SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Adam Silvera Part 22

YVONNE GARRETT,

Plaintiff,

-against-

DANTE CAPOZZOLI and PIMS NEW YORK, INC., SDS GLOBAL LOGISTICS, INC., SDS COURIER CORP And SDS TRANS INC.,

Defendant.

DECISION/ORDER

INDEX NO. 158463/2013
MOTION SEQ NO 001

ADAM SILVERA, J. :

Upon the foregoing papers, it is ordered that defendant Pims New York, Inc.'s (hereinafter "Pims") motion for summary judgment is granted for the reasons set forth below. Pims moves for summary judgment on the issue of liability and dismissal of all claims and counter claims as against it, pursuant to CPLR 3212, on the grounds that it cannot be held vicariously liable for the negligent acts of an independent contractor and is not liable for negligent hiring, retention, supervision, or training. Plaintiff opposes the motion.

BACKGROUND

Plaintiff alleges that, on September 9, 2012, plaintiff Yvonne Garret, a pedestrian walking on West 12th Street at its intersection with 5th Avenue in the City, County and State of New York, was injured when she was struck by a motor vehicle operated by defendant Dante Capozzoli, a courier. Plaintiff filed suit against Capozzoli as sole defendant on or about September 17, 2013 filed under Index No. 158463/2013. Thereafter plaintiff commenced a second action against Pims on or about September 30, 2014. A third separate action was

commenced by plaintiff against SDS Global Logistic Inc. on September 30, 2014. The first two actions were consolidated by the Honorable Shlomo Hagler by Order dated February 9, 2015 into *Garret v. Capozzoli* and PIMS New York, Inc. Index No. 158463/2013. Thereafter the consolidated action was consolidated with the action of *Garret v SDS Global Logistics, Inc. et al.* by the Honorable Leticia M. Ramirez by Order dated November 29, 2016.

Plaintiff alleges that the accident occurred due to Capozzoli's carelessness and negligence while under the employ of Pims. Capozzoli testified that at the time of the accident, he had a green light, and made a right hand turn on to Fifth Avenue when he heard an impact and subsequently saw blood on the street and plaintiff lying nearby the vehicle (Dfdnts Mot., Exh F at 37).

Plaintiff alleges that Pims is vicariously liable for the actions/inactions of Capozzoli and was negligent in its retention, supervision, or training of Capozzoli, whom plaintiff alleges is an employee of Pims. Capozzoli testified that he was carrying out either a pick up or drop off for Pims at the time of the incident (*id.* at 8). Pims denies any fault or negligence, carelessness or, recklessness regarding the incident and refutes the allegation that Capozzoli is an employee.

DISCUSSION

Pims' motion for summary judgment seeks to dismiss the complaint for a lack of triable issue of fact. Pims argues that it cannot be held vicariously liable for the negligent acts of Capozzoli, whom it alleges, is an independent contractor.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the

burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure … to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

Vicarious Liability of an Employee

An employer is generally liable for the negligent acts of its employees (*Kleeman v Rheingold*, 81 NY2d 270, 273 [1993] [finding "that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts"]). Labor Law article 6 defines "employee" as "any person employed for hire by an employer in any employment" (Labor Law § 190 [2]). This definition excludes independent contractors, and the determination of whether an employee-employer relationship exists depends on evidence that the employer exercises either control over the results produced or over the means used to achieve the results (*See 12 Cornelia St., Inc. v Ross*, 56 NY2d 895, 897 [1982]). Though both control over the results produced and over the means used to achieve the results are considered, "control over the means is the more important factor to be considered" (*Matter of Ted is Back Corp.*, 64 NY2d 725, 726 [1984] [finding that "incidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship").

The Court of Appeals has found that "factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule" (*Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]). "Where the proof on the issue of control presents no conflict in evidence or is undisputed, the matter may properly be determined as a matter of law" (*Barak v Chen*, 87 AD3d 955, 957 [2d Dep't 2011] [internal

quotation marks and citation omitted]).

In *Carrion v Oribit Messenger, Inc.* (82 NY2d 742, 744 [1993]), the Court of Appeals found that the defendants, were not entitled to judgment as a matter of law, because plaintiff demonstrated that the driver in question worked exclusively for the defendant, was supplied with workers' compensation insurance by defendant, was required to use defendant's name and forms while working and was given a check cashing card which described the driver as an employee. Further, the First Department has affirmed that drivers are independent contractors where drivers, are not required to wear a uniform, own and maintain their own vehicles, pay for their own automobile insurance, decide what days and hours to work, break when they want, and are issued 1099 rather than provided with W-2 statements (See *Chaouni v Ali*, 105 AD3d 424, 425 [1st Dep't 2013]).

