Davis v EAB-TAB Enters.
2017 NY Slip Op 33316(U)
May 25, 2017
Supreme Court, Greene County
Docket Number: 15-0649
Judge: Lisa M. Fisher
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STATE OF NEW YORK
SUPREME COURT GREENE COUNTY

KODY DAVIS and NICHOLE DAVIS,
Plaintiffs,

- against -

EAB-TAB ENTERPRISES, THOMAS BENDER, and ELIZABETH BENDER,
Defendants.

DECISION & ORDER

Index No.: 15-0649
RJI No.: 19-15-8649

EAB-TAB ENTERPRISES, THOMAS BENDER, and ELIZABETH BENDER,
Third Party Plaintiffs,

- against -

UTICA FIRST INSURANCE COMPANY,
Third Party Defendant.

PRESENT: HON. LISA M. FISHER:

APPEARANCES: Joseph Napoli, Esq.
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FISHER, J.:

The is a personal injury action wherein Plaintiff Kody Davis (hereinafter "Plaintiff Kody") was injured in a building owned by Defendant/Third Party Plaintiff EAB-TAB Enterprises, LLC (hereinafter "EAB"). Third Party Defendant Utica First Insurance Company (hereinafter "Utica

First") provided insurance coverage for the subject building. Defendant EAB was owned by Defendant Thomas Bender (hereinafter "Thomas") and Defendant Elizabeth Bender (hereinafter "Elizabeth").

Initially, Plaintiffs commenced this action against Defendants with language in the complaint that Plaintiff was an "employee" of Defendant EAB. Depositions of Plaintiff Kody and Defendant Thomas were held on March 4, 2016. Therefore, Plaintiffs successively moved this Court to amend their complaint to conform to the evidence (CPLR R. 3025 [c]), and did so removing any reference that Plaintiff Kody was an "employee." This was unopposed and granted on May 26, 2016. The complaint was amended and duly served.

Defendants submitted a verified answer, impleading Defendant Utica First on the grounds that it had an insurance policy in full force and effect during the subject accident. Defendants claim that Defendant Utica First was required to indemnify and hold harmless the holders of the policy from any personal injuries sustained at the subject property.

Now, Defendant Utica First moves for an order 1) pursuant to CPLR R. 3211 (a) (1) (documentary evidence) and (7) (failure to state a cause of action) dismissing the third-party complaint against it, 2) pursuant to CPLR R. 3211 (c) treating this motion as one for summary judgment and declaring, pursuant to CPLR § 3001, that Utica First has no duty to defend or indemnify any party in connection with the subject incident, 3) severing the action pursuant to CPLR § 603 and R. 1010, and 4) any other order and further relief as the court may deem just and proper.

Specifically, Defendant Utica First claims that the subject policy contains an exclusion wherein Utica First does not pay for "bodily injury to an employee of an insured if it occurs in the course of employment" (emphasis removed). This exclusion applies where "the insured is liable either as an employer or in any other capacity." Here, Defendant Utica First claims that Plaintiff Kody is an employee of Defendants which is clear from their interactions and how the pleadings previously labeled him. Therefore, Defendant Utica First claims that the exclusion applies and Utica First is not obligated to defend or indemnify Defendants.

Plaintiffs and Defendants oppose the application, arguing that Plaintiff Kody was not an employee of Defendant EAB but an independent contractor. They claim this is apparent from the deposition testimony, wherein Plaintiff Kody was not a W2 wage earner, did not have any taxes

taken out of his paycheck, and Defendant EAB did not have "control" over Plaintiff Kody. Defendant Utica First submits a reply contesting these allegations.

The Court reviewed the application and had several issues regarding the policy, particularly to some exceptions to the exclusions in the subject policy. Oral argument was held in the matter wherein all parties were represented and had an opportunity to be heard. Supplemental submissions were permitted, and all parties submitted same.

Defendant Utica First's supplement successfully demonstrated that the other exceptions to the exclusions do not apply. This was echoed in the supplemental submissions by the other parties. Plaintiffs' supplemental submission noted that Defendants were not in the business of construction, sheet-rocking, painting and other labor that Plaintiff Kody was performing: this was a one-time renovation which he was assisting as an independent contractor.

In reviewing this matter, the Court has expended a significant amount of time researching the applicable law and combing several times through the deposition testimony in this decision. All submissions by the parties are laudably prepared by competent counsel, who are commended for same. As noted by the parties, the dispositive issue posited is whether Plaintiff Kody is an employee of Defendant EAB. Defendant Utica First requested several times in its papers and at oral argument to convert this application to one for summary judgment, and the Court agrees to do so herein since each party has been given the opportunity to provide additional papers in support of their position. (*See* CPLR R. 3211 [c].)

