Anikushina v Moodie

2007 NY Slip Op 32433(U)

July 19, 2007

Supreme Court, New York County

Docket Number: 0117618/2003

Judge: Deborah A. Kaplan

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SCANNED ON 8/7/2007

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

PRESENT: Hon. Deborah A. Kaplan, *Justice* PART 22

NATALIA ANIKUSHINA

INDEX NO. 117618-03

MOTION DATE

- v -

MOTION SEQ. NO. 008 ~~010~~

COURTNEY D. MOODIE, CONSOLIDATED DELIVERY LOGISTICS, INC., CDL INC., OLYMPIC COURIER SYSTEMS, INC., CDL (NEW YORK) LLC and CLICK MESSENGER SERVICE INC.,

MOTION CAL. NO. 8

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

See attached memorandum decision.

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

FILED
AUG 07 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 19, 2007

Deborah Kaplan
DEBORAH A. KAPLAN J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTRY OF NEW YORK : IAS PART 22
--X
NATALIA ANIKUSHINA,

Plaintiff,

-against-

Index No. 117618/03

COURTNEY D. MOODIE, CONSOLIDATED DELIVERY LOGISTICS, INC., CD&L INC., OLYMPIC COURIER SYSTEMS, INC., CDL (NEW YORK) L.L.C. and CLICK MESSENGER SERVICE, INC.,

Defendants.
--X

FILED
AUG 07 2007
COUNTY CLERK'S OFFICE
NEW YORK

DEBORAH KAPLAN, J.:

Motion sequence numbers 008 and 010 are consolidated for disposition.

In motion sequence number 008, defendants Consolidated Delivery Logistics, Inc., CD&L, Inc., Olympic Courier Systems, Inc. (Olympic), CDL (New York) L.L.C. and Click Messenger Service, Inc. (Click)(collectively, the corporate defendants), move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint as against them. Plaintiff Natalia Anikushina (Anikushina) cross-moves for an order granting her leave to renew the decision of the court dated January 9, 2006, denying her request that the court strike the corporate defendants' denial of paragraphs 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, and 18 of plaintiff's Second Amended Complaint, and on reconsideration, granting her motion to strike those denials.

In motion sequence number 010, the corporate defendants

move, pursuant to CPLR 3103, for an order striking plaintiff's notice to admit.

This action results from an automobile accident which occurred on August 1, 2003. Plaintiff alleges that a van driven by defendant Courtney D. Moodie (Moodie) struck her as she was attempting to cross King Street in Manhattan, seriously injuring her. In her original complaint, plaintiff sued only Moodie. Plaintiff amended her complaint, adding Consolidated Delivery Logistics, Inc. as a defendant. Then, on or about December 22, 2003, plaintiff again amended her complaint, adding as defendants, CD&L, Inc., Olympic, CDL (New York) L.L.C., and Click (Second Amended Complaint).

In her Second Amended Complaint, plaintiff alleges, among other things, that the various corporate defendants maintained offices and conducted business in New York; that Moodie was an employee of the various defendants; that the corporate defendants owned the van that Moodie was driving when he hit plaintiff; and that at the time of the accident, Moodie was operating the vehicle with the consent of the corporate defendants and within the scope of his employment. Plaintiff further alleges that there is an overlap in the ownership, officers, directors and personnel of the various corporate defendants. Finally, plaintiff alleges that Moodie negligently and recklessly operated his vehicle when he struck plaintiff, and that the corporate

[* 4]

defendants were negligent in permitting Moodie to operate his vehicle in such a manner.

The corporate defendants move for summary judgment dismissing the claims against them on the basis that at the time of the accident, Moodie was an independent contractor, for whom the corporate defendants are not liable, rather than an employee of any of the corporate defendants. The corporate defendants further contend that, even assuming that Moodie were an employee, he was employed by Olympic, which is a fully owned subsidiary of CD&L, Inc. (previously known as Consolidated Delivery Logistics), and not the other corporate entities named as defendants.

In support of their argument that Moodie was an independent contractor, the corporate defendants submit the following evidence:

Moodie performed work pursuant to an independent contractor agreement with Olympic (*see* Independent Contractor Agreement, dated 1/1/02, Exh. O to Motion for Summary Judgment; *see also* Moodie Affidavit ¶ 1, Exh. N to Motion for Summary Judgment);

Moodie owned his own car (*see* Moodie's answer to plaintiff's first amended complaint and his denials in answer to second amended complaint; Moodie Affidavit, *supra*, ¶ 4; Moodie's statement on the date of the accident, August 1, 2003, Exh. P to Motion for Summary Judgment; and Moodie's statement to his insurance company, Moodie Deposition, Exh. J to Motion for

Summary Judgment, at 164, l. 2-8);

Moodie's car did not advertise Olympic or CD&L (*see* Moodie Deposition, *supra*, at 221, l. 13-19;

By the terms of his independent contractor agreement, Moodie was responsible for the costs of his car, including gas, insurance, and registration (*see* Independent Contractor Agreement, *supra*, Section 2; Moodie Deposition, *supra*, at 222, l. 20-25, and 223, l. 1-30);

