Cited
As of: Feb 17, 2012

RUSSELL SCHARE, Plaintiff, - against - SIX FLAGS THEME PARKS, Defendant.

96 Civ. 9377 (RWS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1998 U.S. Dist. LEXIS 592

January 21, 1998, Decided
January 23, 1998, Filed

DISPOSITION: [*1] Motion to amend as to fraudulent inducement claim denied on grounds of futility. Amendment as to claim under *N.Y. Lab. Law § 198 (1-a)* granted. Six Flags' opposition to that amendment of that claim treated as motion for summary judgment granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff consultant filed an action against defendant theme park alleging a breach of a consulting agreement between the parties, and a violation of *N.Y. Lab. Law § 191(1)(c)*. The consultant filed a motion under *Fed. R. Civ. P. 15(a)* for leave to file an amended complaint to add claims of fraudulent inducement and a violation of *N.Y. Lab. Law § 198(1-a)* to his complaint. The theme park opposed the motion to amend.

OVERVIEW: The consultant sought to plead in his amended complaint that he was an employee since his working relationship with the theme park had all of the substantive characteristics of an employment relationship at the time of the breach, and therefore the theme park's failure to pay him the commissions due violated *N.Y. Lab. Law § 198(1-a)*. The court granted the motion to amend because the consultant's claim under *§ 198(1-a)* was not insufficient as a matter of law. However, the court also converted the theme park's opposition to the motion as a motion for summary judgment and granted the motion. The consultant provided no factual support for the conclusory allegation that he was an employee during the period at issue. At his deposition he testified that he was an independent contractor when he arranged the sponsorship agreement for the theme park. He testified that the only work he performed for the theme park was attending one two-hour meeting with representatives from the sponsor which failed to establish the degree of control typically exercised over an employee such as requiring full-time services, designating the hours of work, or requiring permission for absences from work.

OUTCOME: The court denied the motion to amend as to the claim for fraudulent inducement and granted the claim under the labor law. The court converted the theme

park's opposition to the amendment on the labor law claim as a motion for summary judgment, and granted the motion on that claim.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court

[HN1] *Fed. R. Civ. P. 15(a)* provides that leave to amend a pleading "shall be freely given when justice so requires." The United States Supreme Court has interpreted *Rule 15* to permit such amendments only when: (1) the party seeking the amendment has not unduly delayed, (2) that party is not acting in bad faith or with a dilatory motive, (3) the opposing party will not be unduly prejudiced by the amendment, and (4) the amendment is not futile.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

[HN2] Mere delay absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend. Parties have been permitted to assert new claims long after they acquired the facts necessary to support such claims and have even been permitted to amend a complaint on the eve of trial. The party opposing the amendment has the burden of showing prejudice.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

[HN3] Denial of amendment may be proper where the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face.

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview
Torts > Business Torts > Fraud & Misrepresentation > General Overview

[HN4] To maintain an action based on fraudulent representations, whether it be for the rescission of a contract or in tort for damages, it is sufficient to show that the defendant knowingly uttered a falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged. Accordingly, one who fraudulently makes a misrepresentation of intention for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction is liable for the harm caused by the other's justifiable reliance upon the misrepresentation. The elements of common law fraud are material, false representation, an intent to defraud thereby, and reasonable reliance on the representation, causing damage to the plaintiff.

Contracts Law > Defenses > Fraud & Misrepresentation > Material Misrepresentation
Torts > Business Torts > Fraud & Misrepresentation > General Overview

[HN5] A contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations. New York law has also established that if a promise was made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of a material existing fact. Such a material misrepresentation may serve as the basis for a claim of fraud. However, the tension between the rule against stating a fraud claim based purely on a concealed intent not to perform, and the rule permitting fraud claims for a promise made without intent to perform has been reconciled by yet a third rule of law, which states that a false promise can support a claim of fraud only where that promise was "collateral or extraneous" to the terms of an enforceable agreement in place between the parties.

