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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3083-19

JORGE F. RODRIGUEZ,

Plaintiff-Appellant,

v.

HARTZ METRO FEE II, LLC, and NEW YORK MUTUAL TRADING, INC.,

Defendants-Respondents.

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Argued April 14, 2021 – Decided May 27, 2022

Before Judges Accurso and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3036-18.

Jean-Claude Labady argued the cause for appellant (Garces, Grabler & LeBrocq, PC, attorneys; Jean-Claude Labady, of counsel and on the briefs; Marco Di Stefano, on the briefs).

Michael J. Snizek argued the cause for respondent Hartz Metro Fee II, LLC (McGivney, Kluger, Clark &

Intoccia, PC, attorneys; Michael J. Snizek, on the brief).

Jeffrey M. Beyer argued the cause for respondent New York Mutual Trading, Inc. (Riker Danzig Scherer Hyland & Perretti LLP attorneys; Jeffrey M. Beyer, on the brief).

The opinion of the court was delivered by

ACCURSO, J.A.D.

In this personal injury action, plaintiff Jorge F. Rodriguez appeals from summary judgment dismissing his complaint against defendant Hartz Metro Fee II, LLC, the owner of the warehouse where he worked and was injured, and its tenant New York Mutual Trading, Inc., plaintiff's "special employer." We affirm.

Defendants filed their motions at the end of discovery, a few months before the trial date. The material facts are undisputed. Plaintiff was a "general industrial worker" employed by a temporary staffing agency, assigned to work at New York Mutual's warehouse in Secaucus where he loaded and unloaded container trucks. He worked the second shift from noon until 8:00 p.m. After punching in at the beginning of his shift, plaintiff would report to his supervisor, a New York Mutual employee, who would give him the day's work assignment. The staffing agency used the time cards to bill New York

Mutual each week for all the agency's employees assigned to the Secaucus warehouse, including plaintiff. The agency would then transfer the proceeds, minus its share, to the employees for weekly wages and benefits. The parties agree New York Mutual could demand the staffing agency not send plaintiff to the warehouse if the company was unhappy with plaintiff's performance.

The accident happened in late August 2016, after plaintiff had been working at the warehouse for several months. Plaintiff slipped and fell on a metal ramp leading down from the loading dock at the end of his shift. He claimed the ramp was badly lit and a steady, light rain made it slippery. Plaintiff's engineering expert described the six-and-a-half-foot wide steel ramp as "a premanufactured and moveable unit" positioned in one of the truck bays and used to carry items by forklift to the top of the four-foot-high loading dock. Although describing the ramp to be in fair condition and its slope of seven degrees consistent with the maximum allowable slope for a pedestrian ramp, the engineer opined its lack of handrails and a full, non-slip surface made its use by pedestrians unsafe.

There was, however, a staircase with handrails right next to the ramp. But plaintiff testified at deposition most of the warehouse workers, including him, regularly used the ramp, even in the rain, to enter and exit the warehouse.

He had done so many times before, in even harder rains, and he consciously decided to walk the ramp the evening of the accident. Plaintiff explained other warehouse workers would occasionally be sitting on the steps, and one would have to maneuver around them or ask them to move in order to go down the stairs. Plaintiff fractured his right humerus and tore his rotator cuff in the fall, requiring surgery. Because there was no dispute the injury was work related, he received workers' compensation benefits from the staffing agency.

After hearing argument, Judge Espinales-Maloney found the material facts were undisputed and that Hartz and New York Mutual were both entitled to summary judgment for reasons she explained in a comprehensive written opinion. As to Hartz, the judge relied on our statement in Geringer v. Hartz Mountain Dev. Corp., "that 'there is no landlord liability' for personal injuries suffered by a commercial tenant's employee on the leased premises 'due to a lack of proper maintenance or repair, when the lease unquestionably places responsibility for such maintenance or repair solely upon the tenant.'" 388 N.J. Super. 392, 401 (App. Div. 2006) (quoting McBride v. Port Auth. of New York and New Jersey, 295 N.J. Super. 521, 522 (App. Div. 1996)).

