SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36

Index No. 506771/15
Motion Calendar No.
Motion Sequence No.

ANTONIO BERRY,

Plaintiff(s),

-against-

VIAD CORP, and GLOBAL EXPERIENCE SPECIALISTS, INC. (GES),

Defendant(s).

DECISION / ORDER

Present:
Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: dismiss the plaintiff's complaint pursuant to CPLR § 3212.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits.....	3
Replying Affidavits.....	4
Exhibits.....	
Other:.....	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendants, VIAD Corp. ("VIAD") and Global Experience Specialists, Inc. ("GES") have moved, pursuant to CPLR § 3212, for an Order awarding summary judgment and a dismissal of the action brought by the plaintiff, Antonio Berry ("Mr. Berry"), as against said defendants. Plaintiff opposes the motion of the defendants and maintains that there is a triable issue of fact as to whether the plaintiff should be considered a "special employee", and whether plaintiff's action should or should not be barred pursuant to Workers Compensation Law § 11.

Background:

In the underlying matter, the plaintiff was working at the Jacob K. Javits Convention Center ("Javits Center") located at 655 West 34th Street, New York, N.Y. on December 10, 2014, when he was allegedly struck by a freight cart. That cart is alleged to have been left unattended for a brief time, and it rolled down a pedestrian handicap ramp on the concourse level of the Javits Center into the plaintiff while he was assisting in loading a truck with freight.

Plaintiff had been employed as a forklift operator at the Javits Center. Plaintiff also works as a freight handler at the Javits Center, and was performing that task at the time of the alleged incident. It is undisputed that the standard practice at the Javits Center was that workers would be notified in advance (usually the day prior) if they are going to be assigned to a job and whether they should report to work. Assignments were generally based upon seniority. At the time of the accident, plaintiff was assigned to work for the defendants and was taking freight carts that had been prepacked with various materials (desks, chairs, and metal equipment), from the interior area of the Javits Center, rolled out through a sliding door, and down a handicap pedestrian ramp. Those carts were then picked up by another employee who was operating a forklift, and then placed in a tractor trailer which was located outside of the main building.

The plaintiff, by his attorney, commenced this action seeking damages for personal injuries as a result of this incident, by the service of a summons and complaint dated May 29, 2015. Defendants served their answer to plaintiff's complaint on or about July 2, 2015. Included with their answer were Demands for a Verified Bill of Particulars and Combined Demands for Discovery and Inspection. Defendants then served an amended verified answer dated August 3, 2015. The plaintiff served a response to the Demand for a Verified Bill of Particulars on or about August 24, 2017.

Depositions were conducted of the plaintiff on April 13, 2016, as well as of Ken Scala, on behalf of GES on June 14, 2016. Further depositions were conducted of a non-party, Kenneth Martin on December 7, 2016, and non-party, Madeline Morano on April 24, 2017. A deposition of Robert Baeza, a witness on behalf of GES, was conducted on February 1, 2017.

Plaintiff filed a Note of Issue on or about April 28, 2017. Thereafter, this Motion to Dismiss, dated June 19, 2017, was filed by the defendants.

Defendants' contention:

In support of their motion to dismiss, defendants maintain that plaintiff was a special employee of GES at the time of the incident, and therefore, his claim should be barred by virtue of the Workers' Compensation Law § 11.

The defendants contend that a special employee is "one who is transferred for a limited time of whatever duration to the service of another" (see Thompson v. Grumman Aerospace Corp., 78 NY2d 553, 557 [1991]). Consideration of whether one can be deemed a special employee includes such factors as (1) who has the right to control employee's work; (2) who is responsible for the payment of wages and the furnishing of equipment; (3) who has the right to discharge the employee; and (4) whether the work being performed by the employee is in furtherance of the special employer's business (see Martin v. Baldwin Union Free Sch. Dist., 271 AD2d 579, 580, 706 NYS2d 712 [2nd Dept. 2000]). Defendants assert that the key factor in determining the status of a special employee is a finding of who "controls and directs the manner, details and ultimate result of the employee's work" (see Thompson v. Grumman Aerospace Corp., 78 NY2d at 558).

