Feimer v Antonio's Car Serv.
2018 NY Slip Op 32505(U)
October 3, 2018
Supreme Court, New York County
Docket Number: 150990/2017
Judge: Adam Silvera

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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VANESSA FEIMER,

Plaintiff,

- v -

ANTONIO'S CAR SERVICE, ANTONIO'S CAR & LUXURY TRANSPORTATION CORP., PARK WEST EXECUTIVE SERVICES, INC. D/B/A TOWN CAR INTERNATIONAL, TOWN CAR INTERNATIONAL NETWORK, LLC,JOSE CUZCO, ADEL MINA

Defendant.

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INDEX NO. 150990/2017

MOTION DATE 08/15/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendant Park West Executive Services, Inc. d/b/a Town Car International's (hereinafter "Park") motion for summary judgment in favor of defendant and to dismiss all claims and cross-claims against Park on the grounds that Park did not employ the driver of a vehicle and did not own or maintain the vehicle that was involved in a motor vehicle accident which occurred on December 27, 2014, at the intersection of East 40th Street and Lexington in the County, City, and State of New York when a vehicle operated by Jose O. Cuzco and allegedly owned Cuzco, Antonio's Car Service, and Antonio's Car & Luxury Transportation Corp. collided with a vehicle operated by defendant Adel M. Mina that was transporting plaintiff Vanessa Feimer and led to her serious injury is granted. The decision and order are as follows:

"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]).

"An employee is someone who works for another subject to substantial control, not only over the results produced but also over the means used to produce the results. A person who works for another subject to less extensive control is an independent contractor" (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] citing *Matter of Hertz Corp.*, 2 NY3d 733, 735 [2004]; *Matter of Charles A. Field Delivery Serv.*, 66 NY2d 516, 521 [1985]). The Court of Appeals has found that "incidental control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship" (*Matter of Ted is Back Corp.*, 64 NY2d 725, 726 [1974]). In *Bynog v Cipriani Group, Inc.*, 1 NY3d 193, 198 [2003] the Court of Appeals listed five "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."

The Appellate Division First Department has found that taxi drivers are independent contractors and not considered employees where the "drivers own their own vehicles, were responsible for the maintenance thereof, paid for the insurance, and had unfettered discretion to determine the days and times they worked, with no minimum or maximum number of hours or days imposed by [the dispatcher]" (*Chaouni v Ali*, 105 AD3d 424, 425 [1st Dept 2013] [finding that the independent contractor relationship was demonstrated by the lack of a uniform requirement or dress code, driver discretion of when to work, the ability to work from other

livery base stations, receipt of a percentage of all fares and 100% of all tips by drivers, not withholding taxes and the issuance of 1099 forms not W-2 forms]).

Here, Park argues that the driver, defendant Mina was not an employee of Park but instead an "Independent Owner Operator" (hereinafter "IOO). Defendants provide the affidavit of Seth Berman, the Executive Vice President and General Counsel of Park who affirms that Park "does not own any of the vehicles used to transport the customers, nor does it lease any such vehicles. Instead, the IOOs own their vehicles. The IOOS are responsible for the maintenance of those vehicles, and all expenses associated with their vehicles, such as gasoline, EZ pass, insurance and workers compensation coverage . . . the IOOs, furthermore are free to accept or decline any booking . . . free to work as many or as few days and hours as they choose" (Mot, Exh K, ¶¶ 3-4). Further, Berman affirms that IOOs receive a percentage of the taxi fares and receives no salary from Park (*id.*, ¶ 6). Defendants attach an agreement between Park and IOO which specifically notes that the IOOs act "as independent contractors" in addition to listing the liberties and responsibilities each IOO has as delineated in the Berman affidavit (Mot, Exh L).

In opposition plaintiff's claim that defendants' motion is premature. Plaintiff's state that further discovery is necessary before the court can make a determination as to whether the driver is an independent contractor. Plaintiff's argument hinges on the possibility of the actual practice of the parties involved to be different than that delineated in the agreement Park has with its IOOs. Plaintiff believes that depositions are necessary to come to such a determination and that not being afforded the opportunity to do so before summary judgment would be prejudicial.

Plaintiff's opposition fails to raise another argument and provide any evidence as to the existence of an employer/employee relationship. The First Department permits parties to move

for summary judgment before depositions are held and the "mere hope" that further evidence may be uncovered through discovery is insufficient to defeat a motion for summary judgment (*Turner v ISR Solutions*, — Misc 3d —, 2005 NY Slip Op 51302 [1st Dept 2005] citing *Jones v Gameray,* 153 AD2d 550, 551 [2nd Dept 1989]). Absent any evidence that discovery will lead to evidence that will trump defendants' affidavit and attached IOO agreement, plaintiff's opposition relies merely on the hope that further evidence exists.

Plaintiff has demonstrated that defendant Adel M. Mina owns the vehicle involved in the incident, is responsible for the maintenance thereof, paid for the insurance, and had unfettered discretion to determine the days and times that he worked, with no minimum or maximum number of hours or days imposed by Park. Defendant Mina received a percentage of fares collected by Park and was responsible for his own taxes. Mina was free to work for other companies, was not provided with any benefits, paid for his own insurance, paid for his own EZ pass and insurance. Finally, in accordance with the Bynog test, Park has demonstrated that defendant Mina (1) worked at his own convenience, (2) was free to engage in other employment, (3) received no benefits, (4) was not on the employer's payroll and (5) was not on a fixed schedule. Thus, Park has made a prima facie showing of entitlement to judgment as a matter of law and tendered sufficient evidence that no issue of fact exists as to whether defendant Mina was an independent contractor. Park has demonstrated that did not own, maintain or control the vehicle involved in the underlying incident and thus has no liability for the motor vehicle accident. Thus, the Complaint, all claims, and cross claims are dismissed as against defendants Park West Executive Services, Inc. d/b/a Town Car International.

Accordingly, it is

ORDERED that the motion of defendants Park West Executive Services, Inc. d/b/a Town Car International to dismiss the complaint, all claims and cross-claims herein is granted and the

complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; 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.

ORDERED that within 30 days of entry, defendants Park West Executive Services, Inc. d/b/a Town Car International shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

10/3/18
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE