

Ledee v Sister Courier, Inc.

2007 NY Slip Op 33294(U)

September 27, 2007

Supreme Court, New York County

Docket Number: 0114665/2005

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

GHISLAIN LEDEE and HILDRETH ARKAY-LEDEE

INDEX NO. 114665/05

- v -

MOTION DATE 7-25-07

SISTER COURIER, INC., ESTHER GOMEZ and
VELOCITY EXPRESS CORP.

MOTION SEQ. NO. 002

MOTION CAL. NO. 63

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

The motion of defendant Velocity Express Corp. for, *inter alia*, summary judgment dismissing the complaint and all cross-claims against it is granted in accordance with the attached Decision.

This constitutes the Decision and Order of the Court.

Dated: September 27, 2007

FILED
OCT 15 2007
NEW YORK
COUNTY CLERK'S OFFICE
Deborah Kaplan
DEBORAH A. KAPLAN
Deborah A. Kaplan J.S.J.C.

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

-----X
 GHISLAIN LEDEE and HILDRETH ARKAWY-
 LEDEE,

Plaintiffs,

-against-

Index No. 114665/05

SISTER COURIER, INC., ESTHER GOMEZ and
 VELOCITY EXPRESS CORP.,

Defendants.

-----X
DEBORAH KAPLAN, J.:

Defendant Velocity Express Corp. (Velocity) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it¹, or in the alternative, for an order granting Velocity indemnity on its cross claim for contractual indemnity against defendants Esther Gomez (Gomez) and Sister Courier, Inc..

This action arises from an automobile accident wherein plaintiff Ghislain Ledee, a pedestrian, was struck by a van owned and operated by defendant Esther Gomez, at the intersection of West 66th Street and Broadway on October 13, 2005. Gomez was then employed by her own company, defendant Sister Courier, as a driver making pick-ups and deliveries. It is undisputed that at the time of the accident, she was in the process of making deliveries for Velocity. Velocity contends, however, that Gomez was an independent contractor, and thus, that the complaint

¹ Velocity does not submit any documents indicating the existence of cross claims against it.

should be dismissed as against it. In support of its motion, Velocity refers to the following facts:

Gomez worked for Velocity pursuant to an "Independent Contractor Agreement for Transportation Services" which was entered into by Sister Courier, Inc. Deposition of Esther Gomez, dated January 9, 2007, at 9. Pursuant to the agreement, Velocity could request that Gomez perform delivery services, advising her of the time and place of a pick-up or delivery, and that she had the right to decline such a request and the right to select the routes taken. Independent Contractor Agreement, at 1.

The vehicle which Gomez was driving at the time of the accident was registered to Sister Courier (see Accident Report), and was insured under the name Sister Courier. *Id.* at 18. The side of the vehicle had the initials "E.G.", standing for Esther Gomez, and not the name Velocity. *Id.* at 26.

Gomez worked five days per week for Velocity, and would obtain a delivery sheet, though she indicated that she did not really need one because she always had the same route. *Id.* at 30. Gomez did not receive a base salary from Velocity (Deposition of Oscar Melian, Velocity branch manager, at 24), but rather, was paid weekly for all deliveries she made for the company (Gomez Dep., at 23,), and no deductions were taken from her checks. *Id.* at 24. Gomez received a 1099 form from Velocity reflecting her pay, rather than a W-2. *Id.* at 36.

Gomez was not required to work exclusively for Velocity (*id.* at 20), and during the year 2005, she earned approximately \$8,000 (of a total of \$38,000) from other jobs. *Id.* at 22. On the day of the accident, Gomez had made a delivery for someone other than Velocity before making her Velocity deliveries. *Id.* at 44.

Although Gomez wore a uniform shirt with Velocity's name on it, wearing the uniform was not compulsory (*id.* at 25). Rather, the uniform was provided to assist her in entering buildings because of heightened security after September 11, 2001. *Id.* at 40, *see also* Melian Dep., at 25. Gomez was not provided a cell phone or hand held computer by Velocity. Gomez Dep., at 35, 41.

According to Melian, Velocity does not provide any training to independent contractor delivery drivers (Melian Dep., at 17), but just tells drivers to do whatever the customer requires, including meeting the time of delivery. *Id.* at 19.

Finally, in her deposition, Gomez repeatedly stated that it was her understanding that she worked for Velocity as an independent contractor (Gomez Dep., at 15, 18, 20, 36), and that prior to working for Velocity, she had been an independent contractor for other companies, Gray and Corporate Express. *Id.* at 18. Although at the time of her deposition Gomez was retired due of health reasons, her company was still active because she had not yet "[gone] to city hall to retire that company." Gomez Dep., at 9.

