

Sciurca v Homeside Dev. Corp.
2011 NY Slip Op 31091(U)
April 18, 2011
Sup Ct, Nassau County
Docket Number: 12024/2006
Judge: Anthony L. Parga
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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

JOSEPH L. SCIURCA

-----X PART 8

Plaintiff,

INDEX NO. 12024/2006

-against-

MOTION DATE: 03/10/11
SEQUENCE NO. 004, 005

HOMESIDE DEVELOPMENT CORP., NEW YORK
HOLDING CORPORATION, 168-66 93RD STREET, LLC,
PCI CONSTRUCTION, INC., PCI CONTRACTING, INC.
and JOSEPHY RABIZADEH,

Defendants.

-----X

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Upon the foregoing papers, defendant Joseph Rabizadeh's motion for summary judgment is granted, and defendant PCI Contracting, Inc.'s motion for summary judgment is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

In this action, plaintiff alleges that he sustained personal injuries during the course of his employment as a New York City Firefighter, on July 28, 2005, when he tripped and fell over construction debris, namely a partially buried slab of concrete, at a construction site at 107-04 166th Street in Jamaica, Queens, New York. The plaintiff was responding to a dispatch call

regarding an unconscious male on the property. The accident occurred after the plaintiff entered the property through a 6-8 foot wide hole in the fence surrounding the construction site and walked down a dirt ramp-like mound that sloped onto the property from the street. The plaintiff claims that the construction site was strewn with construction debris and that he tripped on a partially buried concrete slab on his way to aid the unconscious individual, who later was discovered to be deceased.

The property was owned by Homes Plus Associates, Ltd. (hereinafter "Homes Plus"). Homes Plus purchased the property for the purposes of building two (2) two-family homes on two lots for commercial sale. Defendants New York Holding Corporation (hereinafter "NY Holding"), 168-66 93rd Street LLC (hereinafter "168-66"), and Homeside Development Corp. (hereinafter "Homeside") contracted with various companies to design, build and construct the two-family homes that were eventually assigned addresses of 107-04 and 107-06 166th Street, Jamaica, New York. Individual defendant, Joseph Rabizadeh, is the officer and sole shareholder of Homes Plus, Homeside, NY Holding, and 168-66. Defendant Homeside contracted with defendant P.C.I. Contracting, Inc. (hereinafter "PCI") to maintain the fence around the construction site and to remove construction debris and clean up the premises for ultimate sale.

Individual defendant, Joseph Rabizadeh, moves for summary judgment upon the grounds that there is no basis to hold him personally liable, as his only connection to the construction site was as an officer of the corporate defendants. Defendant Joseph Rabizadeh submits an affidavit in which he attests that all of the invoices from various contractors, including PCI, were addressed to the corporate entities and paid by the corporate entities. Additionally, Mr. Rabizadeh attests that the corporate entities, not him personally, entered contracts with various companies for the design and build of the two-family dwellings, including the contract with PCI. He further attests that he did not personally supervise or direct the work of any of the contractors hired by Homes Plus, Homeside, NY Holding, and 168-66 to build the homes on the premises. Defendant Rabizadeh attests that he also did not personally operate, maintain, manage, inspect, or control the construction site at issue. He attests that the only inspections that he undertook of the construction site were in his capacity as an officer of the corporate defendants.

With respect to plaintiff's allegation that on July 28, 2005, defendant Rabizadeh personally conducted business at 3333 New Hyde Park Road, Suite 212, New Hyde Park, New

York, Joseph Rabizadeh attests that said address is the corporate location for defendants Homeside, NY Holding, 168-66, and Homes plus and that he did not personally conduct business at this address. Defendant Joseph Rabizadeh contends that there are no allegations within the complaint, and no facts adduced during discovery, that set forth a basis to “pierce the corporate veil” to hold him individually liable for the plaintiff’s injuries. Further, defendant Joseph Rabizadeh contends that there is no evidence that he violated the Administrative Code provisions set forth in plaintiff’s complaint under plaintiff’s second cause of action pursuant to General Municipal Law Section 205-a. In order to maintain a claim pursuant to General Municipal Law 205, the plaintiff has to establish that a statute was, in fact, violated by the defendant and that there is a practical or reasonable connection between the violation and the plaintiff’s injuries. (*See, Williams v. City of New York*, 2 N.Y.3d 352 (2004); *Campbell v. City of New York*, 31 A.D.3d 594 (2d Dept. 2006)). Accordingly, defendant Rabizadeh argues that he is entitled to summary judgment, as there is no basis in law or fact to hold him personally liable for the plaintiff’s injuries herein.

Defendant Rabizadeh has established a *prima facie* showing of entitlement to summary judgment. The proponent of a summary judgement motion “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a *prima facie* showing of entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (Ct. of App. 1980)).

In opposition, plaintiff contends that defendant Joseph Rabizadeh can be held liable to plaintiff as he is the sole officer and only owner of the corporate defendants Homes Plus, Homeside, NY Holding, and 168-66. Plaintiff contends that said corporate entities were simply instrumentalities for the purpose of carrying on the business of defendant Rabizadeh. Plaintiff fails, however, to submit evidence in support of its contentions. A “shadowy semblance of an issue is not enough to defeat a motion [for summary judgment].” (*Ben Strauss Indus., Inc. v. City of New York*, 90 A.D.2d 751, 456 N.Y.S.2d 5 (1st Dept. 1982); *See also, Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 22 N.Y.2d 255, 257 N.E.2d 890 (1970) (bald conclusory

assertions, even if believable, are not enough to defeat a motion for summary judgment)). Some evidentiary facts are required to be put forward to create a factual issue sufficient to defeat a *prima facie* showing of entitlement to summary judgment. (*See, S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 313 N.E.2d 776 (1974)).