Legal Analysis

The classification of a worker as an employee or independent contractor is no stranger to judicial review and has roots in ancient common law doctrine. (*See Blake v Ferris*, 5 NY 48 [1851].) Generally, this necessary classification falls into two categories: negligence cases where vicarious liability needs to be assessed, or where coverage in a policy to pay for damages is in dispute. The latter's cases overwhelmingly pertain to workers' compensation coverage, where coverage hinges on whether a worker was an employee and covered under the workers' compensation policy or an independent contractor and excluded from the workers' compensation policy. As other courts before, this Court also finds this line of cases applicable to the present insurance disputes such as this controversy. (*See In re Morton*, 284 NY 167 [1943].)

There is "no absolute rule for determining whether one is an independent contractor or an employee, and that each case must be determined on its own facts" (*Matter of Miller*, 262 AD 385, 387 [3d Dept 1941]; *see Matter of Wells (Utica Observer-Dispatch & Utica Daily Press—Roberts)*, 87 AD2d 960, 960 [3d Dept 1982] ["each case must be decided on its own peculiar facts"]). "[N]evertheless, there are many well recognized and fairly typical indicia of the status of an independent contractor, even though the presence of one or more is such indicia in a case is not necessarily conclusive" (*Matter of Miller*, *supra*, 262 AD at 387).

"[T]he principal factors to be considered are the right to control, the method of payment, who furnishes the equipment, the right to discharge and the so-called 'relative nature of the work' test" (*Matter of Scott v Stevenson Motors*, 127 AD2d 953, 954 [3d Dept 1987]). "Other relevant factors include whether the individual furnishes his own tools or equipment, how payment is made and whether Social Security and other taxes are withheld from such payments" (*Greene v Osterhoudt*, 152 AD2d 786, 787 [3d Dept 1998]; *see Harjes v Parisio*, 1 AD3d 680, 681 [3d Dept 2003]; *see also Stevens v Spec Inc.*, 224 AD2d 811, 812 [3d Dept 1996]).

"While no single factor is determinative, control over the results produced or the means used to achieve those results are pertinent considerations, with the latter being more important" (*Matter of Armison*, 122 AD3d 1101, 1102 [3d Dept 2014], quoting *Matter of Automotive Serv. Sys., Inc. [Commissioner of Labor]*, 56 AD3d 854, 855 [3d Dept 2008] [citations omitted]; *accord Matter of Scott*, *supra*, 127 AD2d at 954). "The determination whether an individual is an employee or an independent contractor turns principally upon the question of who exercises control over the method and means of the work" (*Greene*, *supra*, 152 AD2d at 787). Indeed, it has long been held that "the decisive question being as to who has the right to direct what shall be done, and when and how it shall be done" (*Matter of Miller*, *supra*, 262 AD at 387; *see Berger v Dykstra*, 203 AD2d 754, 755 [3d Dept 1994] *lv dismissed, lv denied* 84 NY2d 965 [1994] ["Control of the method and means by which the work is to be done, therefore, is the critical factor in determining whether one is an independent contractor or an employee"]; *see also Kleeman v Rheingold*, 81 NY2d 270, 273–74 [1993]; *Harjes*, 1 AD3d at 680–81; *Mason v Spendiff*, 238 AD2d 780, 781 [3d Dept 1997]; *Claim of Wells*, *supra*, 87 AD2d at 960).

Plaintiff Kody testified he did not even know what EAB-TAB Enterprises was at his deposition. He testified he had only been working with Defendant Thomas for approximately two weeks before the subject accident. Plaintiff Kody testified he knew Defendant Thomas from a

prior job, and Defendant Thomas approached Kody's wife to see if Plaintiff Kody could assist in an apartment renovation. The renovation project was for bedrooms to rent out to tenants and to convert a space into a cigar club.

There was no contract for this work. Plaintiff Kody worked for approximately 20-28 hours a week "helping" Defendant Thomas hang sheetrock and paint walls. Defendant Thomas testified that he provided the paint and brushes. He testified that he told Plaintiff Kody to paint, but did not direct or instruct him how or what walls to paint. Defendant Thomas further testified he did not instruct Plaintiff Kody at any time to do something different other than what he was already doing, like using a different color or not to use a certain brush.

Approximately two or three weeks after the subject accident, Plaintiff Kody worked several days for Defendant Thomas painting walls. This was while Plaintiff Kody had an air cast on his injured foot, and he testified he had to go back to work because he needed money for his family. After the few days back, he was hired by a restoration company and started working there while his foot was injured. There is also testimony from Plaintiff Kody that he stopped working for Defendant Thomas because Defendant Thomas backed into his car while intoxicated; Defendant Thomas admitted that he plead guilty to this.

Defendant Thomas paid Plaintiff Kody once a week in a check that did not have any taxes taken out of it. Defendant Thomas testified that he did not take out taxes of any other person's check. He testified that the only two employees of Defendant EAB-TAB were Defendant Elizabeth and himself. He did not provide Plaintiff Kody with a W2 or a 1099, and he paid Plaintiff Kody "under the table" with the understanding that he needed help with work and Plaintiff Kody was looking for work to do.

