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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Julio GARCIA-TRUJILIO, Plaintiff,

v.

ATLANTIC BUILDING ASSOCIATES, INC., et al. Defendants.

C.A. No. N16C-04-071 VLM
|
Submitted: May 18, 2020
|
Decided: August 13, 2020

Upon Consideration of Defendant's Motion for Summary Judgment, **DENIED.**

Attorneys and Law Firms

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MEMORANDUM OPINION

MEDINILLA, J.

I. INTRODUCTION

Plaintiff worker, Julio Garcia-Trujilio, brings a personal injury against Defendant Atlantic Building Associates, Inc., the deemed insurer of Plaintiff's injuries as determined under the Workers' Compensation Act. Atlantic moves for summary judgment under two different theories. First, it argues it owes no legal duty to Plaintiff subcontractor. Alternatively, it contends because Plaintiff elected his exclusive remedy under the Workers' Compensation Act, he cannot pursue his claim in tort. After consideration of the parties' written submissions and oral arguments, for the reasons stated below, Defendant's Motion for Summary Judgment is **DENIED.**

II. FACTUAL AND PROCEDURAL BACKGROUND

On April 9, 2014, Plaintiff, Julio Garcia-Trujilio (Plaintiff), an employee of Gaston Santos d/b/a Santos Construction (Santos), was performing framing work at a construction site known as Millville by the Sea (Millville Project).[1] While on the second floor of a house under construction, Plaintiff fell through loose plywood to the first floor and sustained serious injuries.[2]

Miller and Smith – Delaware LLC served as the general contractor for the Millville Project. Miller and Smith subcontracted Defendant Atlantic Building Associates, Inc. (Atlantic) to perform foundation framing and landscaping work.[3] Atlantic further sub-subcontracted defendant WVM Construction, Inc. (WVM) to perform its carpentry and cementing work.[4] WVM then entered into a contract with Plaintiff's employer Santos for the framing work.[5]

On April 9, 2016, Plaintiff filed a Complaint against various Defendants, including but not limited to, Atlantic, WVM,[6] and Miller and Smith.[7] Plaintiff also filed a companion claim through the Industrial Accident Board (IAB). After an extended procedural history, including several legal hearings before the IAB and an appeal, a favorable decision was issued to Plaintiff on August 9, 2019, wherein the IAB determined he was entitled to receive worker's compensation benefits under 19 *Del. C.* 2311(a)(5).[8] Accordingly, Atlantic is the deemed insurer for benefits owed Plaintiff for his work injury.

On January 28, 2020, Miller and Smith filed its Motion for Summary Judgment. On January 30, 2020, Atlantic filed its Brief in Support of Motion for Summary Judgment that this Court accepted as its Motion for Summary Judgment. Following oral arguments on May 18, 2020, this Court granted Miller and Smith's motion, as unopposed, leaving Atlantic as the sole defendant. Having considered all pleadings, the matter is ripe for decision.

III. STANDARD OF REVIEW

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***2** Under Superior Court Civil Rule 56, the moving party carries the burden of proof, to succeed in making a showing that it is entitled to judgment as a matter of law, and demonstrate there exist no genuine issues of material fact.[9] If this burden is satisfied, to defeat the motion for summary judgment, the non-moving party must then sufficiently establish the "existence of one or more genuine issues of material fact."[10] Summary judgment will not be granted where there is a material fact in dispute or where additional inquiry would be helpful for clarifying the application of law.[11] The court does not entertain conjecture or speculation,[12] but draws all reasonable inferences in a light most favorable to the non-moving party.[13]

IV. CONTENTIONS OF THE PARTIES

Atlantic argues it cannot he held liable as a general contractor where Plaintiff fails to prove an exception to the general rule that a general contractor owes no duty to Plaintiff. Alternatively, Atlantic advances the theory that since Plaintiff elected his remedy under the Workers' Compensation Act (the Act)—and Atlantic is the deemed insurer—the exclusivity provision under the Act precludes a tort claim against Atlantic.

Plaintiff opposes dismissal and argues genuine issues of material fact exist as to Atlantic's liability, namely whether it retained active control over Plaintiff's work or assumed responsibility for Plaintiff's safety on the jobsite. Further, Plaintiff argues that the Act does not bar his tort claim because Atlantic is not his employer. In addressing Atlantic's Motion for Summary Judgment, the Court considers whether Atlantic owed a legal duty to Plaintiff or if Plaintiff's workers' compensation claim constitutes his exclusive remedy against Atlantic.

