Loja v Mandara
2024 NY Slip Op 35246(U)
June 17, 2024
Supreme Court, Westchester County
Docket Number: Index No. 64068/2022
Judge: Alexandra D. Murphy
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To commence the statutory time period 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. ALEXANDRA D. MURPHY, J.S.C.

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BORIS LOJA,

Plaintiff,

– against –

JOHN MANDARA,

Defendant.

-- x

Index No. 64068/2022

Motion Seq. 1

DECISION & ORDER

In an action to recover damages for personal injuries, the defendant moves for summary judgment dismissing the complaint pursuant to CPLR 3212:

Papers Considered **NYSCEF Doc. 15-28; 31-34; 36**

1. Notice of Motion/Affirmation of Laura Alto, Esq./Exhibits A-J;
2. Affirmation of Sameer Nath, Esq. in Opposition/Affidavit of Boris Loja;
3. Reply Affirmation of Laura Alto, Esq.

Factual and Procedural Background

The plaintiff Boris Loja was injured on September 26, 2020, when he fell from the roof of a single-family home located at 26 Kelly Ridge Road, Carmel, New York. The premises was owned by the defendant John Mandara. The plaintiff was performing work on the roof at the time of the accident.

The plaintiff sought Workers Compensation benefits resulting from the accident. A full hearing was held before an Administrative Law Judge (ALJ) where the plaintiff was represented by counsel. During the hearing, the plaintiff, Mandara, and the non-party Mark Franzoso testified. Franzoso is the owner of the non-parties FCI Total Home Repair (FCI) and Franzoso Contracting (collectively referred to as Franzoso).

During the Workers' Compensation hearing, the plaintiff testified that he had been employed by Franzoso for approximately eight years. He testified that at the time of the accident, he was working for Franzoso performing roofing work at Mandara's house. The plaintiff testified that he was paid by Franzoso. Mandara testified at the hearing that he also worked for Franzoso. Mandara testified that in September 2020, there was an ongoing project at his home to enclose a deck. According to Mandara, the plaintiff came to his home on the date of the accident as a "friend" to help with the deck project and did not request any compensation (NYSCEF Doc. 24 p. 21).

The ALJ found the plaintiff was injured while working as an employee of Franzoso and that the accident arose out of and in the course of that employment (NYSCEF Doc. 20). On appeal, the Workers' Compensation Board reversed the decision of the ALJ denying the plaintiff's Workers' Compensation claim and held:

> Here, we find insufficient evidence that the claimant's injuries arose out of and in the course of covered employment. It is not disputed that the claimant fell off a roof while at the home of his supervisor, John Mandara on September 26, 2020. However, we do not concur that [] FCI Total Homes or Franzoso Roofing is the liable employer. We find that the claimant at the time of the accident was performing a personal errand "on the side" for his supervisor, without any benefit to the employer and outside the scope of his regular employment. With his regular employer, the claimant was entitled to paid personal and vacation time. Therefore, whether the claimant was paid by his regular employer for that day sheds little or no light on whether he was injured during the course of his regular employment.
>
> The evidence reveals that the claimant arrived at the Mandara residence in his own vehicle with his brother, who is a non-employee, which is consistent with and strong evidence that the claimant was not working for the covered employer. Further, the evidence reveals that the roof job at the Mandara residence was not indicated on the company calendar. Further, the evidence also reveals a private discussion between the claimant and John Mandara on September 25, 2020 regarding performing work on September 26, 2020 at his house. Significantly, the claimant's co-worker, the mechanic, testified that the claimant told him the day before the incident that he would not be working the following day and was working for himself, which indicates the claimant knew he was not working for the employer when he was performing personal work for his supervisor, and that the claimant did not reveal to the employer or his co-workers what he was doing on the day he was injured. The claimant's testimony regarding his supervisor's behavior after the accident is strongly indicative of the fact that the supervisor was aware that the claimant was working separate and apart from his work for his regular employer. We therefore find that

> based on the totality of the evidence, there is insufficient evidence that the claimant was working for the regular employer on the date of the accident.
>
> Therefore, the Board Panel finds, upon review of the record and based upon a preponderance of the evidence, that the claim is disallowed (NYSCEF Doc. 21).

The plaintiff commenced this action against Mandara alleging violations of Labor Law 200, 240(1), and 241(6), as well as common law negligence. Mandara joined issue with the service and filing of his answer.

Mandara moves for summary judgment dismissing the complaint. Mandara argues that the plaintiff is collaterally estopped from now claiming that he was employed by Mandara at the time of the accident. Mandara further argues that the plaintiff was a volunteer at the time of the accident, and the complaint must therefore be dismissed. Finally, Mandara argues that the plaintiff's Labor Law claims are barred by the single-family home exemption.