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Summary Judgment > Supporting Materials > General Overview

[HN6] Where amended claims fail as a matter of law, and would have been defeated by a motion to dismiss on the pleadings alone, denial of amendment is within the discretion of the district court. Where the amended claims would withstand such a motion, but may be successfully challenged in a summary judgment posture, denial of amendment is not appropriate: Where the alleged futility of the amendment rests on findings of fact courts prefer to let the district court resolve the factual issues. If the documents referred to by defendant are as decisive as it claims, the only prejudice it suffers from allowing appellant to amend is the inconvenience and expense of submitting these documents in support of a motion for

summary judgment. This burden hardly amounts to prejudice outweighing the policy of *Fed. R. Civ. P. 15(a)* in favor of permitting the parties to obtain an adjudication of the merits.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
[HN7] Where an amended claim would fail on a summary judgment motion, the court has discretion to treat the opposition to the amendment as a motion for summary judgment and to consider matters outside the pleadings in resolving the motion.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
[HN8] *Fed. R. Civ. P. 56(e)* provides that a court shall grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law. In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. If there is any evidence in the record regarding the issues on which summary judgment is sought from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper. A party seeking to defeat a summary judgment motion cannot rely on mere speculation or conjecture as to the true nature of facts to overcome the motion. Rather the responding party must show the existence of a disputed material fact in light of the substantive law. In the absence of any disputed material fact, summary judgment is appropriate.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview
Labor & Employment Law > Wage & Hour Laws > Administrative Proceedings & Remedies > General Overview
[HN9] *N.Y. Lab. Law § 198(1-a)* (1986) provides as follows: In any action instituted upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was willful, an additional amount as liquidated damages equal to 25 percent of the total amount of the wages found to be due.

COUNSEL: For Plaintiff: DANIEL J. KAISER, ESQ., Of Counsel, KAISER SAURBORN & MAIR, New York, NY.

For Defendant: JEFFREY I. KOHN, ESQ., LORI A. MAZUR, ESQ., Of Counsel, O'MELVENY & MYERS, New York, NY.

JUDGES: ROBERT W. SWEET, U.S.D.J.

OPINION BY: ROBERT W. SWEET

OPINION

OPINION

Sweet, D.J.

Plaintiff Russell Schare ("Schare") has moved under *Rule 15(a), Fed. R. Civ. P.* for leave to file an amended complaint to add claims of fraudulent inducement and a violation of *N.Y. Lab. Law § 198(1-a)* to his complaint against defendant Six Flags Theme Parks, Inc. ("Six Flags"). The motion to amend as to the fraudulent inducement claim is denied on grounds of futility. The amendment as to the claim under *N.Y. Lab. Law § 198 (1-a)* is granted. Six Flags' opposition to that amendment of that claim will be treated as a motion for summary judgment and is also granted.

Parties

Schare is a citizen and resident of the State of New York, residing [*2] in New York City.

Six Flags is a corporation duly organized under the laws of the State of New Jersey. Its principal place of business is Parsippany, New Jersey.

Prior Proceedings

This action was filed by Schare on December 13, 1996, alleging a breach of a consulting agreement between the parties, and a violation of *N.Y. Lab. Law § 191(1)(c)*. Schare filed this motion to amend on September 11, 1997. It was argued on October 14, 1997 at which time it was deemed fully submitted.

Facts

Facts Underlying Breach of Contract Claim

According to the complaint as initially filed, Six Flags, a New Jersey corporation, employed Schare, a New York resident, as director of national sales from January 1992 until November 1995. While Schare was employed by Six Flags as a Director of National Sales, he was entitled to and received commissions for deals he closed in the amount of 100% of cash values at a commission rate of approximately .5% and one third of co-op and television media sales at a commission rate of approximately .5%. In November 1995, Six Flags terminated Schare and the group in which he was employed. He thereafter performed service for Six Flags [*3] under a consultant's agreement. A letter dated November 28, 1995, from Joseph M. Redling, ("Redling"), Senior Vice President of Six Flags, confirmed the consulting arrangement, (the "November 28 Letter"), stating:

> This letter will confirm our agreement to compensate you for your efforts through the end of the year (December 31, 1995) on the closing of the following accounts: 1. Reebok; 2. Philips Consumer Electronics . . . You will be paid a 2% commission on all cash and on pre-approved barter and media values. This commission will be paid once contracts are signed.

In or about the middle of November 1995, Schare secured initial verbal approval from Philips Consumer Electronics ("Philips Consumer") for a sponsorship program between Philips Consumer and Six Flags for 1996 (the "Philips Consumer 1996 Program"). Philips Consumer and Six Flags had entered a sponsorship program in 1995 as well.

Sponsorship programs are generally agreements wherein in exchange for money, advertising, and/or barter, Six Flags licenses to a third party the right to use its name and trademarks in advertising and provides the third party with a number of admission tickets to its theme parks. Generally, [*4] Six flags enters into sponsorship agreements to promote the sale of the third party's products in exchange for cash. In exchange, Six Flags may receive free goods -- e.g., hot dog rolls, bottled water -- which it would otherwise have to purchase. Six Flags may also receive quality media, i.e., advertising which Six Flags would otherwise have purchased from its media budget. An example of qualified media Six Flags may receive from a sponsorship agreement is a thirty-second television commercial identifying both Six Flags and the third party, in which Six flags received primary identification.

