

**Commissioners of State Ins. Fund v NY Minute Mgt.
Corp.**

2014 NY Slip Op 31103(U)

April 21, 2014

Supreme Court, New York County

Docket Number: 402625/09

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN A. MADDEN

PART 11

Justice

COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

INDEX NO. 402625/09

MOTION DATE _____

MOTION SEQ. NO. 006

- v -

NY MINUTE MANAGEMENT CORP,

Defendant.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ORDERED that *The motion is determined in accordance with the annexed decision and order.*

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COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 21, 2014

[Signature]
JOAN A. MADDEN J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
COMMISSIONERS OF THE STATE
INSURANCE FUND,

Plaintiff,

- against -

INDEX NO. 402625/09

NY MINUTE MANAGEMENT CORP. and
NY MINUTE MESSENGER, INC.

Defendants.
-----X

FILED

APR 30 2014

JOAN A. MADDEN, J.:

COUNTY CLERK'S OFFICE
NEW YORK

In this action for nonpayment of workers' compensation insurance policy premiums, defendants NY Minute Management Corp. and NY Minute Messenger, Inc. (together, NY Minute) move for summary judgment and dismissal of the State Insurance Fund's (SIF) complaint pursuant to CPLR 3212. The motion is granted in full.

The following facts are undisputed. NY Minute is a delivery company which directly employs bike and foot messengers, and hires car and truck drivers on an as needed basis from staffing agencies.¹ The drivers who make deliveries for NY Minute use their own vehicles, and pay for the insurance, gas and repairs on those vehicles. The drivers are not paid by NY Minute, nor provided with tax documents, do not receive a regular salary, do not maintain regular hours, and are free to work for other delivery companies. The drivers are not provided with sick leave, retirement plans or unemployment insurance. NY Minute provides the drivers with radios for the

¹ NY Minute had a workers' compensation policy with the SIF for the foot and bike messengers, until it was terminated for nonpayment on July 14, 2008, due to the instant controversy.

dispatcher to contact them regarding available jobs. The drivers are also provided with a NY Minute shirt, though they are not required to wear the shirts in the course of their duties.

NY Minute contracted with NICA, Inc. (NICA), a staffing and payroll company, to provide it with drivers, and to pay the drivers after completion of a delivery. The drivers sign an agreement with NICA, which specifically recites that the drivers are independent contractors who are not entitled to a pension or health insurance. The contract includes occupational and disability coverage, as well as a death and dismemberment benefit. NICA does not automatically withhold taxes from the driver's paychecks, and annually issues each driver an IRS form 1099.

On April 15, 2008, SIF sent a letter to NY Minute stating that they would be adding a charge to their workers' compensation coverage to include the drivers, on the grounds that the drivers were uninsured subcontractors. On May 7, 2008, the president of NY Minute, Brendan McNulty, faxed a copy of a workers' compensation policy for the drivers held by NICA, to SIF. On May 13, 2008, SIF replied by letter, stating that because NICA's workers' compensation policy was not recognized by the New York Workers' Compensation Board, nor by the New York Insurance Rating Board, the charge would remain. SIF further stated that unless it was presented with a policy for NICA which included an endorsement for New York, they would not consider removing the charge. On June 10, 2008, NY Minute's attorney, Wayne Baden, replied by letter, stating that the drivers are independent contractors, and thus not entitled to workers' compensation coverage. NY Minute did not pay the charge; and on July 14, 2008, SIF cancelled NY Minute's workers' compensation policy.

[* 4]

On October 16, 2009, SIF commenced the instant action, seeking \$359,981.34 in unpaid premiums and \$79,195.89 in collection costs, pursuant to New York Financial Law § 18, and interest at the statutory rate from July 14, 2008. After discovery, SIF reduced its claim for unpaid premiums to \$243,319.67.

In support of the motion, NY Minute argues that the drivers are not employees, but independent contractors who are not covered by the Workers' Compensation Law, and thus, the court should grant summary judgment dismissing the complaint. SIF opposes, arguing that NY Minute has not established as a matter of law that the drivers are independent contractors, that NY Minute is responsible for covering uninsured employees of NICA pursuant to Workers' Compensation Law §56, and that material issues of fact exist.

"The terms 'employee' and 'independent contractor' are familiar ones, and their definitions are well known. Broadly speaking, 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 [internal citations omitted]." (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006]). In order to prevail on their motion, NY Minute must first make a showing that the drivers are independent contractors, who are outside the ambit of the Workers' Compensation Law.² Even if NY Minute makes such a showing, SIF may defeat the motion by presenting

² The parties do not dispute "that independent contractors are not employees covered by the Workers' Compensation Law" (*Commissioners of State Ins. Fund v Fox Run Farms*, 195 AD2d 372, 374 [1st Dept 1993]).

* 5
“admissible evidence showing the existence of a triable issue of fact or a defense warranting denial of summary judgment” (*Plantamura v Penske Truck Leasing*, 246 AD2d 347, 348 [1st Dept 1998]).

