

Jordan v Queens Blvd. Extended Care Facility Corp.

2024 NY Slip Op 33922(U)

October 31, 2024

Supreme Court, Kings County

Docket Number: Index No. 510498/2016

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31st day of October, 2024.

P R E S E N T :

HON. WAVNY TOUSSAINT,
Justice.

-----X
ELAINE JORDAN,

Plaintiff,

Index No.: 510498/2016

-against-

DECISION AND ORDER

QUEENS BOULEVARD EXTENDED CARE FACILITY CORP., AKA QUEENS BOULEVARD EXTENDED CARE FACILITY MANAGEMENT, LLC,

MS #12

Defendant.
-----X

The following papers numbered 1 to read herein
Notice of Motion/Order to Show Cause/
and Affidavits (Affirmations) Annexed
Cross Motion and Affidavits (Affirmation) Annexed
Answers/Opposing Affidavits (Affirmations)
Reply Affidavits (Affirmations)
Affidavit (Affirmation)
Other Papers

Papers Numbered

225-248

250-254

255

Upon the foregoing papers, defendant Queens Blvd. Extended Care Facility Corp., a/ka/a Queens Blvd. Extended Care Facility Management, LLC (defendant) moves (Seq. 12) for an order, pursuant to CPLR § 2221, granting leave to renew its prior motion (Seq. 11), and upon such renewal, granting summary judgment dismissing plaintiff's complaint

on the grounds that the plaintiff was a “special employee” of defendant. Plaintiff opposes the motion.

BACKGROUND AND PROCEDURAL HISTORY

On the morning of October 16, 2024, plaintiff alleges it was raining and that as she was walking from the ambulette arrival area into the premises located at 61-11 Queens Blvd., Woodside, New York, she slipped and fell on the tile near the entrance causing her to sustain serious personal injuries. The premises was owned by defendant and operated as a nursing facility. Plaintiff, a certified nurse’s assistant (CNA), was referred to defendant by staffing agency, non-party The Bachrach Group, LTD (Bachrach), pursuant to a consulting agreement, and was allegedly hired by defendant as a temporary CNA.¹

Defendant previously moved under Motion Seq. 11 to renew the prior summary judgment motion (Seq. 10), filed on July 11, 2023. By order dated October 19, 2023, the Court denied Motion Seq. 10, without prejudice (NYSCEF Doc. No. 188). Defendant was granted leave to renew the motion on proper papers, as incomplete Workers’ Compensation records had been submitted (see NYSCEF Doc. No. 171). Defendant indeed so moved under Motion Seq. 11 and submitted supplemental Workers’ Compensation records. Thereafter, the Court granted defendant’s renewal application on Motion Seq. 11, and upon renewal, denied that part of Motion Seq. 11 which sought dismissal of the complaint.²

¹ A third-party action commenced by defendant against Bachrach was discontinued by stipulation filed on 1/23/19 (NYSCEF Doc. No. 43).

² Defendant’s application for leave to file an amended answer was granted, with additional Court direction regarding service of the Amended Answer and plaintiff’s time to respond thereto (see Order at p. 6).

Defendant now submits its second renewal motion (Seq. 12), again seeking summary judgment dismissing plaintiff's complaint on the grounds plaintiff was a "special employee" of defendant. In support of the motion, defendant submits "new" evidence, including an affidavit from the CEO of Bachrach and additional Workers' Compensation records.

THE PARTIES' CONTENTIONS

Defendant argues the "new" evidence demonstrates that plaintiff was defendant's "special employee" and, as such, having received Workers' Compensation benefits for her alleged injuries, is barred from pursuing any further claims via this lawsuit under the exclusive remedies set forth under Workers' Compensation Law Secs. 11 and 29(6). Defendant further argues that the foregoing "new" evidence rebuts the Court's conclusion with respect to Motion Seq. 11 that there was a question of fact whether plaintiff's employer was Bacharach or Strategic Outsourcing Inc.

In opposition, plaintiff contends that her employer was Bachrach, by whom she was paid directly, having worked for Bachrach about two- and one-half years before being assigned to defendant. Plaintiff had been a CNA for approximately fourteen years before the assignment and required no training. Plaintiff further contended her job schedule was approved by Bachrach; that her time out from work and any incidents occurring at defendant's facility were reported directly to Bachrach; and that Bacharach was responsible for all other matters relating to her employment (i.e., nametag, uniform requirements, termination, interviews, placements, payment, supervision, etc.). On this basis, plaintiff contends the Court already properly ruled that plaintiff was not defendant's "special

employee”, as there was a question of fact whether defendant exercised complete and exclusive control over the plaintiff’s employment to the exclusion of Bacharach. Further, plaintiff contends defendant failed to submit a reasonable justification for its failure to present the “new” evidence on the prior motion (Seq. 11).