The Philips Consumer 1996 Program for 1996 included the following essential terms: (1) cash to be paid from Philips Consumer to Six Flags in the amount of $ 500,000; (2) television media valued by the contract in the amount of $ 1,500,000; and (3) co-op media valued at $ 6,000,000. In or about the middle of December 1995, the deal between Philips Consumer and Six Flags received final approval by both contracting parties. Schare was paid a 2% commission for the $ 500,000 in cash and a 2% commission for 1/3 of the $ 1,500,000 representing the television media. He was not paid commissions for the [*5] $ 6,000,000 worth of co-op media. It is Schare's contention that his consulting agreement with Six Flags entitled Schare to a 2% commission on the Philips Consumer co-op media value and a full 2% commission on the television media value, and that Six Flags breached the consulting contract when it failed to pay Schare those commissions.

Facts Underlying the Fraudulent Inducement Claim

Michael Kent ("Kent") is Vice President for advertising and promotions at Six Flags, and was responsible for determining the amount of commissions to be paid to Schare under the consulting contract. In his deposition of August 7, 1997, (the "Kent Deposition"), Kent testified that, simultaneously with the negotiating of the terms of the commissions agreement with Schare, he and Redling had determined that the co-op media from the Philips Consumer 1996 Program did not have significant value and therefore would not be commissioned:

Q: Did Redling specifically tell you what he told [Schare] in these discussions?

A: He told me that he would be engaging Russell Schare's services and he was in discussions on that, yes.

Q: Did he tell you during those discussions, "We are going [*6] to engage Russell Schare's service, but we are not paying him with regard to the co-op media portion of plaintiff's exhibit 2 [Phillips Consumer Sponsorship Agreement]?

A: We discussed he would be paid cash and barter preapproved media.

Q: Did Redling tell you in his discussions that Russell Schare would not be commissioned on the co-op media portion of plaintiff's exhibit 2?

A: He and I were clear that on qualified media he would be eligible for commissions on any of these programs.

Q: And this understanding, that is a general understanding you had . . . was it also clear that that understanding of qualified media was clear in your discussion with Joe Redling that referred to the deal with Russell Schare, that Russell Schare pursuant to that general understanding, would not be commissioned on co-op media of plaintiff's exhibit 2?

A: Yes, which was consistent with media commission policy.

Q: And those discussions occurred before plaintiff's exhibit 1 [the November 28 Letter] was sent out, correct; those discussions ultimately culminated in the sending out of plaintiff's exhibit one to Russell Schare?

A: I don't recall specific dates, but it would [*7] have happened simultaneous with this whole process.

Schare contends that this testimony demonstrates that Redling and Kent knew he would not receive commissions for co-op media from the Philips Consumer 1996 Program before sending the November 28 Letter to Schare. Schare asserts that this pre-knowledge establishes his a claim for fraudulent inducement as well his claim for breach of contract.

The Additional Labor Law Claim

In the initial complaint, Schare pleaded a claim pursuant to *N.Y. Lab. Law § 191(1)(c)* on the theory that he was an independent contractor at the time of the breach. In the amended complaint, Schare pleads in the alternative that he was an employee since his working relationship with Six Flags had all of the substantive characteristics of an employment relationship at the time of the breach, and therefore Six Flags' failure to pay him the commissions due violated *N.Y. Lab. Law § 198(1-a)*.

Discussion

A. *The Motion to Amend is Granted in Part and Denied in Part*

[HN1] *Rule 15(a)* provides that leave to amend a pleading "shall be freely given when justice so requires." The Supreme Court has interpreted *Rule 15* to permit such [*8] amendments only when: (1) the party seeking the amendment has not unduly delayed, (2) that party is not acting in bad faith or with a dilatory motive, (3) the opposing party will not be unduly prejudiced by the amendment, and (4) the amendment is not futile. *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)*; *see Mackensworth v. S.S. Am. Merchant, 28 F.3d 246, 251 (2d Cir. 1994)*; *Chan v. Reno, 916 F. Supp. 1289, 1302 (S.D.N.Y. 1996)*.

