

**Hodges v P.C. Richard & Son Serv. Co., Inc.**

2008 NY Slip Op 31036(U)

March 31, 2008

Supreme Court, Nassau County

Docket Number: 4257-05/

Judge: Daniel Martin

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**SHORT FORM ORDER  
SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN  
Acting Supreme Court Justice**

**TRIAL/IAS, PART 31  
NASSAU COUNTY**

\_\_\_\_\_  
**ANTHONY HODGES.**

**Plaintiff.**

**- against -**

**Sequence No.: 001 & 002  
Index No.:014257/05**

**P.C. RICHARD & SON SERVICE COMPANY, INC.,  
P.C. RICHARD & SON, LLC and JOHN DOE (the  
name being fictitious and presently unknown).**

**Defendants.**

**The following named papers have been read on this motion:**

	<b>Papers Numbered</b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>X</b>
<b>Notice of Cross-Motion and Affidavits Annexed</b>	<b>X</b>
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	<b>X</b>

Upon reading the papers submitted and due deliberation having been had herein, defendants' motion for an order pursuant to CPLR 3211(c)(2),(3) and (7) dismissing the complaint herein is granted and plaintiff's cross-motion for an order striking defendants' defense that plaintiff is barred from maintaining the instant action by the Workers' Compensation Law is denied.

The following facts are undisputed. Prior to and on December 5, 2004 plaintiff was employed by a temporary employment agency, non-party Magill Associates, Inc. (hereinafter "Magill"). On December 5, 2004 plaintiff was assigned to work at defendant P.C. Richard & Son Service Company, Inc.'s and P.C. & Son, LLC's (hereinafter, collectively "P.C. Richard") warehouse where he suffered personal injuries as a result of his being struck by a fork lift thereat. Plaintiff commenced the instant action alleging negligence on defendants' part. Defendants have answered, including an affirmative defense that plaintiffs' claim is barred by the Workers' Compensation Law. Defendants move for the relief set forth above upon the grounds that plaintiff was a "special employee" of defendants' and that he was restricted to obtaining workers' compensation benefits as provided by Workers' Compensation Law §11. Plaintiff cross-moves for an order striking defendants' affirmative defense based upon the Workers' Compensation

Law.

At the outset, it appears that defendants' motion is more properly made as a motion for summary judgment which this court would normally consider untimely pursuant to CPLR 3212(a). It has been held, however, that the relief sought by defendants herein may be made as a motion to dismiss pursuant to CPLR 3211(a)(1),(2),(3) and (7)- documentary evidence, lack of subject matter jurisdiction, lack of standing and failure to state a cause of action respectively. See, Hernandez v. Sanchez, 40 A.D.3d 446 (1<sup>st</sup> Dep't 2007); Corp v. State, 257 A.D.2d 742 (3<sup>rd</sup> Dep't 1999). The court shall therefore entertain defendant's motion.

In support of their motion defendants point to plaintiff's deposition testimony wherein he testified that:

- 1) he reported to P.C. Richard where he reported to a supervisor named John Ryan;
- 2) during the time plaintiff worked at P.C. Richard's warehouse he was told by P.C. Richard employees what to do and how to do his work;
- 3) when he reported to work at P.C. Richard he executed a sign-in sheet at a desk for temporary staff; and
- 4) after his accident plaintiff filed a Workers' Compensation claim.

At his deposition P.C. Richard employee John Ryan testified that:

- 1) he was employed as a transfer supervisor and was responsible for all employees in the warehouse including temporary employees; and
- 2) he had the authority to fire temporary employees without need to consult anyone.

Defendants argue that while plaintiff was a general employee of Magill, he was also a special employee of defendants' and as he elected to receive Workers' Compensation benefits based upon his status as Magill's employee, such was his exclusive remedy and he therefore lacks standing and capacity to sue P.C. Richard.

In opposition to defendants' motion and in support of his motion, plaintiff asserts that the determination of the employee's status, including whether or not he is a special employee, is the province of the Workers' Compensation Board and where its determination is made based upon substantial evidence, its decision will not be disturbed by the court. Specifically, plaintiff asserts that where the issue of the injured worker's employment status is one of pure fact, it is strictly the province of the Workers' Compensation Board. Plaintiff argues that the issue of who was plaintiff's employer was resolved by the workers compensation board and that defendant may not seek this court's ruling on that status.

