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

PRESENT: CAROL E. HUFF PART 32

0104536/1999

SMITH, TEDDY
VS
21 WEST LLC LIMITED LIABILITY

SEQ 4

DISMISS ACTION

INDEX NO. _____

MOTION DATE 2/15/05 (25)

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, ~~it is ordered that this motion~~

motion is decided in accordance

with accompanying memorandum decision

FILED
JUL 14 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: JUL 05 2005

CAROL E. HUFF J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

----------X

TEDDY SMITH and SARA SMITH, : Index No. 104536/99

Plaintiffs, :

- against - :

21 WEST LLC LIMITED LIABILITY COMPANY and BRAVA DEMOLITION CORP., :

Defendants. :

----------X

CAROL E. HUFF, J.:

In this action relating to workplace injuries, plaintiffs were granted partial summary judgment as to liability (308 AD2d 312), and a trial was held to determine damages. Defendant Bravo Demolition Corp. moved (seq. no. 004), first, to dismiss plaintiffs' complaint and defendant 21 West LLC's cross-claims on the ground that, because Smith was allegedly Bravo's special employee, the claims against it are barred by the Worker's Compensation Law; and, second, to dismiss 21 West's cross-claim for contractual indemnification or common law contribution on the ground that the contract was never executed. Following the damages trial, a framed issue hearing was held February 23, 2005, to determine Bravo's motion.

Bravo contends that plaintiff Teddy Smith was its special employee and therefore plaintiffs cannot have a recovery from it in excess of his Workers' Compensation award. At the framed issue hearing, no witnesses with knowledge of the facts of Smith's employment were produced by either side. The relevant documentary evidence with respect to Smith's employment status was submitted.

Pursuant to a construction contract between defendant 21 West LLC and Bravo, dated October 8, 1996, relating to property located at 21 West Street, New York, New York (the contract was not executed by the parties), Bravo hired non-party City Operating Corp. to work on the project along with Bravo. Bravo and City Operating are undisputedly separate entities. However, Bravo owner Nick Verna testified at his deposition that the two companies worked together as joint venturers and contemplated a merger. At the job site, Bravo and City Operating worked cooperatively, sharing employees and equipment as needed. (Verna 12/12/00 Dep., pp. 26-27.)

Smith testified at his deposition that he did not know which company he worked for, that a union representative simply called and told him to report to the 21 West job site. (T. Smith 11/8/00 Dep. at p. 59.) Bravo owner Verna testified that Smith was an employee of City Operating, but that he (Verna) had the power to fire him. (Verna Dep., p. 58.) 21 West contends that W-2's indicate that Smith was paid by City Operating. The W-2's are not in evidence, but Bravo does not dispute the allegation.

Smith's union "Member Work History" indicates that he was employed by Bravo. The Worker s' Compensation carrier issued an award to him, listing his employer as "City Operating d/b/a Bravo Demolition." Smith's health insurance claim form lists the insured as "City Operating Corp.," and lists City Operating's address as "Bravo Demolition." The insurance policy procured pursuant to the construction contract lists the insured as "Bravo Demolition Corp. &`/or City Operating Corp."

A plaintiff has the burden of proof in alleging noncoverage with respect to general employment (Murray v City of New York, 43 NY2d 400, 407 [1977]). A defendant raising the

affirmative defense of special employment, however, must overcome the presumption of general employment with a "clear demonstration of surrender of control by the general employer and assumption of control by the special employer." Mitchell v Grumman Aerospace Corp., 78 NY2d 553, 557 (1991). Factors for a court to consider with respect to special employment include "the right to control, the method of payment [of wages], the furnishing of equipment, the right to discharge, and the relative nature of the work [and] who controls and directs the manner, details, and ultimate result of the employee's work." Martin v Baldwin Union Free School Dist., 271 AD2d 579, 580 (2d Dept 2000).

Although Bravo, through the deposition of owner Verna, makes some allegations regarding relevant factors of Smith's employment, these allegations do not amount to a "clear demonstration of surrender of control" on the part of City Operating. Bravo also does not meet its burden of demonstrating the existence of a joint venture. See Williams v Forbes, 175 AD2d 125 (2d Dept 1991).

Accordingly, Bravo's motion seeking dismissal of claims against it on the ground that Smith was its special employee is denied.

Bravo also moves to dismiss 21 West's claims against it for common law contribution and indemnification. With respect to common law contribution, Bravo argues that it was not involved in the project to a sufficient degree to invoke liability. See Navaez v 4518 Assocs., 250 AD2d 436 (1st Dept 1998). However, its arguments and evidence in support of Bravo's claim of being Smith's special employer, while not enough to prove special employment, are sufficient to establish Bravo's significant role at the worksite.

With respect to contractual indemnification, Bravo contends that because the

construction contract was not executed, there was no enforceable "written contract" that could provide a basis for an obligation to indemnify.

Following the framed issue hearing, the Court of Appeals decided a case that addresses this issue squarely. In Flores v The Lower East Side Service Center, 4 NY3d 363 (2005), the Court analyzed whether the "written contract" provision in Workers' Compensation Law § 11 requires a signed agreement. Like Bravo, the contractor in that case was seeking a finding that it was not obligated to indemnify the owner of the property for a workplace injury because the construction contract was not executed. The Court found that "the common-law rule – which authorizes review of the course of conduct between the parties to determine whether there was a meeting of minds sufficient to give rise to an enforceable contract – governs the validity of a written indemnification agreement under Workers' Compensation Law § 11." Id. at 369-70. In Flores, where the work specified was performed and payments were made in conformity with the contract, failure to execute the contract did not relieve the contractor of its duty to indemnify the property owner.

Here, the deposition testimony of Bravo's owner establishes that Bravo performed work pursuant to the contract, and 21 West has submitted evidence that it made payments to Bravo pursuant to the contract in 1996 and 1997. The motion is denied.

Accordingly, it is

ORDERED that Bravo's motion, first, to dismiss plaintiffs' complaint and defendant 21 West LLC's cross-claims, and, second, to dismiss 21 West's cross-claim for contractual indemnification or common law contribution is denied.

Dated: JUL 0 5 2005

CAROL E. HUFF
J.S.C.