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IN THE COURT OF APPEALS OF INDIANA

STEVEN BARNARD,

Appellant-Plaintiff,

and SHERRY BARNARD,

Plaintiff,

vs.

METRO SECURITY FORCES, INC.,

Appellee-Defendant,

and PETER J. KERNAN, d/b/a PACIFIC COAST CONCERTS, and CITY OF SOUTH BEND,

Defendants.

No. 71A03-0903-CV-86

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Margot F. Reagan, Judge
Cause No. 71D04-0510-CT-216

November 25, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Steven Barnard appeals the trial court's order granting summary judgment in favor of Metro Security Forces, Inc. ("Metro Security"). For our review, Barnard raises a single issue, whether the trial court erred when it granted summary judgment. Concluding the evidence submitted by Metro Security is insufficient to support the grant of summary judgment, we reverse and remand.

Facts and Procedural History[1]

On October 26, 2003, Barnard attended an REO Speedwagon concert at the Morris Performing Arts Center (the "Morris") in South Bend, Indiana. The Morris contracted with Metro Security to provide uniform guard services. At least some Metro Security employees wore white polo shirts that said "Metro Security." There were also people working at the concert who wore a tag that said "Usher," but who were not wearing Metro Security polo shirts.

[1] We held oral arguments at Michigan City High School on November 9, 2009. We thank Michigan City High School, the LaPorte County Judiciary, and the LaPorte County Bar Association for their hospitality. We also thank counsel for their very competent advocacy.

As the concert reached its conclusion, the members of the band began throwing souvenir items into the crowd, including guitar picks and drum sticks. As Barnard bent over to pick up a guitar pick, an unknown individual with an "Usher" tag stepped on his hand. Barnard pushed the usher off of his hand and stood up, at which time the usher placed both hands on Barnard and pushed him into an adjacent aisle. Barnard collided with a fellow concert goer, who was trying to retrieve a drum stick the band had thrown into the crowd. Barnard was injured in the collision.

On October 21, 2005, Barnard filed a complaint and request for jury trial. Barnard alleged the usher was an employee of Metro Security and brought a claim against Metro Security under the doctrine of respondeat superior. On December 29, 2008, Metro Security filed a motion for summary judgment alleging the usher was not a Metro Security employee. In support of its motion, Metro Security produced a document entitled "Agreement for Security Services," which stated Metro Security would provide the Morris with "Uniform Guard Services" on an as-needed basis. Appellant's Appendix at 13. The agreement is dated February 7, 2000, and indicates the agreement becomes effective on February 15, 2000, and expires on February 15, 2001. It is signed by a representative of Metro Security but not by a representative of the Morris.

Barnard did not produce any evidence in opposition to Metro Security's motion for summary judgment. Rather, Barnard argued Metro Security's designated materials failed to establish a prima facie showing that no genuine issue of material fact existed with respect to whether the usher was a Metro Security employee. The trial court held a hearing on February

17, 2009, and granted summary judgment in favor of Metro Security on February 20, 2009. Barnard now appeals.

Discussion and Decision

I. Standard of Review

The party appealing a summary judgment decision has the burden of persuading this court the grant or denial of summary judgment was erroneous. Smith v. Matthews, 907 N.E.2d 1076, 1077 (Ind. Ct. App. 2009), trans. denied. We review summary judgment decisions using the same standard as the trial court, Winchell v. Guy, 857 N.E.2d 1024, 1026 (Ind. Ct. App. 2006): summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, Ind. Trial Rule 56(C). In reviewing a summary judgment decision, we consider only those materials designated to the trial court, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. Indianapolis Downs, LLC v. Herr, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), trans. denied.

II. Identity of the Usher's Employer

In granting summary judgment in favor of Metro Security, the trial court found:

> [Barnard's] only argument in opposition to the Motion for Summary Judgment is that Metro failed to designate any evidence establishing that the usher who allegedly pushed [Barnard] was not an employee of Metro. However, upon examination of the designated evidence, Metro did show that the usher who allegedly pushed [Barnard] was not an employee of Metro. The designated portions of [Barnard's] deposition definitively identify the usher as opposed to a security guard by virtue of the respective uniforms and tags identifying them as either an usher or a security guard. Further, the contract between Metro and the Morris Performing Arts Center specifically stated that only "uniformed guard" services would be provided. [Barnard] testified that

> an usher (with an "Usher" tag on his shirt) pushed him, not a person with "Metro Security" on his uniform which clearly would have identified him as a Metro [S]ecurity guard. Barnard has produced no evidence which contradicts his own testimony in order to create a genuine fact issue.

Appellant's App. at 42.

The summary judgment procedure in Indiana differs markedly from the federal standard. See Schmidt v. Am. Trailer Court, Inc., 721 N.E.2d 1251, 1253-54 (Ind. Ct. App. 1999), trans. denied.

> In Indiana, the party moving for summary judgment has the burden of establishing that no genuine issue of material fact exists. Once the moving party has met this burden with a prima facie showing, the burden shifts to the nonmoving party to establish that a genuine issue does in fact exist. In contrast, the federal summary judgment approach requires summary judgment to be granted against a party who fails to establish an essential element of that party's case as to which that party bears the burden of proof at trial.

Id. at 1253 (citations omitted). Our supreme court explained, "[u]nder Indiana's standard, the party seeking summary judgment must demonstrate the absence of any genuine issue of fact as to a determinative issue, and only then is the non-movant required to come forward with contrary evidence." Jarboe v. Landmark Cmty Newspapers of Ind., Inc., 644 N.E.2d 118, 123 (Ind. 1994) (emphasis added).

Under our standard, Metro Security, as the party seeking summary judgment, bears the burden of making a prima facie showing there are no genuine issues of material fact and it is entitled to judgment as a matter of law. Indianapolis Downs, 834 N.E.2d at 703. Barnard did not designate any evidence to demonstrate the existence of a genuine issue of material fact; rather, he argued Metro Security did not produce sufficient evidence to make a prima facie showing. Therefore, the dispositive question is whether Metro Security designated sufficient

evidence to make a prima facie showing it did not employ the usher. This court has previously defined prima facie evidence as "such evidence as is sufficient to establish a given fact and which if not contradicted will remain sufficient." Plough v. Farmers State Bank of Henry County, 437 N.E.2d 471, 475 (Ind. Ct. App. 1982); see also Black's Law Dictionary 598 (8th ed. 2004) (defining "prima facie evidence" as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced").

As evidence it did not employ the usher, Metro Security designated a written agreement for security services. Taking the contract on its face, it is insufficient evidence of the contractual relationship between Metro Security and the Morris at the time of Barnard's injuries. First, the contract explicitly sets a duration that expired two and one-half years prior to the injury. Second, the contract is unsigned by an agent of the Morris. As such, it could constitute nothing more than a working draft or proposed agreement. Third, although the contract contemplates Metro Security will provide only "Uniform Guard Services," it fails to define that term or to describe the uniform of Metro Security employees. Appellant's App. at 13. Metro Security did not submit any supporting affidavits or deposition testimony clarifying the terms or duration of the contract or identifying the contract as a valid agreement between Metro Security and the Morris.

Metro Security also designated portions of Barnard's deposition to support its contention the usher was not a Metro Security employee. In his deposition, Barnard described the attire of the usher as a white dress shirt with a collar, a multi-colored vest, and an "Usher" tag. In contrast, Barnard described the attire of a Metro Security guard as a white

polo shirt reading "Metro Security." Accepting as true Metro Security's assertion it provided only uniformed guard services to the Morris, Barnard's deposition testimony does not negate the possibility the usher was a Metro Security employee. Barnard's description of the usher's attire could be construed as a uniform, assuming all ushers wore the same white dress shirt, multi-colored vest, and "Usher" tag.

Our standard of review requires us to construe the evidence in favor of Barnard and resolve all doubts in his favor. We conclude the evidence presented by Metro Security is not sufficient to make a prima facie showing the usher was not a Metro Security employee. Therefore, Metro Security is not entitled to summary judgment, and we reverse the trial court's decision and remand this case for further proceedings.

Conclusion

The trial court erred when it granted summary judgment in favor of Metro Security. Therefore, we reverse the trial court's decision and remand this case for further proceedings.

Reversed and remanded.

MATHIAS, J., and BRADFORD, J., concur.