

Kerker v Maple View Dairy, Inc.
2012 NY Slip Op 50858(U)
Decided on May 15, 2012
Supreme Court, New York County
Edmead, J.
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DENIED request to dismiss death claim due to the exclusive remedy under Workers' Compensation Law §11.

**Susan J. Kerker, as Co-Administrator of the
Estate of MARIO ANTONIO MARTINEZ, Deceased,
and CANDELARIA SANTIAGO, individually, Plaintiffs,**

against

Maple View Dairy, Inc., Defendant

107081/2011

For Plaintiff: Weingrad & Weingrad, . 350 Fifth Avenue - Suite 7720, New York, New York 10118
for Defendant: Scolaro, Shulman, Cohen, Fetter & Burnstein, P.C. 507 Plum Street, Suite 300, Syracuse, Ny
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Carol R. Edmead, J.

Defendant Maple View Dairy, Inc. (Mapleview) moves for an order, pursuant to CPLR 3211 (a) (2) and (a) (7), dismissing the complaint as barred by the Workers' Compensation Law.

In this action, plaintiffs Susan J. Kerker, as co-administrator of the estate of Mario Antonio Martinez, deceased (decedent), and Candelaria Santiago, individually, allege that, on February 24, 2010, at 3:00 P.M., while in housing accommodations owned by Mapleview, decedent died in a fire that consumed the trailer where decedent slept. Mapleview alleges that it had hired decedent less than one week earlier, on February 17, 2010, pursuant to a written farm work agreement (the employment agreement).

In the complaint, plaintiffs assert claims against Mapleview for negligence, carelessness, recklessness, and wrongful death. In addition, Santiago, decedent's widow, asserts a claim for loss of consortium.

Mapleview now seeks to dismiss the complaint, contending that plaintiffs' exclusive remedy lies with the Workers' Compensation Board (the Board) and that the complaint is barred by Workers' Compensation Law § 11, on the sole ground that the written and verbal terms of decedent's employment by Mapleview required decedent to sleep on its premises, and that, therefore, decedent's death occurred in furtherance of that employment.

In opposition, plaintiffs contend that this action is not barred by the Workers' Compensation Law, on the ground that the fire occurred after decedent's shift had ended, and that, therefore, decedent did not die during the course of his employment.

On a motion such as this, addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Joel v Weber*, 166 AD2d 130, 135-136 [1st Dept 1991]; CPLR 3211 [a] [7]). Dismissal on documentary evidence is warranted only if the "evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d, at 88; *see* CPLR 3211 [a] [1]).

"To be compensable under Workers' Compensation Law, the injury must both occur in the course of the employment and arise out of the employment" ([*Matter of Mattaldi v Beth Israel Med. Ctr.*, 29 AD3d 1192](#), 1193 [3d Dept 2006]; *see* Workers' Compensation Law § 11). Thus, the Workers' Compensation Law will bar an action where the employment relationship did not cease when the employee was off-duty and asleep on the employer's premises when the accident occurred. "It is clear that if the employee is required to live on the premises either by virtue of the contract of employment or by reason of the nature of the employment[,] any injury resulting from normal activities on the premises is compensable" under the Workers' Compensation Law (*Matter of Chapman v Kiamesha Concord, Inc.*, 15 AD2d 618, 618 [3d Dept 1961]; *Matter of Mattaldi v Beth Israel Med. Ctr.*, 29 AD3d at 1193; Workers' Compensation Law § 11). Further, "[s]leeping on the premises in a room provided by the employer . . . [is] an incident of the employment, mutually beneficial to employer and employee, not a temporary suspension of" the employment (*Matter of Giliotti v Hoffman Catering Co.*, 246 NY 279, 281-282 [1927]).

"On the other hand[,] if the employee is on the premises solely out of the kindness of the employer[,] injuries are not compensable" (*Matter of Chapman v Kiamesha Concord, Inc.*, 15 AD2d at 618). Thus, the Workers' Compensation Law does not bar an action where sleeping on premises provided by the employer is not a job requirement, but is, instead, a matter of convenience for the employee (*Matter of Mattaldi v Beth Israel Med. Ctr.*, 29 AD3d at 1193; *Matter of Groff v Uzzilia*, 1 AD2d 273, 275 [3d Dept 1956], *affd* 2 NY2d 840 [1957]), or where the employee's activity at the time of the accident is incidental to the employer's business (*Matter of Davis v Ryan*, 262 App Div 982, 982 [3d Dept 1941], *affd* 287 NY 778 [1942]).

In the complaint, plaintiffs allege that, at the time of his death, decedent was employed by Maplevue, and inside a building "owned, operated, maintained, managed, and controlled" by Maplevue that "was utilized by [Maplevue] to house those persons in [Maplevue's] employ, including plaintiffs' decedent" (Complaint, ¶¶ 7-9). Plaintiffs also allege that decedent died in a fire at Maplevue's premises, and that his death was caused solely by Maplevue's negligence, recklessness, and carelessness (*see id.*, ¶¶ 10-13, 15).

Maplevue alleges that the employment agreement executed by decedent on February 17, [*3]2010 required decedent to live on Maplevue's premises, and that Maplevue verbally advised decedent of this condition of employment (*see* Lou Anne King, a Maplevue Member, Aug. 18, 2011 Aff., ¶¶ 4-5). However, the contemporaneous documents produced by Maplevue do not support these allegations.

The employment agreement allegedly completed by decedent is written entirely in Spanish. Although Maplevue produced what it contends to be an English version of the same contract form, it has failed to produce a duly authorized translation of the completed Spanish document. Further, it appears that the terms of the English contract form vary from those of the Spanish form, and do not provide that decedent was required to live on the premises, but, instead, merely indicate that housing arrangements are contemplated.

In addition, these documents do not reference decedent's name, Mario Antonio Martinez. The signature line in the completed Spanish employment agreement bears the signature of "Salvador Cordoba Gomes." The form C-2 employer's report of work-related injury/illness filed with the Board by Maplevue on February 25, 2010 identifies the injured employee solely as "Salvador Cordoba." The New York State Insurance Fund letter dated March 8, 2010 to Maplevue acknowledging receipt of the form C-2 identifies the claimant solely as "Cordoba Salvador."

Maplevue explains that, during the employment interview at which the agreement was executed, decedent represented his name to be Cordoba Gomes, and produced documentation, including a resident alien card and photo identification, in support of that representation, and that Maplevue did not learn decedent's true name until some time after the fire (see Lou Anne King Oct. 18, 2011 Aff., ¶¶ 9, 10). However, Maplevue has failed to produce copies of the identification supplied by decedent when he was hired. Plaintiffs do not concede that Gomes and decedent are the same person.

Further, Maplevue's allegations regarding verbal communications between its member, Lou Anne King, and decedent regarding the terms of his employment, and between Ms. King and the Board regarding the Board's acceptance of the claim are unavailing. These allegations, at most, merely raise credibility issues that may not be addressed on a motion to dismiss the pleadings.

For these reasons, Maplevue has failed to demonstrate that decedent was required to sleep on the premises as a condition of employment.

Accordingly, it is

ORDERED that the motion is denied in its entirety; and it is further

ORDERED that defendant Maple View Dairy, Inc. is directed to serve an answer within 20 days from service of this order with notice of entry; and it is further

ORDERED that counsel of record are directed to appear for a preliminary conference before Justice Carol Robinson Edmead, Supreme Court, New York County, Part 35 in Room 438, 60 Centre Street, on Tuesday, July 17, 2012 at 2:30 p.m.; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

Dated: May 15, 2012

ENTER: _____
Carol Robinson Edmead, J.S.C.