Plaintiffs respond that Gomez was paid on a weekly basis (*id.* at 24), she wore a Velocity uniform while making deliveries for Velocity, she had the same delivery route for a long time (*id.* at 27), Velocity gave her a delivery sheet for deliveries she made on its behalf (*id.* at 30-31), and Gomez asked customers to sign a form which she then returned to Velocity. *Id.* at 31-32. Plaintiffs also contend that Velocity's address was printed on the side of Gomez's vehicle. *Id.* at 26-27. The court notes, however, that according to Gomez, the address on her vehicle is 530 West 35th Street, and according to Melian, Velocity's address is 527 W 34th Street (Melian Dep., at 7), though in her deposition, Gomez stated that the West 35th Street address was Velocity's address. Gomez Dep., at 27.

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. See *Kleeman v Rheingold*, 81 NY2d 270, 273-274 (1993).

Citing *Carrion v Orbit Messenger, Inc.* (192 AD2d 366 [1st Dept], *affd* 82 NY2d 742 [1993]), plaintiffs argue that the question of whether Gomez was an independent contractor must be determined by a jury at the time of trial, rather than on this

motion for summary judgment. However, the Court of Appeals in *Carrion* specifically stated that, there, summary judgment was not warranted because the plaintiffs had "submitted sufficient proof to raise a question with respect to the nature of the relationship between the tortfeasor and his alleged principal." *Id.* at 744. Among the facts noted by the Appellate Division in rejecting the motion for summary judgment were that the driver worked exclusively for the defendant company, carried a beeper in order to be reached at a moment's notice, the defendant company provided bookkeeping services to the driver, paid him 57% of the company's gross billings, furnished the driver Worker's Compensation Insurance at no cost, and issued the driver a payroll check-cashing card. The Appellate Division also noted that the driver had not filed any documents with any governmental entity indicating that he was a sole proprietor. Finally, however, the Appellate Division indicated that the question of the nature of the employment relationship "may under appropriate circumstances be decided as a matter of law." *Carrion v Orbit Messenger, Inc.*, 192 AD2d at 367. See also *Lazo v Mak's Trading Co., Inc.*, 199 AD2d 165, 166 (1st Dept 1993), *affd* 84 NY2d 896 (1994) ("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") (internal citations omitted).

In *Rokicki v 24 Hour Courier Service, Inc.* (294 AD2d 555 [2d Dept 2002]), where a bicycle messenger, who injured plaintiff, owned his own bicycle, was paid only for each delivery he made, was free to make deliveries for other companies, used his own judgment concerning when and how to make deliveries, and whose 1099 forms did not indicate deductions for taxes, Social Security or other benefits, he was determined to be an independent contractor rather than an employee.

Similarly, 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 the plaintiff, received radio dispatches from the company to pick up customers, was free to reject pick-ups, set his own hours, owned his own car, paid 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 *Greene v Osterhoudt*, 251 AD2d 786, 787 (3d Dept 1998) (factors to be considered regarding the question of who exercises control over the method and means of work include "whether the individual furnishes his own tools or equipment, how payment is made and whether Social Security and other taxes are withheld from such payments. ... [W]here evidence is undisputed, and the facts are compellingly clear, the issue may be determined as a matter of law" (internal citations omitted).

Here, Gomez owned her own vehicle, which was registered to and insured by her company, Sister Courier. She maintained insurance on the vehicle, could, and did, do pick-ups and deliveries for other customers, received no base salary, was paid only for those pick-ups and deliveries which she performed, had no deductions taken from her pay, and believed herself to be an independent contractor. Although she was provided a delivery sheet every day, there is no evidence that Velocity controlled her method of making deliveries, other than requiring that she follow the requirements of the customer, make deliveries on time, and obtain the signature of the customer. Certainly, whether she was an employee, or an independent contractor, she would be informed where to make pick-ups and deliveries and would likely obtain the signature of the customer. Finally, the fact that she

was provided a Velocity shirt for identification, which she was not required to wear, is insufficient to raise an issue of fact as to whether Gomez was an employee rather than a contractor.

Thus, on the basis of this record, in contrast with that in *Carrion*, the court concludes that plaintiffs have failed to raise sufficient proof to raise a question of fact regarding the nature of the relationship between Gomez and Velocity to preclude Velocity's motion for summary judgment. In light of the fact that Velocity's motion for summary judgment is granted, its request for a finding of contractual indemnity against Gomez and Sister Courier is denied as moot.

Accordingly, it is hereby

ORDERED that the motion for summary judgment is granted and the complaint is severed and dismissed as against defendant Velocity Express Corp. with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of said defendant accordingly; and it is further

ORDERED that the remainder of the action shall continue.

Dated: September 27, 2007

Deborah Kaplan

J.S.C.
DEBORAH A. KAPLAN
J.S.C.

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