Moodie was responsible to, and did, pay his own taxes (Independent Contractor Agreement, Section 12) and Olympic did not withhold Federal, State, Local, Social Security, or Medicare taxes from Moodie's pay (1099's for 2001, 2002 and 2003, Exh. R to Motion for Summary Judgment);

Moodie was free to decide his own route for deliveries (*see* Independent Contractor Agreement, *supra*, Section 3 ["Contractor understands that, except as provided in paragraph 6 below, there are no specific routes or territories assigned to Contractor and that it is Contractor's responsibility to determine the most efficient routes for the delivery of shipments contracted for by Contractor"]; Moodie Deposition, *supra*, at 58, l. 11-18 ["you listen to the radio, there can be an accident on the L.I.E., there could be snow, rain - but basically, I go straight down the L.I.E. It's slow, but there's no other way that makes sense]);

Moodie was free to accept or reject regularly scheduled

deliveries and may work for other companies (*see* Independent Contractor Agreement, *supra*, Section 9 (b)["The Company may, from time to time, make available certain jobs requiring deliveries. The Contractor has the right to accept or reject these offers as he/she sees fit"]; Section 6 [re special assignments - "Contractor and Company agree that acceptance of such assignments shall be at the sole and absolute discretion of Contractor"]); and had a flexible work schedule (Moodie Deposition, *supra*, at 24, l. 6-25);

Moodie paid for the telephone (Moodie Deposition, *supra*, at 29, l. 10 - 20, 30, l. 5-17) and radio (*see* Radio Leasing Agreement, Exh. T to Motion for Summary Judgment) which he used to communicate with dispatchers;

Moodie was paid on a commission basis (Moodie Deposition, *supra*, at 59, l. 2-4);

Moodie got a bonus for wearing the CD&L shirt, which he paid for (Moodie Deposition, *supra*, at 205, l. 4-12, 232, l. 15-24, 233, 5-14; Independent Contractor Agreement, *supra*, Schedule A, 1% adv bonus).

Although there is no evidence that he did so, Moodie had the right to hire, exercise control over, and fire his own employees. *See* Independent Contractor Agreement, Section 9.

Plaintiff argues in opposition that:

From October 1, 2003 to December 31, 2003, Moodie was

[* 7]

required to do a pick up/delivery route from Bear Stearns to NSI Uniondale over 50 times (the court could not locate the reference to Moodie's testimony relied on by plaintiff, though Moodie did testify that he made that pick up/delivery every day for the past couple of years [Moodie Deposition, *supra,* at 58, l. 4-11]);

Moodie was given orders by the dispatcher as to what pick ups and deliveries he was to make (Moodie Deposition, *supra*, 27 l. 12-19, and 73, l. 4-20);

Moodie always wore his CD&L shirt when he worked (Moodie Deposition, *supra,* at 22, l. 10-11);

By wearing his CD&L shirt, Moodie held himself out as being an employee of CD&L (Moodie Deposition, *supra,* at 20-22);

Moodie was first asked by a company manager to wear the shirt in 1994, 1995 or 1996 (Moodie Deposition, at 22, l. 18-25).

As a general rule, a party employing an independent contractor, as opposed to an employee, is not liable for the independent contractor's negligence, since the employing party has no control over the manner in which the work is to be done. The risk of loss is therefore placed on the independent contractor. *Kleeman v Rheingold,* 81 NY2d 270, 273-274 (1993). "The determination of whether one is an independent contractor typically involves a question of fact concerning which party controls the methods and means by which the work is to be done. However, where the proof on the issue of control presents no

conflict in evidence the matter may properly be determined by the court as a matter of law." *Lazo v Mak's Trading Co., Inc.*, 199 AD2d 165, 165-166 (1st Dept 1993), *affd* 84 NY2d 896 (1994)(citations omitted). In *Berger v Dykstra* (203 AD2d 754 [3d Dept 1994]) where the salesman had no set hours or sales quotas, worked out of his own home, used his own vehicle, and paid all of his own business expenses, which were not reimbursed, the court concluded on the motion for summary judgment that, as a matter of law, the salesman was an independent contractor rather than an employee. In *Abouzeid v Grgas* (295 AD2d 376 [2nd Dept 2002]), where a limousine driver, who struck and injured a person, received radio dispatches from the company to pick up customers, was free to reject pick-ups, set his own hours, owned his own car, payed for gasoline and EZ Passes, maintained insurance, was responsible for maintenance of his limousine, could hire drivers to work for him, and the company withheld no taxes for the driver, the court concluded that the control exercised by the company over the driver was only incidental, and was insufficient to give rise to an employment relationship. *See also Rokicki v 24 Hour Courier Service, Inc.*, 294 AD2d 555 (2d Dept 2002) where bicycle messenger, who injured plaintiff, owned his own bicycle, was paid only for each delivery he made, was free make deliveries for other companies, used his own judgment when and how to make deliveries, and whose 1099 forms did not indicate deductions for

[* 9]

taxes, social security or other benefits was an independent contractor rather than an employee.