In support of their argument that the plaintiff was a special employee, the defendants rely upon the deposition testimony of the parties, as well as the non-party witnesses. The plaintiff

testified that he was notified the night prior to the incident that he was needed for a job at the Javits Center the following morning. The plaintiff, upon arrival (the following morning), checked in with Charlie Jones, the Javits Center supervisor, and was told that he was being assigned that day to work for GES. The plaintiff then reported to the GES supervisor, Robert Baeza. The plaintiff stated that he then took his assignments and instructions for the work to be performed that day directly from the GES supervisors. The supervisors advised the plaintiff that he was to load a truck, and Mr. Baeza, a supervisor for GES, would provide him with the instructions as to how to perform that task. The plaintiff testified that there were other GES supervisors present (who wore shirts bearing a GES emblem) who directed and controlled the work that the plaintiff had to perform that day (see EBT of the plaintiff Antonio Berry, pgs. 49-54).

Kenneth Scala, the senior operations manager for GES at the Javits Center, testified and submitted an affidavit as to the role that GES played. GES had been retained by the International Council of Shopping Centers to be the general service provider for their trade show at the Javits Center. GES hired and provided the supervisors, who were responsible for overseeing the setup and tear down of the shows, but the laborers, such as freight handlers and forklift operators (which included the plaintiff), were provided by the Javits Center to GES, after GES advised the Javits Center as to how many workers were needed for a project. Mr. Scala explained that while these laborers who were assigned to his company were paid by the Javits Center, they took their instructions from GES. In his affidavit, Mr. Scala stated that GES had the authority to terminate a worker from working for GES during a shift.

Kenneth Martin, the manager of security at the Javits Center, who was responsible for overseeing public safety officers and other supervisors who worked for the Javits Center,

testified that the Javits Center provided the labor force and they then worked under the direction and supervision of the general service contractors (ie. GES).

Robert Baeza, who worked as a supervisor for GES, testified that he oversaw the laborers who were provided by the Javits Center. As a supervisor, he provided the instructions to the laborers as to where to go and what work to perform.

Finally, Madeline Morano, who worked for the Javits Center as the Manager of Health and Safety, testified that the laborers are Javits Center employees who are leased to the general contractor. She described the Javits Center, with respect to the laborers being assigned work, as being like a leasing company (see EBT of Madeline Morano p. 19).

Defendants assert that since the relationship between the plaintiff and defendants should result in the plaintiff being determined to be a special employee, the plaintiff should be barred from asserting claims against GES under the Worker's Compensation Law § 11.

As to the plaintiff's argument that the service of the amended or supplemental pleading which was served without leave of court, should be considered a nullity, defendants maintain that the amended answer "should be considered effective when it is clear that the party would have been entitled to amend or supplement had he sought permission". Additionally, where the amended pleading does not prejudice a substantial right of a party, the failure to seek prior leave is an irregularity which may be disregarded". (Felix v. Tischler, 422 NYS2d 446, 447, 73 AD2d 609 [2nd Dept. 1979]). The defendants assert that the affirmative defense of Workers' Compensation is a defense that can be freely asserted up to the verdict at trial (see Goodarzi v. City of New York, 217 AD2d 683, 684, 630 NYS2d 534 (2nd Dept. 1995) quoting Murray v. City of New York, 43 NY2d 400, 407, 401 NYS2d 773 [1977]).

Plaintiff's contention:

The plaintiff, in opposing defendants' motion for summary judgment, maintains that the evidence fails to establish that the plaintiff was a special employee of GES as it relates to Workers Compensation Law § 11. In addition, plaintiff contends that the defendants failed to properly amend their answer to include the workers' compensation law as an affirmative defense.[1]

In support of the argument of Mr. Berry that he was an employee solely of the Javits Center, the plaintiff maintains that he has been employed at the Center since 1996, initially as a freight handler and was later promoted to a forklift operator after receiving the necessary training by the Javits Center. The plaintiff had received a W-2 tax form from the Javits Center for every year of his employment since 1996.