"While this determination usually presents questions of fact sufficient to preclude summary judgment, where evidence is undisputed, and the facts are compellingly clear, the issue may be determined as a matter of law" (*Greene, supra*, 152 AD2d at 787). Here, the Court finds Plaintiff Kody to be an independent contractor and not an employee7 of Defendant EAB. While Defendant Thomas provided the equipment, his testimony is clear that he did not direct how the tasks should be done or instruct Plaintiff Kody how to perform such tasks. There is no evidence of control, other than requesting certain tasks like sheet-rocking or painting to be done. Once such task was assigned to Plaintiff Kody, Defendant Thomas testified he did not direct, instruct, or request any changes to how Plaintiff Kody was performing the tasks. The manner in which Plaintiff Kody was

retained and left the work site is also not indicative of an employee-employer relationship, as Defendant Thomas solicited Plaintiff Kody's wife for help and Plaintiff Kody left the job without giving any prior notice. Both of their testimony was clear that this was a job "off the table", and the course of conduct between the two did not evince a permanent relationship or one where Defendants controlled Plaintiff Kody to the point of an employer-employee relationship.

The "relative nature of the work" was simply not that of an employer-employee. The work was for an ex-coworker who had extra side work to prepare apartments for rent and to convert a space into a cigar club, and did not need Plaintiff Kody any longer than it was necessary to do such tasks. Defendant EAB is also not in the business of construction and demolition, but that of a landlord.

Therefore, Defendant Utica First's motion for summary judgment must be denied. Plaintiff Kody is not an "employee" under the subject policy's exclusion, but rather an independent contractor. The documentary evidence fails to establish Defendant Utica First's entitlement to summary judgment, and therefore impleader states a valid cause of action against Utica First.

As for Defendant Utica First's request for a declarative judgment, the Court declines to issue a declarative judgment at this point in the litigation before Utica First has served an answer. Declaratory judgments are governed by CPLR § 3001, which provides that "[t]he supreme court *may* render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy" (emphasis added). "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*James v Alderton Dock Yards, Ltd.*, 256 NY 298, 305 [1931]). Given that Defendant Utica First's motion is denied, it is not entitled to a favorable declarative judgment. The Court does not find it prudent to issue a declarative judgment against Defendant Utica First as it has not served an answer or had the opportunity to engage in reasonable disclosure.

While the Court agrees to severe the claim against Defendant Utica First given that it integrally relates to insurance, which it is well-held to be prejudicial in front of a jury during the personal injury portion of this action (*see Simpson v Foundation Co.*, 201 NY 479 [1911]; *Loughlin v Brassil*, 187 NY 128, 135 [1907]; *Manigold v Black River Traction Co.*, 81 AD 381 [4th Dept 1903]; *Wildrick v Moore*, 66 Hun 630, 22 NYSC 1119 [4th Dept 1892]; *see also Salm v Moses*, 13 NY3d 816, 818 [2009] [noting such rule as even been considered "the least controversial in the

law of evidence"]), the Court declines to do so at the present time for administrative and judicial efficiency. The insurance claim against Defendant Utica First shall continue herein until the time of trial, where the two claims for personal injury and impleader will be severed and tried separately.

After service of notice of entry of this decision and order on Defendant Utica First, Utica First shall serve an answer within the time afforded by the CPLR.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic.

Thereby, it is hereby

ORDERED that Third Party Defendant Utica First Insurance Company's motion is **GRANTED**, in part, only to the extent that the Court will sever the insurance claim at the time of trial, and all other relief is **DENIED**, in its entirety; and it is further

ORDERED that the Court declines to issue a declarative judgment as explained above.

This constitutes the Decision and Order of the Court. Please note that a copy of this Decision and Order along with the original motion papers are being filed by Chambers with the County Clerk. The original Decision and Order is being returned to the prevailing party, to comply with CPLR R. 2220. Counsel is not relieved from the applicable provisions of this Rule with regard to filing, entry and Notice of Entry.

IT IS SO ORDERED.

DATED: May 25, 2017
Catskill, New York

ENTER:

HON. LISA M. FISHER
SUPREME COURT JUSTICE

Papers Considered:

1) Notice of motion to dismiss, dated August 26, 2016; affirmation in support, of Sherri N. Pavloff, Esq., with annexed exhibits, dated August 26, 2016; memorandum of law, dated August 26, 2016;
2) Affirmation in opposition, of Joseph Napoli, Esq., with annexed exhibits, dated September 12, 2016;
3) Answering affirmation, of Joseph H. Warren, Esq., with annexed exhibits, September 19, 2016;
4) Reply affirmation, of Sherri N. Pavloff, Esq., with annexed exhibits, dated October 6, 2016;
5) Supplemental affirmation, of Sherri N. Pavloff, Esq., dated March 1, 2017;
6) Attorney's affirmation in further opposition, of Craig Phemister, Esq., and March 15, 2017; and
7) Supplemental answering affirmation, of Joseph H. Warren, Esq., with annexed exhibits, dated March 16, 2017.