

**Flores-Bonilla v Big Apple Sign Corp.**

2024 NY Slip Op 30219(U)

January 10, 2024

Supreme Court, New York County

Docket Number: Index No. 160951/2019

Judge: Leslie A. Stroth

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

**PRESENT: HON. LESLIE A. STROTH PART 12**

*Justice*

-----X  
SANTOS FLORES-BONILLA,

Plaintiff,

- v -

BIG APPLE SIGN CORP, AM STONE, INC.

Defendant.  
-----X

INDEX NO. 160951/2019  
MOTION DATE 10/24/2023  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59

were read on this motion to/for

JUDGMENT - SUMMARY

Plaintiff Santos Flores-Bonilla (plaintiff) commenced this action to recover for personal injuries he allegedly sustained at 3 Oval Drive, Islandia, New York (the premises), on April 28, 2018. At the time of the incident which led to his injuries, plaintiff was a full-time employee of defendant Big Apple Sign Corp. (Big Apple), working as a “helper” in construction, performing tasks such as preparing areas for a forklift to place materials. Plaintiff was working in the course of his employment when he was injured, and received Workers’ Compensation benefits after his accident.

In his summons and complaint, plaintiff alleges causes of action against Big Apple for negligence relating to his personal injuries and negligence in failing to disclose pertinent facts to plaintiff. Big Apple moves for summary judgement dismissing plaintiff’s claims against it on the grounds that plaintiff’s Workers’ Compensation benefits are his sole and exclusive remedy.

**I. Alleged Facts**

Big Apple operated its sign production business at the premises on the date of the accident. Big Apple did not and does not own the premises. At that time, April 18, 2018, Big Apple had

Workers' Compensation Insurance coverage available to its employees, issued by New Jersey Manufacturers Insurance Company under policy number W40313918.

Plaintiff had been continuously employed by Big Apple as a helper from January 2016 through April 28, 2018. On the last date, plaintiff was acting within the scope of his employment with Big Apple when he was allegedly injured. Plaintiff's accident involved a forklift that was being operated by an employee of Big Apple, who was lowering a piece of marble when it fell onto plaintiff. Plaintiff sustained injuries to his legs, shoulder, cervical spine, and ankles.

Plaintiff testified at his deposition that he received Workers' Compensation benefits after the accident and was awarded a lump sum of money from the Workers' Compensation Board. Additionally, Workers' Compensation paid for plaintiff's related medical treatment.

## II. Analysis

It is well-established that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989), quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

Additionally, it is well-settled that the sole and exclusive remedy of an employee against his employer for injuries sustained in the course of employment is benefits under the Workers' Compensation Law. *See Workers' Compensation Law* §§ 11, 29(6); *see Gonzales v Armac Ind.*,

Ltd., 81 NY2d 1 (1993); *Lane v Fisher Park Lane Co.*, 276 AD2d 136 (1st Dept 2000). It is also well settled that all employees of an employer are deemed covered by the employer's Workers' Compensation policy, regardless of whether they are working "off the books" where the employer has secured a policy of insurance. *See* Workers' Compensation Law § 54(4).; *see also* *Baljit v Suzy's Dep't Store, Inc.* 211 AD2d 555 (1st Dept 1995).

The parties do not dispute that plaintiff's first cause of action, seeking recovery for personal injury, is barred by Workers' Compensation Law. As such, plaintiff's first cause of action is dismissed, on consent.

Plaintiff's opposition is limited to his second cause of action, which alleges that Big Apple was negligent in failing to timely disclose the name of the forklift boom owner. Plaintiff alleges that Big Apple impaired his right to sue a third-party tortfeasor, namely, the owner of the forklift boom, AM Stone, Inc. Although plaintiff implead AM Stone, Inc., and subsequently obtained a default judgement against it<sup>1</sup>, plaintiff argues that Big Apple's delay prevented him from obtaining relief from AM Stone, Inc. because by the time plaintiff was informed that AM Stone, Inc. was the boom owner, AM Stone, Inc. was no longer in business and its owner was in federal prison.

To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Solomon v City of New York*, 66 NY2d 1026 (1985). "[B]efore a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff. In the absence of duty, there is no breach and without a breach there is no liability." *Pulka v. Edelman*, 40 NY2d 781 (1976). Indeed, the threshold question in analyzing a negligence claim is whether the

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<sup>1</sup>On July 5, 2022, Justice Shlomo Hagler granted a default judgment against AM Stone, Inc. on liability. *See* NYSCEF doc. no. 45.

defendant owed a duty of care to the plaintiff. *See Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002).

In support of its motion, Big Apple attests through Sophia M. Candela's Affirmation in Support that on April 28, 2018, plaintiff was an employee of Big Apple, and thereby had Workers' Compensation insurance coverage available to him for the injuries he sustained from his alleged accident. *See* NYSCEF doc. no. 33. Further, Big Apple contends that plaintiff was in the course of his employment at the time of the accident, and he subsequently received Workers' Compensation benefits for the injuries he allegedly sustained in connection with his accident. *Id.*

In opposition to the instant motion, plaintiff alleges he demanded that Big Apple produce the forklift and the boom for inspection prior to the commencement of litigation. Additionally, plaintiff contends that he advised Big Apple that he knew the forklift and boom were not owned by Big Apple, but rather by an unknown third-party entity. Plaintiff claims he served written requests and demands on Big Apple requesting to inspect the forklift and boom and to provide the name and identifying information of the owner and manufacturer of the forklift and boom. As a result of Big Apple's alleged failure to timely disclose necessary identifying information, plaintiff claims he was deprived of the opportunity to inspect the forklift and boom and, as such, deprived of evidence that was essential to the prosecution of his personal injury lawsuit.

Plaintiff, however, has failed to provide any evidence in admissible form that such pre-litigation discovery was demanded or that defendant owed any duty to disclose said information to plaintiff sufficient to create a viable cause of action. The preliminary conference in this action was held on January 15, 2020, and there is no indication that plaintiff requested an inspection, and an inspection was not ordered. *See* NYSCEF doc. no. 59. Inasmuch as, there is no court order which directed Big Apple to produce the forklift for inspection, and plaintiff did not issue a

subpoena for, or otherwise request, an inspection of the forklift and boom during litigation<sup>2</sup>, there is no viable cause of action against Big Apple.

Plaintiff's inability to obtain evidence from co-defendant AM Stone, Inc., against whom he has obtained a default judgment, has no bearing on whether Big Apple is entitled to summary judgment. Plaintiff failed to present any evidence in admissible form that Big Apple had or has a duty to provide him with discovery controlled by a third party, or that plaintiff requested the pre-litigation discovery. As plaintiff was an employee of Big Apple in the course of his employment, at the time of his accident, his sole and exclusive remedy is to receive Workers' Compensation benefits. Plaintiff is barred from bringing a personal injury lawsuit against his employer, Big Apple. Plaintiff has raised no triable issues of material fact to defeat Big Apple's motion for summary judgement. Thus, Big Apple is entitled to summary judgment as a matter of law.


**III. Conclusion**

Accordingly, it is hereby

ORDERED that defendant Big Apple Sign Corp.'s motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to plaintiff as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the Order and Decision of the Court.

  
LESLIE A. STROTH, J.S.C.

1/10/2024  
DATE

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

<sup>2</sup>Nevertheless, Big Apple did produce the forklift for inspection in March 2021; Big Apple could not produce the boom, as it was owned and controlled by the co-defendant, AM Stone, Inc., as plaintiff was aware.