The plaintiff maintains that what is essential to creating a special employment relationship, is whether the working relationship with the injured plaintiff was sufficient in kind and degree so that this special employer may be deemed plaintiff's employer (see Bautista v. David Frankel Realty, Inc., 54 AD23d 549, 550, 863 NYS2d 638 [1st Dept. 2008]). While plaintiff acknowledges that who controls and directs the manner, details and ultimate result of the employee's work is an important factor, that is not necessarily determinative (see Stone v. Bigley Bros., 309 NY 132 [1955]). The other factors to consider are who is responsible for the payment of wages, who furnishes the worker's equipment, who had the right to hire and discharge the worker and whether the work being performed was in furtherance of the special

[1]. On or about August 3, 2015, the defendants served an amended answer to plaintiff's complaint which included the workers compensation law as an affirmative defense.

employer's or the general employer's business (see Thompson v. Grumman Aerospace Corp., 78 NY2d at 560).

Plaintiff maintains that on the day of the accident, he was assigned by Mr. Baez to load a truck in the morning, and in the afternoon, he was in the process of loading a trailer when the accident occurred. The plaintiff alleges that immediately before the accident, in order to expedite the process, Mr. Baeza assisted in bringing a cart to the top of the ramp so that it would be ready for pick-up by the forklift for loading. However, when the wheels of the cart were allegedly not "chocked" (something is placed at the wheels to stop it from rolling), the cart rolled down the ramp and struck the plaintiff (see EBT of plaintiff pgs. 64-65). The plaintiff contends that GES never provided any training to the plaintiff nor did they have a meeting with any of the Javits Center employees on the morning of the incident, all of which is important criteria that should be considered when determining whether plaintiff was a special employee.

In support of its opposition to this motion, the plaintiff also refers to the deposition testimony of both the parties and non-parties. Kenneth Scala, (senior operations manager for GES) testified that it is the Javits Center who provides freight handlers and carpenters for the GES jobs. While these employees, such as the plaintiff, take their instruction from GES supervisors while on a shift, they are nonetheless W-2 employees of the Javits Center who are paid by the Javits Center (see EBT of Kenneth Scala pg. 27).

Kenneth Martin testified that the Javits Center employs a labor force of teamsters and carpenters who are contracted out to general service providers. The general service providers (GES) paid the Javits Center for the laborers' services and the Javits Center would then pay the laborers (see EBT of Kenneth Martin pgs. 15-16).

Plaintiff contends that defendants' sole argument for finding that the plaintiff was a special employee was that the GES supervisor determined the order in which its equipment

should be loaded. The plaintiff alleges that the GES supervisor could not fire or terminate an employer, but rather they could only remove an employee from working on a particular assignment. In addition, there is no indication that GES controlled or determined their work, hours, schedules or vacation, had the authority to discipline them or provided them with equipment or supplies to perform their work.

The defendants contend that the evidence submitted by GES does not demonstrate a "working relationship" with the plaintiff "sufficient in kind and degree" to justify deeming GES to be plaintiff's employer (see Cardona v. Ho-Ro Trucking Co., Inc., 83 AD3d 428, 429, 920 NYS2d 334 [1st Dept. 2011]). The defendants contend that the situation in Cardona is similar to the facts in this case, where the Court in Cardona determined that defendant Ho-Ro had failed to meet its burden in establishing that the plaintiff was a special employee. In that matter, the plaintiff, an employee of a non-party AZM, was operating a cab owned by AZM, and hauling a trailer owned by defendant Ho-Ro. AZM had contracted with Ho-Ro to haul and deliver trailers on behalf of Ho-Ro. Factors that the court considered in not finding a special employee relationship were that AZM owned the cab that the plaintiff had operated and was responsible for its maintenance, that AZM and not Ho-Ro determined how plaintiff got paid, and AZM trained plaintiff before he began to haul loads on behalf of Ho-Ro.