i. *Amendment is Not Untimely*

Six Flags has opposed the amendment on the grounds that it is untimely. [HN2] "Mere delay . . . absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend." *State Teachers Retirement Board v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981)* (permitting amendment where amended claim was one of objects of discovery and related closely to the original claim); *accord Rachman Bag Co. v. Liberty Mutual Insurance Co., 46 F.3d 230, 234 (2d Cir. 1995)* (leave to amend affirmed where movant's reasons for delay not entirely clear but

opponent offered no reasons, such as prejudice or bad faith, to call district court's grant of leave [*9] into question); *Block v. First Blood Associates, 988 F.2d 344, 350 (2d Cir. 1993)*. "Parties have been permitted to assert new claims long after they acquired the facts necessary to support such claims and have even been permitted to amend a complaint on the eve of trial." *Hannah v. Metro-North Commuter Railroad Co., 753 F. Supp. 1169, 1176 (S.D.N.Y. 1990)* (citations omitted); *see also Fox v. Board of Trustees of the State University of New York, 764 F. Supp. 747, 757 (N.D.N.Y. 1991)* (parties have been allowed to assert new claims long after they acquired facts necessary to support such claims). The party opposing the amendment has the burden of showing prejudice. *Id.* (citing *In re Gallaudet, 40 B.R. 828, 830 (Bankr. Vt. 1984))*. Six Flags has not articulated any prejudice it would suffer as a result of the amendments to the complaint, which arise from the identical set of facts and same time period as the original claims.

ii. *Amendment is Futile as to the Claim of Fraudulent Inducement*

Six Flags urges that the amendment would be futile because it will not withstand a motion for failure to state a claim. [HN3] Denial of amendment may be proper where "the proposed [*10] change clearly is frivolous or advances a claim or defense that is legally insufficient on its face." 6 Charles A. Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure: Civil 2d*, § 1487 at 637. *See, e.g., S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28, 42 (2d Cir. 1979)* (noting that "[a] trial court does not abuse its discretion in denying leave to amend a complaint which even as amended would fail to state a cause of action); *Freeman v. Marine Midland Bank-New York, 494 F.2d 1334, 1338 (2d Cir. 1974)* (proffered amendment did not contain sufficient additional facts to make out a violation of banking law); *Torres v. Knapich, 966 F. Supp. 194, 195 (S.D.N.Y. 1997)* (amendment denied as futile where plaintiff failed to allege a municipal policy or custom as required to state a *Monell* claim); *Chan v. Reno, 916 F. Supp. 1289, 1302 (S.D.N.Y. 1996)* (amended complaint presented non-justiciable claim and failed to present court with subject matter jurisdiction); *McNally v. Yarnall, 764 F. Supp. 853, 855 (S.D.N.Y. 1991)* (amendment futile where alleged statements which supported additional claim fell within absolute privilege conferred [*11] by New York law).

As proof of Six Flag's fraudulent intent, Schare cites Kent's deposition, contending that it demonstrates that when Six Flags entered into the consulting arrangement with Schare after his termination, it was Six Flags' understanding that Schare would not be entitled to a commission on the amount of co-op media listed in the Phillips Consumer Program.

> [HN4] To maintain an action based on fraudulent representations, whether it be for the rescission of a contract or, as here, in tort for damages, it is sufficient to show that the defendant knowingly uttered a falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged . . . Accordingly, one "who fraudulently makes a misrepresentation of . . . intention . . . for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction" is liable for the harm caused by the other's justifiable reliance upon the misrepresentation.

Channel Master Corp. v. Aluminium Ltd. Sales, Inc., 4 N.Y.2d 403, 406-07, 176 N.Y.S.2d 259, 262, 151 N.E.2d 833, 836 (1958) (quoting 3 *Restatement (First) of Torts*, § 525 at 59. "The elements [*12] of common law fraud are material, false representation, an intent to defraud thereby, and reasonable reliance on the representation, causing damage to the plaintiff." *Katara v. D.E. Jones Commodities, Inc., 835 F.2d 966 (2d Cir. 1987)*.

