agreed by and between the parties hereto that the equipment and all persons operating the equipment are under the exclusive jurisdiction, supervision and control of Lessee under this lease. It shall be the duty of Lessee to give specific instructions and directions to all persons operating, maintaining, and assembling/disassembling the leased equipment. Lessee specifically agrees that the Lessor has absolutely no control over any person operating or assisting in operating the leased equipment. Lessor may, at its option, provide a pool of personnel from which the Lessee may select or reject personnel for its own use in the operation of, or assisting in the operation of, the leased equipment.

Lessee agrees that if Lessee allows any person from this pool of personnel, or any other person, to operate or assist in operation of the lease equipment, that these persons have been selected and approved by the Lessee and are under the Lessee's exclusive direction and control and are the Lessee's agents, servants, and employees, and the Lessee waives the right to make any claim to the contrary. If the Lessee selects a person to operate or assist in the operation of the leased equipment from the pool of personnel which the Lessor may provide at its option, the lease payments made by the Lessee shall include that person's wages, even though that person's wages may be disbursed by Lessor. This lease is upon the agreement of the parties that the Lessor has no right to replace or substitute personnel except at the direction of and with the approval of Lessee and that Lessee shall have the right to control, including the right of termination, and shall be deemed to have exercised that right as to all details or operation of the leased equipment and personnel the Lessee selects to operate the equipment.

Thus, the agreement, as per A&J and Graham, makes it clear that Graham, as the operator of the crane, was PCT's employee and PCT waived the right to make any claim to the contrary.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If a sufficient prima facie showing is made, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); see also, *Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

Here, the Court has found that PCI being named on the agreement was a scrivener's error and that PCT was the intended entity to be bound by the agreement. However, although the agreement executed between A&J and Manuel Perez, the foreman for the project on behalf of PCT states that PCT shall have exclusive jurisdiction, supervision and control over the operator, there is still an issue of fact as to Graham's employment, since A&J paid Graham's wages, withheld union dues and taxes, there was no discussion by A&J with PCT about paying Graham for his work on the day of the incident, A&J was responsible for Graham's assignment to the project, Perez testified that he did not believe he had any ability to control Graham's work, and Graham was not identified as an employee on PCT's daily time sheets.

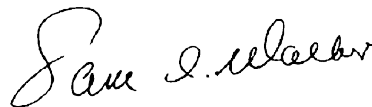
Accordingly, based on the foregoing, it is hereby

ORDERED that Graham's motion for summary judgment is denied.

The parties are directed to appear before the Settlement Conference Part on a date to be later determined.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
May 7, 2020



HON. SAM D. WALKER, J.S.C.