In addition, the plaintiff maintains that the defendants have not complied with the provisions of CPLR § 3025 which permits a pleading to be amended within 20 days of its service without leave of Court. Here, the defendants served an amended answer over 30 days after its initial answer and without leave of Court. As such, the plaintiff maintains that the amended answer should be deemed to be a nullity and not to be considered by the Court.

Discussion:

This Court has reviewed the submissions of counsel for the respective parties, and considered the arguments presented herein, as well as the applicable law, in making this determination with respect to the motion by the defendants which seeks a dismissal of plaintiff's complaint.

At issue before this Court, is whether the plaintiff should be considered a special employee, and whether plaintiff's action should or should not be barred pursuant to Workers Compensation Law § 11.

"The receipt of workers compensation benefits is the exclusive remedy that a worker may obtain against an employer for losses suffered as a result of an injury sustained in the course of employment" (Charles v. Broad St. Dev., LLC, 95 AD3d 814, 816, 947 NYS2d 518 [2002]); Munion v. Trustees of Columbia Univ. in City of N.Y., 120 AD3d 779, 991 NYS2d 460 [2nd Dept. 2014]); see Workers' Compensation Law § § 11, 29[6]). As a result, the employee who is entitled to receive compensation benefits may not sue his or her employer in an action at law for the injuries sustained (Fung v. Japan Airlines Co., Ltd., 9 NY3d 351, 358-359, 850 NYS2d 359 [2007], quoting Thompson v. Grumman Aerospace Corp., 78 NY2d at 560). A person may be deemed to have more than one employer for purposes of the Workers' Compensation Law, a general employer and a special employer" (Alfonso v. Pacific Classon Realty, LLC, 101 AD3d 768, 769, 956 NYS2d 111 [2012] quoting Silkas v. Cyclone Realty, LLC, 78 AD3d 144, 150, 908 NYS2d 117 [2010]). "A special employee is 'one who is transferred for a limited time of whatever duration to the service of another', and limited liability inures to the benefit of both the general and special employer" (Fung v. Japan Airlines Co., Ltd., 9 NY3d at 359, quoting Thompson v. Grumman Aerospace Corp., 78 NY2d at 557). "The receipt of Workers Compensation benefits from a general employer precludes an employee from commencing a

negligence action against a special employer" (Pena v. Automatic Data Processing, Inc., 105 AD3d 924, 963 NYS2d 357 [2013]).

"A person's categorization as a special employee is usually a question of fact". However, "the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact Thompson v. Grumman Aerospace Corp., 78 NY2d at 557-558. Many factors are weighed in deciding whether a special employment relationship exists, and generally no single factor is decisive. As set forth above, the principal factors that courts have considered are "who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee and whether the work being performed was in furtherance of the special employer's or the general employer's business. The most significant factor is who controls and directs the manner, details and ultimate result of the employee's work". (Schramm v. Cold Spring Harbor Lab., 17 AD3d 661, 793 NYS2d 530 [2005]; Gonzalez v. Woodbourne Arboretum, Inc., 100 AD3d 694, 954 NYS2d 113 [2012]).

Here, the defendants demonstrated through the deposition testimony of the parties as well as the non-parties, that GES controlled and directed the manner and details of the plaintiff's work when the plaintiff was assigned to this service contractor. The plaintiff's EBT testimony provides an acknowledgment that when he is assigned to work for a general contractor that he is under their exclusive supervision. It undisputed that it was common knowledge and the custom and practice at the Javits Center, that the employees relied solely upon entities/general contractors such as GES, (who conducted various shows at the Center) for their employment. The procedure that was utilized at the Javits Center was that an entity who was contracted to do work with the Javits Center would contact the Javits Center and advise them as to how many workers they needed for a project. A worker, such as the plaintiff, would then be advised as to the need for

his/her services. The worker would then report to the Javits Center and be assigned to work for that entity. The supervisor for that entity would dictate the work that the employee would perform, and the employee would be under the control of that entity until the assignment was completed or he/she was removed from that project by that entity.