V. DISCUSSION

A. Legal Duty

Under Delaware law, there is no duty imposed on an owner or a general contractor to protect employees of an independent contract from hazards created by the completion of the contract work, by the "condition of the premises[,]" or by the nature of the work performed.[14] A duty is only imposed when "the owner or general contractor retains active control over the manner in which the work is carried out and the methods used."[15] Moreover, even without making a sufficient showing of active control "a general contractor can, in some circumstances, be held liable where [it] has 'voluntarily assumed responsibility for workplace safety.' "[16]

***3** Whether Atlantic retained active control over the method and manner of the performance and delegated tasks on the Millville Project is factual in nature.[17] According to Atlantic's construction manager, Richard Garufi (Garufi), he reviewed the safety of and "took care of [his] own people; that's it."[18] Plaintiff asserts otherwise through his own experience and reference to statements of other workers that claim "American Ricky" (a.k.a. Garufi) was "Santos' boss"[19] and supervised Plaintiff. Thus, a dispute exists as to the role held by Atlantic's construction manager, and to what extent that role involved managing, supervising, or overseeing Plaintiff's work.

The Court finds that this dispute involves genuine issues of material fact as to whether Defendant retained active control and/or voluntarily assumed responsibility on the Millville Project, and if it acted as a reasonably prudent entity by failing to have safety/fall protection programs in place. It is for a jury to reconcile the conflicting testimonies of Plaintiff and Garufi. Therefore, drawing all reasonable inferences in a light most favorable to Plaintiff, this Court cannot grant summary judgment in favor of Atlantic.

B. Election of Remedies

Plaintiff brought a claim before the Industrial Accident Board (IAB) requesting workers' compensation *benefits* under the Act. Plaintiff also filed his Complaint seeking *damages* alleging negligence against Atlantic. Since Atlantic maintains Plaintiff has elected his exclusive remedy under Act, the crux of Atlantic's motion requires this Court to look more closely at the interplay between—and purposes of—19 *Del. C.* §§ 2304 and 2311(a)(5).

It is undisputed that Plaintiff suffered a work-related injury. A worker's claim of personal injury by accident arising out of or in the scope of employment against an employer is limited to a workers' compensation claim against an employer.[20] Under 19 *Del. C.* § 2304 of the Act, the exclusivity provision reads:

> Every *employer and employee* ... shall be bound by this chapter respectively to pay and to accept compensation for personal injury ... arising out of and in the course of employment ... regardless of the question of negligence and to the exclusion of all other rights and remedies.[21]

Unfortunately, neither Plaintiff's employer (Santos) nor WVM (contracting entity above Santos) carried workers' compensation insurance. Plaintiff therefore cannot recover benefits from his employer.

In 2007, the General Assembly amended the Act and imposed upon contractors a duty to verify that their subcontractors carried workers' compensation insurance.[22] Since Atlantic was the contracting entity that subcontracted WVM (that subcontracted Santos) this legal chain obligated Atlantic to obtain certificates of insurance and verify that WVM carried insurance. Atlantic failed to do so. Therefore, Plaintiff properly filed under § 2311(a)(5) seeking benefits from Atlantic.

The relevant language of Section § 2311(a)(5) provides that:

> "[a]ny contracting entity *shall* obtain from an independent contractor or subcontractor ... a certification of insurance .... If the contracting entity *shall* fail to do so, the contracting entity *shall* not be deemed the employer of any independent contractor or subcontractor or their employees but *shall* be deemed to insure any workers' compensation claims arising under this chapter."[23]

***4** Following two hearings on remand, the IAB concluded that "Atlantic failed to exercise due diligence in verifying that its subcontractor (WVM) had Delaware workers' compensation insurance in force at the time of contract; pursuant to ... § 2311(a)(5), Atlantic (a non-employer) is deemed to insure [Plaintiff's] April 9, 2014 injuries."[24]

Atlantic argues the Court must interpret § 2311(a)(5) in tandem with § 2304. If read together, Atlantic maintains that § 2311(a)(5) was not intended by the legislature to "confer greater rights on an injured worker than he would otherwise have,"[25] and contends it "seems illogical"[26] for injured workers to be able to assert claims both under the Act and in tort. This argument is unavailing for three reasons. Atlantic's interpretation of §§ 2304 and 2311(a)(5) is contrary to the express language in the statutes, inconsistent with current case law, and implicates considerations of public policy.