Defendant has made a prima facie showing that Capozzoli is not an employee but rather an independent contractor. While Pims may have control over directing where couriers should deliver packages, it has shown that it did not control the means by which Capozzoli completed said deliveries. In addition to having stated himself that he was an independent contractor at the time of the incident, Capozzoli, meets the five factors laid out by the Court of Appeals in *Bynong v Cipriani* (Dfdt's Mot., Exhibit G, 17). Capozzoli (1) worked at his own convenience, (2) was engaged in work as a driver for SDS Logistics, another company, (3) did not receive any health insurance or pension benefits, (4) was not on the employer's payroll and (5) was not on a fixed schedule (*id.* At 9, 13-14, 18, 19).

Capozzoli did not wear a uniform or outwardly present the Pims name. In fact, his truck is affixed with a logo bearing his own initials, with no mention of Pims. The vehicle in question was owned and insured by Capozzoli and not Pims. Pims and Capozzoli had no written

agreement for the work performed (*id.* at 9). Control over the means used to achieve the results is further demonstrated by Capozzoli's testimony that he determined his own routes for deliveries, decided the days he would work and the days he would take off (*id.* at 12).

Pims further highlights that Capozzoli, like the drivers in *Chaouni*, was merely issued 1099 rather than W – 2 statements (Pltf's Aff in Supp, ¶9). Defendant has demonstrated that there is no conflict of evidence as to whether Capozzoli is an independent contractor. Thus, the matter may properly be determined as a matter of law such that Pims cannot be found vicariously liable for Capozzoli's alleged negligence.

Negligent hiring, retention, supervision or training

Plaintiff argues that even if Capozzoli is an independent contractor, Pims' motion to dismiss should nonetheless be denied because plaintiff's claims for negligent hiring, retention, supervision or training of Capozzoli should survive. Plaintiff alleges that Pims failed to satisfy its initial burden as the motion for summary judgment does not address said claims. However, Pims' motion seeks the dismissal of all of plaintiff's claims against it, and the court may consider all the papers and evidence in making its determination.

While an employer is not liable for the torts of an independent contractor, a claim for negligent hiring, retention, supervising or training may proceed where the hiring party knew or should have known about the tort-feasors propensity for the type of conduct which caused the injury (*Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dep't 2004] [finding that plaintiff's cause of action for negligent hiring and retention should have been dismissed where plaintiff's complaint was devoid of allegations concerning such propensity and knowledge thereof, and, "in the face of defendants' motion to dismiss the complaint, plaintiff opted not to make any additional submissions to cure these deficiencies"). Several exceptions exist to the general rule

against vicarious liability for independent contractors. "These exceptions, most of which are derived from various public policy concerns fall roughly into three basic categories: negligence of the employer in selecting, instructing, or supervising the contractor; employment for work that is especially or "inherently" dangerous, and finally, instances in which the employer is under a specific nondelegable duty" (*Kleeman* 81 NY2d at 274 [internal citations omitted]).

Here, plaintiff mistakenly relies on the deposition of Pims chief financial officer and treasurer, Jeffrey Milano, to demonstrate that Milano's lack of knowledge as to the details of Capozzoli's credentials amounts to negligent hiring, retention, supervising or training. Plaintiff asserts that Pims should have knowledge of and ensure whether it's "couriers possess the proper licenses, do not have a poor driving history, and are adequately insured (Pltf's Aff in Opp at 3, ¶ 10). Defendant driver indeed did not have a commercial driver's license, lacked a commercial insurance policy, and had a policy of only $100,000 (*id.* at 4, ¶¶17-18). However, plaintiff has failed to demonstrate any past incidents involving defendant driver or any such propensity that defendant Pims would have or should have known about. In fact, Pims has provided Capozzoli's testimony, in which he states that it is a "fair estimate" to that he has driven the route on which the accident occurred about 1,700 times prior to the incident. (Dfdnts Mot., Exh F at 21, ¶¶ 18-24). Absent allegations concerning such propensity and knowledge thereof, plaintiff fails to demonstrate negligent hiring and retention. Further, plaintiff has not shown that Pims had a nondelegable duty and has failed to provide evidence Capozzoli's work, driving as a courier, was especially or inherently dangerous.

Conclusion

Pims has made a prima facie showing that there is no question of fact as to Capozzoli's status as an independent contractor and that Pims was not negligent in its hiring, retention,

supervising or training. Thus, Pims' motion for summary judgment is granted on the issue of liability and to dismiss all claims and counter claims against Pims.

Accordingly, it is

ORDERED that the motion of defendant Pims New York, Inc. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon the remaining defendants with notice of entry.

This constitutes the Decision/Order of the Court.

Dated: 4/12/18

ENTER:

Hon. Adam Silvera, J.S.C.