Where the injured worker has more than one employer-a general employer and a special employer-and he makes a claim for Workers' Compensation benefits with his general employer, the worker is barred from maintaining an action for negligence against the special employer. See, Thompson v. Grumman Aerospace Corp., 78 N.Y.2d 553 (1991). An employer may be held to be a special employer as a matter of law where the general employer relinquishes control over

its employee to the special employer who takes over control and direction of the worker's performance. *Id.*

Plaintiff's position that the court may not determine whether he is a special employee where such determination is factual as opposed to strictly legal, but that same is the exclusive jurisdiction of the Board is unavailing. In matters where the plaintiff-employee receives workers' compensation benefits from his general employer the issue of whether the defendant is a special employer for purposes of application of the Workers' Compensation Law's exclusivity provision in a negligence action may be decided by the court as a matter of law. See, e.g., Ugijanin v. 2 West 45<sup>th</sup> Street Joint Venture, 43 A.D.2d 911 (2<sup>nd</sup> Dep't 2007); Thompson v. Grumman Aerospace Corp., 166 A.D.2d 578 (2<sup>nd</sup> Dep't 1991). A close reading of the Appellate Division decision in Thompson, cited above, reveals that the assigned Supreme Court Justice made the determination that the plaintiff in that case was a special employee of Grumman as a matter of law based upon Grumman's control over the plaintiff's work and the lack of control exercised by the general employer with whom that plaintiff made a Workers' Compensation claim. That determination was affirmed by both the Appellate Division and the Court of Appeals. *Id.*, 166 A.D.2d 578 (2<sup>nd</sup> Dep't 1991); *Id.*, 78 N.Y.2d 553.

In Thompson the plaintiff was employed by a company known as ATS and was assigned to work in a facility owned by Grumman. While at the Grumman facility the plaintiff suffered personal injuries and he was awarded and accepted Workers Compensation benefits "through his employment status with ATS [the general employer]." Thompson v. Grumman Aerospace Corp., 166 A.D.2d 578, 579. The Appellate Division thereafter ruled on the issue of whether the plaintiff therein was a special employee of Grumman's. The court held that plaintiff was a special employee based upon the fact that Grumman controlled and directed the plaintiff's work and upon the absence of any such control on the part of plaintiff's general employer. *Id.*

This appears to be the same situation as in the instant matter. There is no dispute that plaintiff herein is employed by Magill and that he accepted workers' Compensation benefits through his employment with Magill. The Board's decision which awarded the benefits provides that plaintiff was injured "while working for Magill Staffing." See, Ugijanin v. 2 West 45<sup>th</sup> Street Joint Venture, *supra*; Thompson v. Grumman Aerospace Corp., *supra*.

Based upon the parties' submissions, the court finds that plaintiff was a special employee of P.C. Richards'. Although plaintiff argues that as he testified at his deposition that he did not report to any specific supervisor while at the warehouse and that he performed his duties by doing what other employees of P.C. Richards did, as opposed to being told what to do, nowhere does plaintiff demonstrate that Magill directed or controlled his work or performance. As set forth in Thompson, *supra*, one of the facts used by the court is whether the general employer exercised control over the plaintiff.

Also misplaced is plaintiff's position that the proposal from Magill to P.C. Richard reflects an intention on the respective employers' part that Magill is for all purposes, the employer. While the employers may contractually define their relationships, such shall not serve to "be determinative of the issue of special employment." Thompson v. Grumman Aerospace

Corp., supra., p. 559-560.

Thus, based upon the foregoing, it is hereby determined that plaintiff was a special employee of P.C. Richards and that as he accepted worker's compensation benefits based upon his relationship with Magill, his general employer, plaintiff is prohibited as a matter of law from commencing a personal injury action against defendants herein.

Based upon the foregoing defendants' motion is granted, plaintiff's cross-motion is denied and the complaint is dismissed.

So Ordered.

**Dated:** March 31, 2008

  
A.J.S.C.

**ENTERED**  
**APR 07 2008**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**