Plaintiff cites *Matter of Kelly v Frank Gallo, Inc.* (28 AD3d 1044 [3d Dept 2006]), in which the Appellate Division, Third Department, affirmed the ruling of the Unemployment Insurance Appeal Board that a claimant who drove for the company using his own vehicle to make deliveries, paid all the associated expenses and was responsible for missing products, was never required to work and was permitted to work for the company's competitors, was an employee rather than independent contractor. But as the Court noted in *Abouzeid v Grgas,* appeals from administrative decisions are based on a different standard of law - whether the administrative agency had substantial evidence on which to base its decision, which is not the standard before this court. *Abouzeid*, 295 AD2d at 377-378.

Here, as in *Berger*, *Abouzeid*, and *Rokicki*, Moodie owned and maintained his own van, which did not advertise any of the corporate defendants, got paid on a commission basis, had no taxes withheld from his pay, could refuse a pick-up and set his own hours, and could hire employees. The facts that Moodie called a company dispatcher or received text messages to obtain information as to pick-ups and deliveries, or that he was asked to make a delivery to NSI Uniondale by a specific time are insufficient to convince the court that Moodie was an employee of

either Olympic, CD&L, or any of the other corporate defendants. The route taken by Moodie between Bear Stearns and NSI Uniondale was not dictated by Olympic, but rather, according to Moodie, there was only one sensible route to take, unless there was an accident or other weather-related problems. *See* Moodie Deposition, 58, l. 11-18. Nor does the fact that Moodie wore a CD&L shirt when he made deliveries alter the court's conclusion, particularly in light of the fact that there is no evidence that he was required to wear the shirt, and in fact, that he received a bonus for wearing it. Thus, there is no basis to conclude that the shirt was anything more than, as Moodie described, a convenient way of identifying him as a driver for Olympic (or CD&L) for purposes of security (*see* Moodie Deposition at 23, l. 2-9), and advertising CD&L (*see* Independent Contractor Agreement, *supra*, Schedule A re 1% adv bonus).

The motion for summary judgment of the corporate defendants is granted on the basis that, as a matter of law, Moodie was an independent contractor rather than an employee. It is, therefore, not necessary for the court to reach the corporate defendants' argument that Moodie's business relationship was with Olympic, which was a fully owned subsidiary of CD&L (previously known as Consolidated Delivery & Logistics) and that the other corporate entities have no involvement in this case.

Plaintiff cross-moves for an order granting her the right to

renew with respect to the court's decision dated January 9, 2006, denying her request that the court strike the corporate defendants' denial of paragraphs 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, and 18 of plaintiff's Second Amended Complaint and on reconsideration, granting her motion to strike those denials. Those paragraphs contain allegations regarding the corporate status of defendants Consolidated Delivery Logistics, Inc. and CD&L, Inc. and whether those companies are authorized to and do business in the State of New York. According to plaintiff, her motion is based on filings made with the Securities and Exchange Commission(SEC) after the issuance of Judge Tingling's order dated January 5, 2006.

In light of this court's decision above granting the corporate defendants' motion for summary judgment, the filings with the SEC are basically irrelevant.

Plaintiff also seeks to base her motion to renew on the argument that Moodie had a bad driving record and CD&L (or Olympic) negligently hired Moodie without adequately checking his driving record. Plaintiff submits evidence regarding 10 other accidents in which Moodie was allegedly involved, five of which occurred before, and five after the accident involved in this case. Plaintiff contends that the information about Moodie's driving record sets forth new facts not known to her at the time of her motion for summary judgment. Even assuming that plaintiff

could not have obtained the information about those other alleged accidents before making her motion for summary judgment, the court rejects plaintiff's argument that those facts are directly pertinent to plaintiff's prior motion regarding the corporate status of the individual corporate defendants, which was the subject of her motion for summary judgment. Nor do the alleged accidents relate to whether Moodie was an employee or independent contractor of any of the corporate defendants. Whether the information about the alleged accidents would provide a basis for a new cause of action for negligent hiring is not before the court. For these reasons, plaintiff's cross motion is denied.

In motion sequence 010, the corporate defendants move for an order striking plaintiff's Notice to Admit. Because the court has granted the motion for summary judgment dismissing the action against the corporate defendants, their motion to strike plaintiff's notice to admit is denied as moot.

Accordingly, it is hereby

ORDERED that the motion for summary judgment in motion sequence 080 is granted and the complaint is severed and dismissed as against defendants Consolidated Delivery Logistics, Inc., CD&L, Inc., Olympic Courier Systems, Inc., CDL (New York) L.L.C. and Click Messenger Service, Inc., and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that plaintiff's cross motion for renewal is denied; and it is further

ORDERED that the motion for an order striking plaintiff's notice to admit in motion sequence 010 is denied as moot; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 19, 2007

ENTER:

Deborah A. Kaplan J.S.C.

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AUG 07 2007
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