The judge found Hartz's "triple-net lease with New York Mutual . . . clearly and unequivocally assigns responsibility for all repairs and

maintenance of the subject premises to New York Mutual," making Hartz not responsible for the injuries plaintiff suffered as a result of the condition of the ramp where plaintiff fell. The judge rejected plaintiff's attempt to bring this case within Geringer's other holding, that a commercial landlord that reserves to itself the authority to approve design and construction in the leased space may well be responsible for injuries to the tenant's employee from a defectively designed or constructed interior staircase, id. at 402-05, because "plaintiff slipped and fell on a prefabricated, movable ramp," which neither Hartz nor New York Mutual had any hand in designing or constructing.

The judge also rejected plaintiff's argument that there was an issue of fact as to whether the loading dock where plaintiff was injured was a part of the common area for which Hartz bore some responsibility under the lease. She found the issue was not one of fact but one of law as the lease omits loading docks from the definition of common area but includes them in the description of the demised premises.

As to New York Mutual, the judge found no question but that plaintiff was New York Mutual's special employee under the "fact-sensitive five-pronged test" set forth in Kelly v. Geriatric & Med. Servs., Inc., namely that:

> (1) the employee has made a contract of hire, express or implied, with the special employer;

> (2) the work being done by the employee is essentially that of the special employer;
>
> (3) the special employer has the right to control the details of the work;
>
> (4) the special employer pays the employee's wages; and
>
> (5) the special employer has the power to hire, discharge or recall the employee.
>
> [287 N.J. Super. 567, 571-72 (App. Div.), aff'd o.b., 147 N.J. 42 (1996).]

The judge noted that not all five factors must be satisfied to establish special employment, and while no single factor is dispositive, our courts generally believe "the most significant factor is the third: whether the special employer had the right to control the special employee." Walrond v. Cty. of Somerset, 382 N.J. Super. 227, 236 (App. Div. 2006).

Applying the test, Judge Espinales-Maloney found the undisputed facts — that the staffing agency used plaintiff's time cards at New York Mutual to invoice the company for plaintiff's services and paid plaintiff from the proceeds of those invoices; that New York Mutual assigned plaintiff daily work tasks and supervised his work; and that New York Mutual had the authority to demand plaintiff not be assigned to its warehouse if it was

dissatisfied with his services — clearly established an implied employment relationship between plaintiff and New York Mutual, thereby barring plaintiff's negligence claim under the Workers' Compensation Act, N.J.S.A. 34:15-1 to -142.

Plaintiff appeals, reprising the arguments he made to the trial court. Specifically, plaintiff argues Hartz was not entitled to summary judgment because its lease "was not a true triple-net lease" as landlord and tenant shared costs and control, with Hartz being responsible for structural repairs to the foundation and the roof, Hartz retaining liability for its own negligence in the operation or maintenance of the land or building (exclusive of the demised premises), Hartz requiring New York Mutual to submit construction plans for approval for all construction work in the demised premises and Hartz retaining the right to inspect New York Mutual's work to ensure compliance.

Plaintiff insists Hartz "violated the lease" by negligently permitting New York Mutual to install a defectively designed loading dock ramp on its property without an inspection. Plaintiff further argues Hartz was negligent notwithstanding the lease as it had the ability and opportunity to take reasonable steps to remove the hazards created by the loading ramp and failed to do so.

Plaintiff contends summary judgment to New York Mutual was inappropriate because New York Mutual was not his special employer within the meaning of the Workers' Compensation Act, because "it did not have control" over him, and he was accountable only to the staffing agency. He further argues that even if he was New York Mutual's special employee, the company placed him in a situation in which it was substantially certain he would be injured. He contends he "could not use the stairs adjacent to the loading dock ramp because New York Mutual allowed its employees to occupy the stairs," forcing him instead "to use a steep, slippery and wet loading dock ramp to exit the property," and that such conduct constituted an "intentional wrong," allowing him to maintain this suit against his special employer. Finally, plaintiff argues the judge erred in failing to consider his "position . . . that a wet surface can indeed constitute a slipping hazard that onto itself is a de facto dangerous condition that is foreseeable and unreasonable."

Having considered those arguments in light of the undisputed facts presented by the motion record using the same standard that governed the motion judge, Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021), we conclude none warrants any extended discussion in a written opinion, see R. 2:11-3(e)(1)(E).