In considering whether the defendants have set forth sufficient criteria that is needed for establishing that the plaintiff was a special employee, this Court finds that the defendants have provided ample evidence that they fully supervised the plaintiff while he was assigned to them, they had full autonomy to remove a worker from a project, they provided their own equipment and the work being performed was in furtherance of their business.

A special employee relationship exists where an entity had the authority to remove the plaintiff from a job and the work that the plaintiff performed was in furtherance of the defendant's business (see Navallo v. R.P. Brennan Gen. Conrs., 87 AD3d 683, 928 NYS2d 605 [2nd Dept. 2011]). Therefore, the defendants established their prima facie entitlement to a judgment as a matter of law dismissing the complaint.

In opposition to the prima facie showing of the defendants, the plaintiff makes several cogent arguments, but not enough to offset the argument by the defendants that plaintiff was a special employee. The plaintiff maintains that it was the Javits Center who trained the employees to be laborers and fork lift operators and who provided the W-2's for the employees. However, the involvement of the Javits Center appears to be limited to those aspects, as well as the fact that they arrange for the employees to work for these general service contractors at the Center. These general service contractors contract with the Javits Center to do work by employing these laborers and forklift operators, who are supervised by the staff of the general service contractors. This way of doing business has been a continuing practice and to decide that a special relationship does not exist here, would subject every contractor who utilizes the Javits

Center employees to a potential personal injury action without the protection of the Workers' Compensation Law. Accordingly, the Court finds that the plaintiff has failed to raise a triable issue of fact with respect to the plaintiff being a special employee.

In addressing the timing of defendants' amended answer, a party may seek to amend its pleadings at any time by leave of court or by stipulation of the parties, pursuant to CPLR § 3025. "Leave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay (see McCaskey, Davies and Assocs., Inc. v. New York City Health & Hosps. Corp., 95 NY2d 755, 757, 463 NYS2d 434 [1983]). Here, while it appears that defendants' amended answer was served upon the plaintiff thirty days after the initial answer and without leave of Court, (which plaintiff correctly states should have been done) it has been held that where an amended pleading "does not prejudice any substantial right of the other party, the failure to seek prior leave is an irregularity which may be disregarded (see Matter of Association for Preservation of Freedom of Choice v. Shapiro, 14 AD2d 800, 220 NYS2d 696 [2nd Dept. 1961]). The delay in moving to amend the pleading is not per se a proper ground to deny the motion in the absence of a showing of actual prejudice (see Hillenbrand v. 3801 Review Place, Inc., 72 AD2d 554, 420 NYS2d 766 [2nd Dept. 1979]). The plaintiff has not set forth that he have been prejudiced by the thirty day delay in defendants amending their answer, or by defendants not seeking leave of court within which to do so. Moreover, the defense of worker's compensation can only be waived by the defendant if the defenses are completely ignored, and they can be raised at any time until a final disposition of the matter. (see Murray v. New York, 43 NY2d 400, 401 NYS2d 773 [1977]). Therefore, the argument by the plaintiff that the Court should consider the defendants' amended answer to be a nullity, is denied.

Conclusion:

The motion by defendants VIAD Corp, .and Global Experience Specialists, Inc,. for an Order awarding summary judgment and a dismissal of the action of the plaintiff, Antonio Berry, as against said defendants, pursuant to CPLR § 3212, is granted.

This shall constitute the decision and order of this Court.

Dated: December 13, 2017
Brooklyn, New York

ENTER

Hon. Bernard J. Graham, Justice
Supreme Court, Kings County