There is no evidence in the record before this Court that defendant Rabizadeh was using the corporate entities for his own personal purposes or that the corporations are “dummy” corporations for Joseph Rabizadeh to carry on business in his personal capacity for purely personal, rather than corporate, ends. (*See, Walkovszky v. Carlton*, 18 N.Y.2d 414, 223 N.E.2d 6 (1966). None of the invoices or payments issued were in defendant Rabizadeh’s name, and there is no evidence before this court that he used the corporations to commit a wrong against the plaintiff which resulted in plaintiff’s injury. Piercing the corporate veil requires that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury. (*Pae v. Chul Yoon*, 41 A.D.3d 681, 838 N.Y.S.2d 172 (2d Dept. 2007); *Weinstein v. Willow Lake Corp.*, 262 A.D.2d 634, 692 N.Y.S.2d 667 (1999)). The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances. (*Ventresca Realty Corp. V. Houlihan*, 41 A.D.3d 707, 838 N.Y.S.2d 609 (2d Dept. 2007); *Weinstein v. Willow Lake Corp.*, 262 A.D.2d 634, 692 N.Y.S.2d 667 (2d Dept. 1999)). In the instant action, plaintiff has failed to demonstrate through admissible evidence that defendant, Joseph Rabizadeh, was doing business in his personal capacity rather than a corporate capacity. Accordingly, defendant Joseph Rabizadeh’s motion for summary judgment is granted, and plaintiff’s action, together with all cross-claims, is dismissed against individual defendant Joseph Rabizadeh only.

Defendant PCI also moves for summary judgment on liability grounds. Defendant PCI claims that it was first hired by Homeside to repair a fence on the subject premises on or about January 27, 2005. PCI states that it was then retained again on August 25, 2005, after the date of plaintiff’s accident, to remove debris, repair the fence, and dispose of tires at the subject premises. PCI contends that it was retained on a job-by-job basis on April 18, 2006, May 30, 2006, June 14, 2006, July 21, 2006 and September 21, 2006 to do various jobs around the premises. PCI contends that it never entered into a contract with any of the co-defendants and

did not have an ongoing obligation to remove any debris from the premises until *after* the date of the accident. PCI also contends that “no one from PCI went to the construction site between January 27, 2005 and August 25, 2005.” PCI further notes that defendant Rabizadeh testified at his deposition that he could not recall when he hired PCI prior to the accident and that he would call PCI when PCI’s services were needed. Mr. Rabizadeh also testified that there were no written agreements with PCI concerning the construction site at issue. Defendant PCI further argues that it did not violate any section of the Administrative Code alleged by plaintiff. Defendant PCI contends that it did not create the condition that allegedly caused plaintiff’s accident; that it did no work at the accident site besides the repair of a fence prior to the accident date; that it did not have actual or constructive notice of the alleged condition; and that it did not violate any section of the Administrative Code alleged by the plaintiff. Accordingly defendant PCI contends that it is entitled to summary judgment.

In support of its arguments, moving defendant PCI submits the unsigned deposition transcripts of its witness, Anthony Forte, as well as the unsigned transcripts of the plaintiff and defendant Rabizadeh, without demonstrating that the transcripts were sent to these witnesses for review and execution. As such, plaintiff opposes the reliance upon same, arguing that said transcripts are not in admissible form and should not be considered by the court. (*Scotto v. Marra*, 23 A.D.3d 543, 806 N.Y.S.2d (2d Dept. 2005); *Santos v. Intown Associates*, 17 A.D.3d 564, 793 N.Y.S.2d 477 (2d Dept. 2005); CPLR §3116(a)). In reply, defendant PCI submits the letter it sent to its witness, Anthony Forte, requesting that he review and sign same. The Court will allow the defendant to cure its defect with respect to the deposition transcript of Anthony Forte. (See, *Washington Mutual Bank v. Hickey*, 2008 N.Y. Slip Op. 33028, 2008 WL 4903858 CPLR §3116(a)).

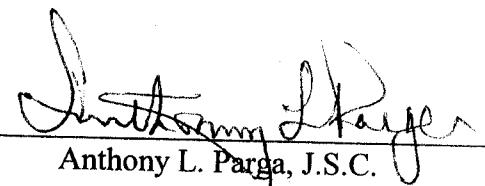
In opposition, plaintiff and opposing defendants Homeside, New York Holding, 168-66, and Rabizadeh, argue that there is a question as to when PCI began doing clean-up work at the site. Defendant Joseph Rabizadeh testified at his deposition that he hired PCI to clean and remove construction debris from the side prior to plaintiff’s accident on July 28, 2005. In addition, opposing defendants submit a bill from PCI to Homeside, dated July 25, 2004, for removal of 28 yards of debris from 107-06 166th Street, addressed to the attention of “Joseph Razibega.” Accordingly, the opponents of the motion have raised questions of fact regarding

PCI's obligation to maintain and clean the subject construction site prior to, and including, the date of the accident, as well as the date that PCI first began providing debris removal and clean up services prior to plaintiff's accident. As such, defendant PCI's motion for summary judgment is denied.

Accordingly, as noted *supra*, defendant Joseph Rabizadeh's motion for summary judgment is granted, dismissing plaintiff's complaint and all cross-claims against Joseph Rabizadeh only, and defendant PCI's motion for summary judgment is denied in its entirety.

All parties are directed to appear in the DCM Trial Part at 9:30 A.M. on April 25, 2011, as previously scheduled.

Dated: April 18, 2011



Anthony L. Parga, J.S.C.

Cc:

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ENTERED

APR 20 2011

**NASSAU COUNTY
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