In opposition, the plaintiff argues that he was employed by Mandara at the time of the accident and that Mandara supervised and controlled the work he was performing.

Discussion

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (*see Zuckerman v New York*, 49 NY2d at 562).

Workers' Compensation Law section 11 bars an employee from suing his employer unless the employee has sustained a grave injury (*see* Workers' Compensation Law 11). Indeed, "Workers' Compensation benefits are the exclusive remedy of an employee against his or her employer for injuries or death which occur in the course of employment" (*LaLima v Consol. Edison Co. of NY, Inc.*, 151 AD3d 832, 834 [2d Dept 2017]). However, an employer may not benefit from the protection of Workers' Compensation Law 11 unless it secures Workers' Compensation benefits for its employees (*see Boles v Dormer Giant, Inc.*, 4 NY3d 235 [2005]).

In this action, the plaintiff alleges that he was working for Mandara at the time of the accident and presumably, that Mandara had not secured Workers' Compensation benefits. This position is contrary to the plaintiff's testimony during the Workers' Compensation hearing wherein he specifically testified that he was working for Franzoso at the time of the accident. Mandara argues that the plaintiff is collaterally estopped in this action from arguing that he was employed by Mandara at the time of the accident.

"The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*FC Notes SVC, LLC v United Gen. Tit. Ins. Co.*, 146 AD3d 935, 936 [2d Dept 2017] [internal citations and quotations omitted]). "The collateral estoppel doctrine gives conclusive effect to prior determinations when two conditions are met. There must be 'an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling'" (*see Lennon v 56th & Park (NY) Owner, LLC*, 199 AD3d 64, 69 [2d Dept 2021] *quoting Buechel v Bain*, 97 NY2d 295, 303-304 [2001]). "A plaintiff's claim may be barred by the doctrine of collateral estoppel when there is a prior determination from an administrative board involving the same subject matter" (*Lennon v 56th & Park (NY) Owner, LLC*, 199 AD3d 64, 66 [2d Dept 2021]).

The issue before the ALJ and the Workers' Compensation Board was whether the plaintiff was employed by his regular employer, Franzoso, at the time of the accident. The Worker's Compensation Board did not make any findings as to the identity of the plaintiff's employer at the time of the accident, rather, it determined that the plaintiff was not working for his regular employer while at Mandara's house. The Workers' Compensation Board therefore determined that the plaintiff's injuries did not arise out of and in the course of covered employment with Franzoso. Therefore, the plaintiff is not collaterally estopped from arguing in this action that he was employed by Mandara at the time of the accident.

Mandara also argues that the plaintiff was acting as a volunteer at the time of the accident, and therefore, the complaint must be dismissed.

The Workers' Compensation Board found that at the time of the accident, the plaintiff was performing a personal errand "on the side" for Mandara. The strict liability provisions of Labor Law 240(1) apply to employees and not to persons who volunteer to work on a project (*see Stringer v Musacchia*, 11 NY3d 212, 213 [2008]). However, Mandara has failed to establish, as a matter of law, that the plaintiff was acting as a volunteer at the time of the accident. The issue of whether the plaintiff was acting as a volunteer was not fully litigated at the Workers' Compensation hearing, and there have been no depositions conducted in this action at time this motion was made. Therefore, Mandara failed to demonstrate prima facie entitlement to summary judgment dismissing the Labor Law causes of action.

Further, even if the plaintiff is ultimately found to have been acting as a volunteer at the time of the accident, that finding alone would not require dismissal of the common law negligence cause of action. "A property owner has a duty to maintain his or her property in a reasonably safe condition" (*Bilancione v Garden Homes Mgt. Corp.*, ___AD3d___, 2024 NY Slip Op 03157, 1 [2d Dept June 12, 2024]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). Thus, Mandara as the owner of the property, failed to demonstrate entitlement to summary judgment dismissing the common law negligence cause of action.

The issue of whether Mandara supervised and controlled the plaintiff's work at the time of the accident is premature inasmuch as there has only been limited discovery in this action and no depositions have been conducted at the time this motion was made.

The Court has considered the parties' remaining contentions and finds them to be without merit.

Accordingly, it is

ORDERED that the defendant's motion for summary judgment dismissing the complaint is **DENIED** with leave to renew upon the completion of discovery.

Counsel for all parties are directed to appear virtually for a **Compliance Conference** on **September 10, 2024, at 11:00 a.m**. as previously scheduled.

Dated: White Plains, New York
June 17, 2024

HON. ALEXANDRA D. MURPHY, J.S.C.