However, it is well-settled under New York law that [HN5] "a contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations." *Rocanova v. Equitable Life Assurance Society of the United States, 83 N.Y.2d 603, 614, 612 N.Y.S.2d 339, 343, 634 N.E.2d 940 (1994)*; *see also New York University v. Continental Insurance Co., 87 N.Y.2d 308, 316, 639 N.Y.S.2d 283, 288, 662 N.E.2d 763, 768 (1995)* ("where a party is merely seeking to enforce its bargain, a tort claim will not lie."); *Bridgestone/Firestone, Inc. v. Recovery Credit Services, Inc., 98 F.3d 13, 19 (2d Cir. 1996)* ("these facts amount to little more than intentionally false statements by [defendant] indicating his intent to perform under the contract. That is not sufficient to support a claim of fraud under New York law."); *Grappo v. Alitalia Linee Aeree*

Italiane, S.p.A., 56 F.3d 427, 434 (2d Cir. 1995) [*13] ("A cause of action for fraud does not generally lie where the plaintiff alleges only that the defendant entered into a contract with no intention of performing it.").

New York law has also established that "if a promise was made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of a 'material existing fact.'" *Sabo v. Delman, 3 N.Y.2d 155, 164 N.Y.S.2d 714, 143 N.E.2d 906 (1957)*; *see also Channel Master, 4 N.Y.2d at 407, 176 N.Y.S.2d at 262, 151 N.E.2d at 835 (1958)* ("a statement of present intention is deemed a statement of material existing fact, sufficient to support a fraud action."). Such a material misrepresentation may serve as the basis for a claim of fraud. *Sudul v. Computer Outsourcing Services, 868 F. Supp. 59, 62 (S.D.N.Y. 1994)* ("a contracting party can be held liable for fraud when, at the time he made a promise, he did not intend to keep it.") However, the tension between the rule against stating a fraud claim based purely on a concealed intent not to perform, and the rule permitting fraud claims for a promise made without intent to perform has been reconciled by yet a third rule of law, which states that [*14] a false promise can support a claim of fraud only where that promise was "collateral or extraneous" to the terms of an enforceable agreement in place between the parties. *International Cabletel Inc. v. Le Groupe Videotron Ltee, 978 F. Supp. 483, 486 (S.D.N.Y. 1997)* (analyzing tension and resolving principle of law) (citing cases).

In *International Cabletel*, the plaintiff sought to state a claim of fraudulent inducement where the defendant had falsely promised not to enter into negotiations with any other buyers, when defendant had never intended to negotiate exclusively with the plaintiff but merely used plaintiff in order to achieve leverage in its anticipated discussions with a third party. *Id. at 485*. The court dismissed the action on the grounds that the promise to deal exclusively was explicitly included in the negotiation agreement between the parties:

> To describe plaintiff's claim is to expose its fundamental flaw. Defendant's promise to negotiate exclusively with plaintiff plainly was not collateral to the [contract], it was memorialized in that agreement as defendant's principle obligation. Thus, defendants' allegedly false statements of future intent [*15] cannot support the present cause of action.

Id. at 488.

Here, the false promise cited by Schare is the promise to pay commissions pursuant to the terms embodied in the November 28 Letter, that is a promise to perform according to the terms of the contract. Such a claim cannot stand as a separate cause of action for fraud.

iii. *Amendment is Granted as to the Labor Law Claim*

Because Schare's claim under *N.Y. Lab. Law § 198(10a)* is not insufficient as a matter of law, amendment will be granted. [HN6] Where amended claims fail as a matter of law, and would have been defeated by a motion to dismiss on the pleadings alone, denial of amendment is within the discretion of the district court. *See Silberblatt, 608 F.2d at 42*; *Freeman, 494 F.2d at 1338*; *Torres, 966 F. Supp. at 195*; *Chan, 916 F. Supp. at 1302*. Where the amended claims would withstand such a motion, but may be successfully challenged in a summary judgment posture, denial of amendment is not appropriate:

> Where, as here, the alleged futility of the amendment rests on findings of fact we prefer to let the district court resolve the factual issues. If the documents referred to by [defendant] [*16] are as decisive as it claims, a question on which we express no opinion, the only prejudice it suffers from allowing appellant to amend is the inconvenience and expense of submitting these documents in support of a motion for summary judgment. This burden . . . hardly amounts to prejudice outweighing the policy of *Rule 15(a)* in favor of permitting the parties to obtain an adjudication of the merits.

Silberblatt, 608 F.2d at 42; *see also* 6 Wright, Miller, Kane § 1487 at 637, 642 (where proposed amendment is not clearly futile denial of leave to amend is improper).

B. *Summary Judgment is Appropriate as to the Amended Labor Law Claims*

[HN7] Where an amended claim would fail on a summary judgment motion, the court has discretion to

treat the opposition to the amendment as a motion for summary judgment and to consider matters outside the pleadings in resolving the motion. *See Silberblatt, 608 F.2d at 42*; *Hannah, 753 F. Supp. at 1176* (treating opposition to motion to amend as motion to dismiss). Six Flags' opposition to Schare's addition of the Labor Law claim will be treated as a motion for summary judgment.