“Two distinct tests have been devised for determining whether an employer/employee relationship exists. Both have been used independent of each other in the past, but the recent trend has been for the courts to employ a combination of the factors in both tests when confronted with workers' compensation questions.” (*Commissioners of State Ins. Fund v Lindenhurst Green & White Corp.*, 101 AD2d 730, 731 [1st Dept 1984]). The first test is the common-law “control” test,” which assesses four factors: 1) direct evidence of the owner's right to or exercise of control; 2) the method of payment; 3) the extent to which the owner furnishes equipment; and 4) whether the owner retains the right to discharge. (*id.*) The second test is the “relative nature of work test,” which analyzes the following factors: 1) the character of the claimant's work; 2) how much of a separate calling the work is from the owner's occupation; 3) whether the work is continuous or intermittent; 4) whether the work is expected to be permanent; 5) its importance in relation to the owner's business; and 6) its character in relation to whether the claimant should be expected to carry his own accident insurance burden. (*id.*)

Applying factors of both tests, in the recently decided case of *Chaouni v Ali* (105 AD3d 424 [1st Dept 2013]), the First Department held that drivers for a limousine service were independent contractors;

Dial 7 submitted a host of evidence showing that it did not control the method or means by which Ali's work was to be performed. The undisputed evidence showed that Dial 7's 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 Dial 7. Dial 7 does not require its drivers to wear a uniform nor does it have a dress code, and its drivers are free to accept or reject any dispatch as they like, can take breaks or end their shifts whenever they want, and are even permitted to work for other livery base stations. Dial 7's drivers kept a fixed percentage of all fares and 100% of all tips, and Dial 7 did not withhold taxes and issued 1099 forms, not W-2 forms, to its drivers.

(*id.* at 425 [internal citations omitted]). These facts are nearly identical to the instant action, though the drivers in *Chaouni* were subjected to a higher degree of control, since they were paid directly by Dial 7, received a 1099 from Dial 7, and were required to have their vehicles inspected by Dial 7.

Other decisions supporting this holding include *Barak v Chen* (87 AD3d 955 [2d Dept 2011]) and *Abouzeid v Grgas* (295 AD2d 376 [2d Dept 2002]); in both of these actions identically situated drivers for limousine companies were found to be independent contractors. The primary distinction between the drivers in *Chaouni*, *Barak*, *Abouzeid*, and the instant action, is that the drivers were transporting passengers, not packages; this is not a factor in the employee/independent contractor analysis. In light of the foregoing, the court finds that NY Minute has made a prima facie showing that the drivers are independent contractors.

The burden now shifts to SIF to demonstrate that an issue of material fact exists. In view of the court's determination that NY Minute's drivers are independent contractors, SIF's argument that NY Minute is responsible for covering the drivers as uninsured employees is untenable.

As to the applicability of Workers' Compensation Law § 56, that section provides, in relevant part, as follows: "A contractor, the subject of whose contract is, involves or includes a

hazardous employment, who subcontracts all or any part of such contract shall, in any case of injury or death to any employee, arising out of and in the course of such hazardous employment, be liable for and pay compensation to such employee . . . unless the subcontractor primarily liable for such compensation . . . has secured compensation therefor for as provided in this chapter.”

The plain language of section 56 states that it is applicable to employees of subcontractors. Here, while NY Minute subcontracted with NICA to supply drivers, SIF fails to raise a triable issue of fact that the drivers are employees of NICA, so as to establish the applicability of section 56 (*see Johnson v Briggs*, 34 AD2d 1068 [3rd Dept 1970]).

SIF also argues that a material issue of fact exists regarding the extent of control over the means of delivery. This argument is premised on what is characterized as a conflict between Mr. Baljinder’s deposition, and the affidavit of another driver, Onkar Singh. As reflected on page 60 of his August 29, 2012 deposition, Mr. Baljinder testified that the customer directed when, where and how to deliver the packages, and that if there were no detailed instructions, and no obvious place to drop off the package, he would call NY Minute for further instruction: “[W]e call New York Minute, ‘okay, here’s the situation. He’s not answering the doorbell. What to do?’” SIF argues that this is in conflict with ¶ 18 of the Singh affidavit, dated April 1, 2013, which states “I was merely required to follow the client’s instructions and deliver the package at the set location at or before the appointed time.”

Mr. Baljinder’s testimony demonstrates nothing more than “mere incidental or ‘general supervisory control’ that does not rise to the level of an employer-employee relationship [internal citations omitted]” (*Chaouni* at 435). As a matter of law, basic instructions regarding delivery

cannot give rise to a material issue of fact; "defendant Tri-State cannot be said to exercise sufficient control over the delivery and distribution of newspapers by Mr. Andrews to raise a triable issue of fact The requirement imposed by the agreement that newspapers be delivered by a certain hour does not create an employer-employee relationship" (*Santella v Andrews*, 266 AD2d 62, 63 [1st Dept 1999]).

Thus, since SIF has failed to establish a material issue of fact, NY Minute is entitled to summary judgment dismissing the complaint.

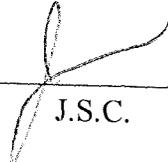
Accordingly it is,

ORDERED that the motion by defendants NY Minute Management Corp. and NY Minute Messenger, Inc. for summary judgment is granted and the complaint in its entirety is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 2, 2014

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J.S.C.

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