First, the plain language of both §§ 2304 and 2311(a)(5) is unambiguous. The language of § 2311(a)(5) expressly mandates that *contractors* who fail to obtain certificates of insurance from their subcontractors are deemed the insurer for claims of injured workers. The language also expressly states "[this] contracting entity shall not be deemed the employer ...."[27] The language is clear. "[T]here is no room for judicial interpretation, and 'the plain meaning of the statutory language controls.' "[28] This section applies to non-employer contractors such as Atlantic that fail to fulfill their legal obligation under the Act.

The plain language of exclusivity under § 2304 is also clear. It applies only to an employer.[29] Atlantic does not suggest it should be considered Plaintiff's employer. In fact, it bases its arguments for dismissal under the premise that it served as a [general] contractor.[30] It argues it lacked a duty to protect Plaintiff because it distanced itself sufficiently from him on the issue of active control (i.e., not an employer) yet seeks to be afforded exclusivity under § 2304, applicable only to an employer. The law prohibits such application.

There is no conflict between §§ 2304 and 2311(a)(5). The former affords exclusivity to an employer. The latter imposes consequences on non-employers who fail to exercise due diligence in verifying the existence of Delaware worker's compensation coverage. The provisions align. Atlantic cannot be afforded exclusivity under § 2304 because it is not Plaintiff's employer. It failed to exercise due diligence as a non-employer contractor and is bound as a deemed insurer under § 2311(a)(5). Neither provision—read separately or together—could be interpreted to shield Atlantic from liability as a tortfeasor. "If the General Assembly did intend to eliminate liability ... , it could have done so explicitly in the later amendment."[31]

***5** In fact, to bar Plaintiff would vitiate the rights currently afforded to him under 19 *Del. C.* § 2363. That section expressly mandates that Plaintiff's acceptance of benefits under the Act cannot act as his election of remedies and he may pursue his tort claim "[w]here the injury... was caused under circumstances creating a legal liability in *some person other than... the employer*[,] to pay *damages*."[32] For these reasons, the plain meaning of the applicable statutes allow Plaintiff to seek his remedy against Atlantic in tort.

Second, this interpretation is consistent with case law that considered the legislative intent of § 2311(a)(5).[33] In *McKirby*

v. A&J Builders, Inc., the Superior Court rejected a general contractor's argument that it could not be held responsible under § 2311(a)(5).[34] The Court commented on the "clear [legislative] intent to offer more coverage to workers for injuries incurred at work and independently to require inquiry at the time of a contract."[35] This Court agrees that the 2007 amendments were intended "to preserve tort liability claims by injured workers against third parties[,]" where an employer-employee relationship does not exist.[36]

Though *McKirby* did not consider the tort liability of an upper level contractor such as Atlantic, the outcome is the same. This Court finds no support in the argument that the legislature intended to eliminate liability against contractors such as Atlantic. The argument that the *McKirby* Court did not consider whether a Plaintiff could pursue both claims under the Act *and* in tort is also unavailing where it is clear that the law provides avenues of relief in both forums.

This interpretation is also consistent with *Desousa v. Station Builders, Inc.*[37] In denying defendant's motion, the Court determined that a contractor non-employer could not be afforded exclusivity under § 2304.[38] And though presented on a motion dismiss, Defendant's arguments here do not turn on any factual distinctions that yield a different result. Guided by these prior rulings, this Court finds no support that leans in Atlantic's favor.

***6** The third and final point the Court considers is the policy implication if it were to accept Atlantic's interpretation. The law currently allows a plaintiff to pursue his claim for *damages* against his tortfeasor and collect separate and distinct *benefits* from his employer.[39] Just as a worker can be both plaintiff and claimant, a contractor can be a deemed insurer and tortfeasor. The incentives under § 2311(a)(5) place responsibilities on contractors to be vigilant and ensure Delaware workers are insured.[40] A broader read of this section would eliminate current legal remedies available to plaintiffs and harm claimants' rights that run counter to the spirit of the Act.

This Court will not foreclose Plaintiff's legal right to a remedy currently available to him or cap Atlantic's obligation to pay benefits if it may also be liable for damages. To do so would serve to incentivize companies such as Atlantic *not* to comply with the law. By turning a blind eye and failing to obtain certificates of insurance from its subcontractors, a contractor could shield itself from the more damaging liability exposure it would face as a tortfeasor. To accept Atlantic's position would reward Atlantic for its failure to exercise due diligence, render meaningless the mandates of Act, and serve to protect tortfeasors from liability.

VI. CONCLUSION

In considering all facts and reasonable inferences in a light most favorable to Plaintiff, Atlantic has not satisfied its burden under Rule 56. The Court finds genuine issues of material fact exist as to whether Atlantic owed a legal duty to Plaintiff. Furthermore, Atlantic fails to establish that the mandates of §§ 2304 and 2311(a)(5) of the Workers' Compensation Act bar Plaintiff's tort claims. Therefore, Atlantic's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

All Citations

Not Reported in Atl. Rptr., 2020 WL 4816343

Footnotes

1 Plaintiff's Complaint ¶ 9 [hereinafter "Comp."].
2 *Id.* ¶ 10.
3 Defendant Atlantic Building Associates' Brief in Support of Motion for Summary Judgment at 1-2 [hereinafter "Def.'s Mot."].
4 Plaintiff's Response in Opposition to Atlantic's Motion for Summary Judgment at ¶ 3 [hereinafter "Pl.'s Resp."].
5 *Id.* ¶ 3.
6 WVM failed to respond to Plaintiff's Complaint and a judgment was entered against it.
7 Original Defendants included Atlantic, WVM, Melvin L. Joseph Construction Co., Miller and Smith – Delaware, LLC, Miller and Smith at Millville, LLC (Miller and Smith), and Christopher Development Co. Plaintiff voluntarily dismissed all remaining original Defendants, except Miller and Smith and Atlantic.
8 *See* Def.'s Mot., Exhibit G at [hereinafter "Order"].

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9 Del. Super. Ct. Civ. R. 56(c).

10 *Quality Elec. Co., Inc. v. E. States Const. Serv., Inc.*, 663 A.2d 488, 1995 WL 379125, at *3-4 (Del. 1995) (citing Super. Ct. Civ. R. 56(C); *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979); *State v. Regency Group, Inc.*, 598 A.2d 1123, 1129 (Del. Super. Ct. 1991)).

11 *See Ebersole v. Lowengrub*, 180 A.2d 467, 469-70 (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957)).

12 *See In re. Asbestos Litig.*, 509 A.2d 1116, 1118 (Del. Super. Ct. 1986), *aff'd sub. nom. Nicolet, Inc. v. Nutt*, 525 A.2d 146 (Del. 1987).

13 *See Nutt v. A.C. & S. Co.*, 517 A.2d 690, 692 (Del. Super. Ct. 1986) (citing *Mechell v. Palmer*, 343 A.2d, 621 (Del. 1975); *Allstate Auto Leasing Co. v. Caldwell*, 394 A.2d 748, 752 (Del. Super. Ct. 1978)).

14 *Hawthorne v. Edis Co.*, No. 01C-09-183 HLA, 2003 WL 23009254, at *2 (Del. Super. Ct. July 14, 2003); *see Urena v. Capano Homes, Inc.*, 901 A.2d 145, 150 (Del. Super. Ct. 2006), *aff'd*, 930 A.2d 877 (Del. 2007); *see also O'Connor v. Diamond State Tel. Co.*, 503 A.2d 661, 663 (Del. Super. Ct. 1985) (citing *Seeney v. Dover Country Club Apartments, Inc.*, 318 A.2d 619 (Del. Super. Ct. 1974); *Williams v. Cantera*, 274 A.2d 698 (Del. Super. Ct. 1971)).

15 *Hawthorne*, 2003 WL 23009254, at *2; *see Urena v. Capano Homes, Inc.*, 901 A.2d 145, 150 (Del. Super. Ct. 2006), *aff'd*, 930 A.2d 877 (Del. 2007); *see also O'Connor*, 503 A.2d at 663 (citing *Seeney v. Dover Country Club Apartments, Inc.*, 318 A.2d 619 (Del. Super. Ct. 1974)).