The motion record establishes beyond any doubt that the ramp on which plaintiff fell was a portable unit neither designed nor constructed by either Hartz or New York Mutual, which New York Mutual brought onto the property for use in its warehouse operations. Plaintiff fails to identify any provision of the lease that would give Hartz the right to "inspect" or "control" a "premanufactured and moveable" ramp New York Mutual used in conjunction with its business. The operative language of the lease, which makes New York Mutual

> responsible for all repairs, interior and exterior, structural and nonstructural, ordinary and extraordinary, in and to the Demised Premises, and the Building (including the facilities and systems thereof) and the Common Areas the need for which arises solely out of (a) the performance or existence of the Tenant's Work or alterations, (b) the installation, use or operation of the Tenant's Property in the Demised Premises, (c) the moving of the Tenant's property in or out of the Building, or (d) the act, omission, misuse or neglect of Tenant or any of its subtenants or its or their employees, agents, contractors or invitees

is dispositive and relieves Hartz of any responsibility under the holdings of McBride and Geringer for plaintiff's injuries suffered as a result of the condition of the ramp. Whether the Hartz/New York Mutual lease is or isn't "a true triple-net lease" because Hartz is obligated to make certain structural repairs to the foundation or the roof is irrelevant to the issue of Hartz's lack of

responsibility for New York Mutual's "premanufactured and moveable" loading ramp.

The summary judgment record also conclusively established plaintiff cannot maintain this common law tort action against New York Mutual under the Workers' Compensation Act. It has long been settled for the purposes of workers' compensation that an employee of a temporary staffing agency such as plaintiff may have more than one employer, both of whom may be liable to him in the event of an injury. See Antheunisse v. Tiffany & Co., Inc., 229 N.J. Super. 399, 402 (App. Div. 1988). Recovery of workers' compensation benefits against one, however, "bars the employee from maintaining a tort action against the other for the same injury." Ibid.

It is undisputed that plaintiff worked in New York Mutual's Secaucus warehouse loading and unloading trucks, and that his New York Mutual supervisor told him what to do every day and supervised his efforts. Further, plaintiff conceded on the motion that the timecard he punched every shift at New York Mutual was what the staffing agency used to invoice the company for plaintiff's labor, and that the staffing company used the proceeds of those invoices, less its percentage share, to pay plaintiff his weekly wages and benefits. Those uncontested facts make plaintiff New York Mutual's special

employee under Kelly. Plaintiff's argument that New York Mutual "did not have control" over him, and he was accountable only to the staffing agency that signed his paychecks is belied by the facts he admitted on the motion. See Kelly, 287 N.J. Super. at 577 (finding that although the special employer had no power to decide whether the plaintiff could continue to be employed by the staffing agency, "it had full control over whether she would continue to work" at its facility, giving it "the functional equivalent of the power to discharge her"). Because the staffing agency paid plaintiff workers' compensation benefits for the injuries he suffered in the fall, he cannot recover against New York Mutual for the same injury.

Plaintiff did not argue in the trial court that he could recover under the "intentional wrong" exception to the Workers' Compensation Act, N.J.S.A. 34:15-8, even if considered a special employee of New York Mutual, making it unnecessary for us to address it here. See Selective Ins. Co. of Am. v. Rothman, 208 N.J. 580, 586 (2012); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Nevertheless, the argument that he was "forced" to walk down the steel loading ramp after dark in the rain by New York Mutual having allowed its employees to sit on the adjacent stairs is obviously not of the same character as those employer acts our courts have found "sufficiently flagrant so

as to constitute an 'intentional wrong,' thereby entitling a plaintiff to avoid the 'exclusivity' bar of N.J.S.A. 34:15-8." Laidlow v. Hariton Mach. Co., Inc., 170 N.J. 602, 611 (2002) (quoting Millison v. E. I. du Pont de Nemours & Co., 101 N.J. 161, 176 (1985)).

Finally, New York Mutual had no duty otherwise to warn plaintiff of the obviously visible condition of the ramp in the weather, a ramp he claimed he used routinely to enter and exit the warehouse. See Tighe v. Peterson, 175 N.J. 240, 241 (2002) (stating the general rule that where a "guest is aware of a dangerous condition or by a reasonable use of his faculties would observe it" the host is not liable).

In sum, we affirm, substantially for the reasons expressed by Judge Espinales-Maloney in her cogent opinion of February 28, 2020.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION