

Gover v Royal Communications Consultants, Inc.

2007 NY Slip Op 32595(U)

August 14, 2007

Supreme Court, New York County

Docket Number: 0118987/2006

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT

Index Number : 118987/2006

PART 10

GOVER, MARTIN

vs

ROYAL COMMUNICATIONS

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

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

[FILED]

AUG 21 2007

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

AUG 14 2007

Dated: _____

HON. JUDITH J. GISCHE *J.S.C.*

Check if appropriate: DO NOT POST
Check one: FINAL DISPOSITION

REFERENCE
 NON-FINAL DISPOSITION

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 10

-----x
Martin Gover,

Plaintiff

-against-

Royal Communications
Consultants, Inc., and
Bear Stearns & Co.,

Defendants.
-----x

DECISION/ORDER

Index No.: 118987/06
Seq. No.: 001

Present:
Hon. Judith J. Gische

J.S.C.
FILED

AUG 21 2007

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of
this/these motion(s):

COURT CLERK'S OFFICE
NEW YORK

Papers	Numbered
Defs' n/m (§3211) w/AFPC and AR affid, exhs	1
Pltff opp w/MG affid	2
Defs' reply w/CS affid	3

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

This is an employment discrimination action under the New York State and City Human Rights Laws (Exec Law § 296.1 and Admin Code § 8-107.1, respectively).

Defendants Royal Communications Consultants, Inc. and Bear Stearns & Co.

(Hereinafter "RCC" and "Bear Stearns," and collectively "defendants") now move for the pre-answer dismissal of the complaint, based upon their legal argument that plaintiff was not their employee, but an independent contractor. Defendants contend that plaintiff cannot prove an essential element of his employment discrimination claim

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against them, which is that there was an employer/employee relationship among them, and that he was their "employee." Defendants contend further that RCC's contract with plaintiff's company is documentary evidence unequivocally disproving his present claim, that he is not an independent contractor.

On a motion to dismiss for failure to state a cause of action [CPLR § 3211 (a) (7)], the court is not required to decide whether plaintiff has pled claims on which he will eventually succeed. Rather, the court has to broadly examine the complaint to see whether, from its four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). Therefore, if the plaintiff asserts facts which, when accepted as true, support the causes of action it has asserted, this will defeat the motion to dismiss the complaint before issue has been joined. Rovello v. Orofino Realty Co., 40 NY2d 633, 634 (1976); Guggenheimer v. Ginzburg, supra; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st dept. 1997]).

Where, the motion to dismiss is premised upon the existence of documentary evidence, such evidence must definitively and unequivocally dispose of plaintiff's claim. CPLR § 3211 (a)(1); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st dept. 1995).

The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. Leon v. Martinez, 84 N.Y.2d 83 (1994). Although the court cannot consider defendants' affidavits in connection with a motion to dismiss pursuant to CPLR § 3211 (a) (7) because they simply assert the inaccuracy of plaintiffs'

allegations, which must be accepted as true (Rovello v. Orofino Realty Co., 40 N.Y.2d 633 [1976]), they may considered in the context of a CPLR § 3211 (a) (1) motion (American Indus. Contracting Co., Inc. v. Travelers Indem. Co., 42 N.Y.2d 1041 [1977]).

The court has also considered defendants' alternate relief, which is to have this dismissal motion converted to one for summary judgment. Summary judgment is never available unless or until issue has been joined. See: Chun v. North American Mortgage, 285 AD2d 42 (1st dept. 2001). Although the court can, on notice to the parties, convert defendant's motion to one for summary judgment, defendant's submissions do not justify this conversion, or such expedited treatment. CPLR § 3212 (c). Therefore, such alternative relief is denied at the outset.

In deciding the remainder of this motion, the court will consider the facts, as alleged in the complaint, and in plaintiff's sworn affidavit in opposition:

Plaintiff is the sole shareholder and owner of a sports management company named "Momentum Sports Management Inc." ("Momentum"). He started the company in September 2002 with hopes it would generate enough income to make it his primary occupation. When he started the company he was a salaried employee with defendant RCC, working as a technician and project manager. RCC offers consultant services to its clients which include Bear Stearns. Plaintiff's employment with RCC ended in 2003. Nonetheless, he maintained a cordial, personal and business relationship with Charles Santo, RCC's president and owner. Mr. Santo asked plaintiff to come back to RCC to service Bear Stearns. In February 2005, plaintiff agreed.