16 *Hawthorne*, 2003 WL 23009254, at *2 (quoting *Kilgore v. R.J. Kroener, Inc.*, 2002 WL 480944, *7 (Del. Super. Ct. Mar. 14, 2002)).

17 *See Bryant v. Delmarva Power & Light Co.*, No. CIV.A. 89C-08-070, 1995 WL 653987, at *6 (Del. Super. Ct. Oct. 2, 1995).

18 Pl.'s Resp., Exhibit G at 15:19-23.

19 Pl.'s Resp. ¶ 6.

20 *See* 19 *Del. C.* § 2304.

21 *Id.* (emphasis added).

22 *See McKirby v. A & J Builders, Inc.*, No. CIV.A. 07A08005RFS, 2009 WL 713887, at *2 (Del. Super. Ct. Mar. 18, 2009); *see also Cordero v. Gulfstream Dev. Corp.,* No. CIV.A. 11A-03-003WCC, 2011 WL 6157487, at *3 (Del. Super. Ct. Nov. 30, 2011), *aff'd*, 56 A.3d 1030 (Del. 2012).

23 19 *Del C.* § 2311(a)(5).

24 *See* Order.

25 *Id.*

26 Def.'s Mot. at 12.

27 19 *Del. C.* § 2311(a)(5) ("Every *employer* .... shall ... pay ... compensation for personal injury...arising out of and in the course of employment ... regardless of the question of negligence and to the exclusion of all other rights and remedies.").

28 *CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011).

29 19 *Del. C.* § 2304 (emphasis added).

30 *See* Def.'s Mot. at 4-8.

31 *McKirby v. A & J Builders, Inc.*, No. CIV.A. 07A08005RFS, 2009 WL 713887, at *4 (Del. Super. Ct. Mar. 18, 2009).

32 *See* 19 *Del. C.* § 2363(a) ("Where the injury for which compensation is payable under this chapter was caused under circumstances creating a legal liability in *some person other than a natural person in the same employ or the employer* to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but such injured employee or the employee's dependents or their personal representative may also proceed to enforce the liability of such third party for *damages* in accordance with this section ....") (emphasis added).

33 *See Desousa v. Station Builders, Inc.*, No. CV N17C-09-109 FWW, 2019 WL 5394166, (Del. Super. Ct. Oct. 8, 2019) (denying defendant's motion to dismiss where plaintiff was not barred from pursuing defendant as to liability both in tort and for workers' compensation benefits); *see also McKirby v. A & J Builders, Inc.*, No. CIV.A. 07A08005RFS, 2009 WL 713887, at *4 (Del. Super. Ct. Mar. 18, 2009) (reversing and remanding IAB's Order dismissing employee's Petition to Determine Compensation against both the employer and the general contractor where under 19 *Del. C.* § 2311(a)(5) employee was able to pursue both parties for benefits).

34 *McKirby*, 2009 WL 713887, at *4.

35 *Id.*

36 *Cordero v. Gulfstream Dev. Corp.,* No. CIV.A. 11A-03-003WCC, 2011 WL 6157487, at *4 (Del. Super. Ct. Nov. 30, 2011), *aff'd*, 56 A.3d 1030 (Del. 2012) (citng *McKirby*, 2009 WL 713887, at *3)).

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37 *See generally* *Desousa*, 2019 WL 5394166.

38 *Desousa*, 2019 WL 5394166 at *3.

39 *See* *Henry v. Cincinnati Insurance Company*, 212 A.3d 285, 290 (Del. 2019) ("[I]n Delaware, an employee who is injured within the course of his employment by a third party is permitted to recover workers' compensation benefits from his employer and also to pursue a personal injury action against the tortfeasor.") (quoting *Duphily v. Del. Elec. Co-op., Inc.*, 662 A.2d 821, 834 (Del. 1995)).

40 *See* *Desousa*, 2019 WL 5394166 at *4 ("[E]xposing general contractors to liability both in tort and secondarily for workers compensation insurance incentivizes general contractors to be diligent in employing only subcontractors who comply with the Workers' Compensation Act[.]").

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