In reply, defendant essentially argues that plaintiff fails to dispute the core issue that while she was under the direct employ of the Bachrach Group, she was also under the special employ of defendant, contending the Workers’ Compensation records show Bacharach as plaintiff’s employer, the consulting agreement between Bacharach and defendant explaining the temporary consulting services arrangement between the two companies, and plaintiff’s deposition testimony which confirms the foregoing. Finally, defendant argues that the reasonable excuse for its failure to submit the “new” evidence on the prior motion arose, first, because of the need to explain to the Court the relationship between Bachrach and Strategic Outsourcing Inc. (namely that Strategic Outsourcing Inc. was Bacharach’s outside vendor for the purposes of payroll administration, benefits and to handle workers compensation coverage) and, second, due to the extended time, after multiple attempts, it took to obtain the additional “pieces” of the Workers’ Compensation file.

DISCUSSION

CPLR § 2221[e] provides in part as follows:

(e) A motion for leave to renew:

1. shall be identified specifically as such;

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion.

In moving for renewal, defendant asserts the Court denied Motion Seq. 11 on the misunderstanding that the proof submitted thereon, including the Worker's Compensation Board Settlement and Notice of Approval, failed to establish defendant was plaintiff's special employer or that Bachrach is the entity from which plaintiff's "special employee" status derived. Defendant further argues the Court misapplied the law as it relates to determining whether plaintiff was defendant's "special employee". Consequently, the instant motion seeks to establish that Bachrach was plaintiff's direct employer, while defendant was plaintiff's special employer.

"A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and . . . shall contain reasonable justification for the failure to present such facts on the prior motion. . . The requirement that a motion for leave to renew must be based on new facts is a flexible one" (*Wells Fargo Bank, N.A. v Malek*, 199 AD3d 1040, 1041 [2d Dept 2021] [internal quotation marks omitted]; CPLR 2221 [e][2], [3]). However, "a motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Mooklal v Clermont Farm Corp.*, 187 AD3d 740, 742 [2d Dept 2020] [internal quotation marks omitted]).

Here, it was evident from the parties' motion papers on Motion Seq. 11 that plaintiff's status as a "special employee" of defendant was a disputed matter. While the CEO of Bacharach purported to explain in his affidavit the relationship between Bacharach and Strategic Outsourcing Inc., missing from the proof was evidence in the form of an agreement between Bacharach and Strategic Outsourcing Inc., which would serve to document this purported relationship as presented by the CEO. Without such documentation, the CEO affidavit constitutes nothing more than bare allegations and speculation, which in any event, are conclusory and thus cannot serve as a basis to grant the renewal motion (*Zeldin v Larose*, 223 AD3d 858, 858 [2d Dept 2024]; *NY Fuel Distributors, LLC v Eljamal*, 162 AD3d 892, 895 [2d Dept 2018]).

Defendant did not offer a reasonable justification for having failed to submit the complete Workers' Compensation records on the initial motion; records which in any event, only further raise questions of fact as to the relationship between Bacharach and Strategic Outsourcing Inc., given the inconsistent references therein as to which entity was plaintiff's direct employer. Moreover, defendant failed to demonstrate any valid reason why the CEO affidavit could not have been submitted on the prior motion. The proffered explanation that the CEO affidavit is just now needed to clarify, for the Court, the relationship between Bacharach and Strategic Outsourcing Inc., is without merit.

"A party seeking summary judgment should anticipate having to lay bare its proof and should not expect that it will readily be granted a second or third chance" (*JPMorgan Chase Bank N.A. v EY Bay Ridge LLC*, 212 AD3d 794, 796 [2d Dept 2023], citing *Deutsche Bank Natl. Trust Co. v Elshiekh*, 179 AD3d 1017, 1020 [2d Dept 2020]). "[E]vidence is not

newly discovered simply because it was not submitted on the prior motion; rather, the evidence must not have been available to the party at the time it made its initial motion and could not have been established through alternate evidentiary means” (*Deutsche Bank Natl. Trust Co.*, 179 AD3d at 1020). The instant motion is effectively defendant’s third attempt to dismiss the complaint. Defendant has not sufficiently explained why the complete Workers’ Compensation records, or the CEO affidavit, were not submitted on the earlier motions; though in any event, the records and the affidavit are not persuasive for the reasons already stated.

On this record, the Court lacks discretion to grant renewal as defendant has omitted a reasonable justification for failing to present the “new” evidence on the original motion (*Nationstar Mtge., LLC v Jong Sim*, 197 AD3d 1178, 1182 [2d Dept 2021], citing *Deutsche Bank Natl. Trust Co.*, 179 AD3d at 1020). Material issues of fact exist in this matter, centered on whether plaintiff was a “special employee” of defendant. The Court fully considered the record before it and weighed the evidence presented by both parties when considering Motion Seq. 11, in accord with the standard of review on a motion for summary judgment (*Matter of Salvatore L. Olivieri Irrevocable Tr. dated 9/29/1994*, 208 AD3d 489, 491 [2d Dept 2022]), and finds no basis to reverse its prior decision.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant Queens Blvd. Extended Care Facility Corp., a/ka/a Queens Blvd. Extended Care Facility Management, LLC’s motion (Seq. 12) for an order,

pursuant to CPLR Rule § 2221, granting leave to renew its prior motion (Seq. 11), is denied in every respect.

The parties' remaining contentions are without merit.

This constitutes the decision and order of the Court.

E N T E R



J. S. C.

HON. WAVNY TOUSSAINT
J. S. C.

KINGS COUNTY CLERK
FILED
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