After salary discussions, it was agreed plaintiff would be paid hourly, but with

overtime, the pay would be commensurate with what he had been earning at RCC in 2003. Mr. Santo insisted that plaintiff enter into a contract with RCC, not him individually, but as Momentum. Plaintiff agreed to this arrangement and RCC prepared the "subcontractor agreement" dated April 5, 2005. It is signed by Alan Rheingold on behalf of RCC and by plaintiff on behalf of Momentum. Momentum is identified in this document as the "subcontractor."

Plaintiff's office was physically located at Bear Stearns, within the communications services group. This group consisted of 14 employees, including the person he claims made the offensive statements, and acted in violation of the Human Rights Laws. Plaintiff's salary was paid by RCC. No taxes or other deductions were withheld from any of the payments to him. He was required to undergo training through Bear Stearns when he first started to work there and was later assigned to a shift he did not choose. Bear Stearns and RCC chose the hours he worked. Mr. Santo at RCC and Mr. Impastato, a senior manager at Bear Stearns, oversaw his hours. He reported directly to Mr. Impastato who gave him assignments.

Plaintiff did not have his own equipment or tools, yet he was required to correct network problems throughout the building Bear Stearns was located in, and even at Bear Stearns' client sites, if there were problems at those locations. He needed diagnostic tools and equipment for those jobs, and all were provided by Bear Stearns. He was also required to perform administrative work for Bear Stearns, such as returning defective hardware to vendors.

Defendants contend that the subcontract agreement between RCC and

Momentum unequivocally disposes of plaintiff's present claim, that he is an employee and not an independent contractor. They rely upon this language in the contract:

"Subcontractor/Consultant is an independent contractor. Neither Subcontractor nor any of Subcontractor's agents or Subcontractor's employees are or shall be deemed for any purpose to be employees of RCC or RCC's clients. RCC and its clients shall not be responsible for, and Subcontractor/Consultant shall indemnify and hold RCC and its clients harmless against any legal claim whatsoever relating to this or any future assignment, any costs, expense, liability, claim, damages, actions, or proceeding relating to any payroll-related taxes for any person that performs any Services or produces any Deliverables hereunder or any claim arising out of or relating to said services or deliverables . . ."

Subcontract agreement, 4/4/05

Ms. Corwin, director of Bear Stearns' Human Resources department, states in her sworn affidavit that plaintiff never applied to work at Bear Stearns, Bear Stearns never paid him benefits, and his bills were paid by RCC. She contends he is not an "employee." Mr. Rheingold, RCC's Chief Operating Officer states in his sworn affidavit that plaintiff sent RCC bills, which it paid. No taxes or other typical employee withholdings were made from plaintiff's check, and RCC issued him a 1099-Misc statement to him. A copy of that document is provided. The 1099 was issued to "Martin Gover, Momentum Sports Management, Inc." The statement has a business address and a federal tax identification number, not a social security number. No taxes or other deductions were made.

Both defendants also rely upon invoices that plaintiff sent to RCC for Mr. Santo to pay attention. The invoice identifies the "Client Site" as Bear Stearns and the services rendered as "Project Management." The invoice plaintiff sent directs that payments be made by RCC to Momentum. The number of hours billed to RCC bi-monthly are not

consistent, but vary, ranging from a low of 44 hours in a two week period to a high of 90 hours, also for two weeks. Mr. Santo states that plaintiff made his own hours, and he chose the schedule he now claims was forced on him.

Defendants contend that plaintiff should not be permitted to claim he was their employee after having taken advantage of a corporate legal status, and the designation of independent contractor, particularly since this is what their contract provides. In reply, plaintiff argues that the form under which he does business does not resolve the issue of whether he is (or not) an employee, under the Human Rights Laws and the court must look further to see if the defendants controlled his work, to such an extent he had no independence and therefore not an "independent contractor."