[HN8] *Rule 56(e) of the Federal Rules of Civil Procedure* [*17] provides that a court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See, Silver v. City University, 947 F.2d 1021, 1022 (2d Cir. 1991)*.

"The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." *Rodriguez v. City of New York, 72 F.3d 1051, 1060 (2d Cir. 1995)*. In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Brady v. Town of Colchester, 863 F.2d 205, 210 (2d Cir. 1988)*; *Matsushita Elec. Indus. v. Zenith Radio Corp, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. If there is any evidence in the record regarding the issues on which summary judgment is sought from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper. [*18] *See Knowles v. New York City Dept. of Corrections, 904 F. Supp. 217, 220 (S.D.N.Y. 1995)*.

A party seeking to defeat a summary judgment motion cannot "rely on mere speculation or conjecture as to the true nature of facts to overcome the motion." *Lipton v. Nature Co., 71 F.3d 464, 469 (2d Cir. 1995)* (quoting *Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986))*. Rather the responding party 'must show the existence of a disputed material fact in light of the substantive law." *Peer Int'l Corp. v. Luna Records, Inc., 887 F. Supp. 560, 564 (S.D.N.Y. 1995)*. In the absence of any disputed material fact, summary judgment is appropriate. Because the new claims are based upon the deposition of Michael Kent, a Six Flags employee with knowledge of the transactions giving rise to the action, there are no material facts in dispute.

Schare initially asserted a claim under *§ 191(1-c)* of the Labor Law on the theory that he was an independent contractor at the time he performed the services in question. Schare now seeks to plead alternatively a claim for damages under *N.Y. Lab. Law § 198(1-a)* on the grounds that he was an employee "since his working relationship with Six Flags [*19] had all of the substantive characteristics of an employment relationship" and "his work was controlled by Six Flags."

[HN9] *Section 198(1-a)* provides as follows:

> In any action instituted upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was willful, an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due.

N.Y. Lab. Law § 198(1-a) (McKinney's 1986).

Schare has provided no factual support for the conclusory allegation that he was an employee of Six Flags during the period at issue. At his deposition he testified that he was an independent contractor when he performed the services at issue for Six Flags:

> Q. And you worked for Six Flags until November 1995?
>
> A. Correct.
>
> * * *
>
> Q. And this was your separation agreement when you terminated your employment with Six Flags in November '95?
>
> A. Basically reviewing, yes.
>
> * * *
>
> Q. Subsequent to your termination of employment with Six Flags, you entered into [*20] an agreement to provide services in connection with the closing of

certain sponsorship agreements?

A. Correct.

On repeated occasions during questioning, counsel for Schare cautioned counsel for Six Flags to distinguish between his relationship with Six Flags during his prior employment and as an independent contractor during this period.

Additionally, Schare testified that the only work he performed for Six Flags during this period was attending one two-hour meeting with representatives from Phillips which fails to establish the degree of control typically exercised over an employee such as requiring full-time services, designating the hours of work, or requiring permission for absences from work. *See In re Ted Is Back Corp., 64 N.Y.2d 725, 726, 485 N.Y.S.2d 742, 743, 475 N.E.2d 113 (1984)*; *cf. In re Bourk, 165 A.D.2d 969, 561 N.Y.S.2d 858* (3d Dep't 1990); *In re Claim of Lucas, 161 A.D.2d 993, 557 N.Y.S.2d 565* (3d Dep't 1990). Since Schare was not an employee of Six Flags, he cannot recover an award of attorneys' fees or liquidated damages under *§ 198 (1-a). See Di Lorenzo v. Sbarra, 124 A.D.2d 446, 449, 507 N.Y.S.2d 548, 550* (3d Dep't 1986).

Conclusion

[*21] For the reasons set forth above, amendment as regards the claim for fraudulent inducement is denied. Amendment as regards the claim under *N.Y. Lab. Law § 198(1-a)* is granted, and as amended summary judgment on that claim is granted for Six Flags.

Because the court on its own motion converted the opposition to a motion for summary judgment, Schare is granted leave to move to vacate this order upon a showing within twenty (20) days of the date hereof that there are either material facts in dispute or the existence of acts which would be sufficient to support the dismissed claim under *N.Y. Lab. Law § 198(1-a)*.

It is so ordered.

New York, N. Y.

January 21, 1998

ROBERT W. SWEET

U.S.D.J.