Discussion

The New York State Human Rights Law and the Civil Rights Act of 1964 are textually the same, providing for similar recovery and addressing the same types of discrimination. Forrest v. Jewish Guild for the Blind, 3 NY3d 295 (2004); Ferrante v. American Lung Association, 90 NY2d 623 (1997). This is also true of New York City's Human Rights Laws, except that under City law, an employee can recovery punitive damages from his employer. Walsh v. Covenant House, 244 AD2d 214 (1st dept. 1997); Bracker v. Cohen, 204 AD2d 115 (1st dept. 2004). Thus, for all intents and purposes, cases construing Title VII can be relied upon by the court in construing the local statutes relied upon by the plaintiff.

Executive Law §296(1)(a) makes it unlawful for an employer to engage in discriminatory practices. It does not, however, apply to claims by independent contractors. Scott v. Massachusetts Mutual Life Ins., 86 N.Y.2d 429 (1995). Whether an employer/employee relationship exists, even if there is a contract, partly depends on

whether the employer exercised control over or the means used by an individual to achieve results. Scott v. Massachusetts Mutual Life Ins., supra at 433 (citing Matter of Ted Is Back Corp., 64 N.Y.2d 725, 726 [1984]). "Minimal or incidental control over one's work product without the employer's direct supervision or input over the means used to complete it is insufficient to establish a traditional employment relationship." Scott v. Massachusetts Mutual Life Ins., supra at 756; Tagare v. Nynex Network Systems Co., 994 F.Supp. 149, 159 (S.D.N.Y.1997).

Accepting all of his facts as true, they set forth a cause of action against the defendants because he had no independence in the manner he did his job, but was told what to do by either or both defendants. Therefore, his complaint withstands this pleading stage motion to dismiss.

Defendant's further argument, that plaintiff is estopped from claiming he is "really" an employee, because: 1) he agreed to be paid as an independent contractor, 2) no taxes were withheld, and 3) he has not produced his tax returns to prove how he declared his income, are all arguments they can pursue after issue has been joined. These factual disputes, once resolved, will inform how the court will apply the law.

The contract between RCC and plaintiff does not, as defendants also argue, equivocally dispose of the complaint. Plaintiff states that the agreement was nothing more than a charade, to convenience the defendants and they treated him like an employee, without paying benefits, etc. Whether he can prove this at trial, remains to be seen. In deciding employment discrimination issues involving independent contractors, the courts have looked beyond the nomenclature used by the parties to describe their relationship, to examine what it exactly entailed. See: Murphy v. ERA

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United Realty, et al., 251 AD2d 469 (2nd Dept 1998); Scott v. Massachusetts Mutual Life Ins., *supra* at 756; Tagare v. Nynex Network Systems Co., *supra*.

Defendants' related argument, that plaintiff cannot contend he is an employee if he filed taxes as an independent contractor, simply states a factual dispute, and not a basis to dismiss the complaint at this stage. The legal authority that defendants rely upon is not only from a court of coordinate jurisdiction, but also a decision made on a motion for summary judgment. Zemel v. Horowitz, 11 Misc. 3d 1058 (A) (Sup Ct, N.Y. Co. 2006). In any event, although they argue the legal principle of "collateral estoppel" should be applied, there has been no determination by an administrative agency of the issues before the court. Engel v. Calgon Corp., 114 A.D.2d 108 (3rd Dept 1986).

Plaintiff's allegations, accepted as true, support his claims and lead the court to deny defendants' motion to dismiss under either CPLR 3211 (a) (1) or (7). Defendants' time to serve their answer is extended to **September 6, 2007**.

This case is hereby scheduled for a preliminary conference on October 5, 2007 at 9:30 a.m. in Part 10, 80 Centre Street, Room 122.

Conclusion

Defendants' motion to dismiss is denied and their time to answer is hereby extended. Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
August 14, 2007

So Ordered:

Hon. Judith J. Casche, J.S.C.

FILED

AUG 21 2007

COUNTY OF ALBANY, N.Y.