

Pettit v Holbdy

2009 NY Slip Op 31779(U)

August 6, 2009

Supreme Court, Wayne County

Docket Number: 53905/2004

Judge: John B. Nesbitt

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STATE OF NEW YORK
 SUPREME COURT COUNTY OF WAYNE

ROBERT A. PETTIT

Plaintiff,

-vs-

Index No. 53905

2004

FREEMAN HOLBDY and C.C. EASTERN, INC.

Defendants.

APPEARANCES: RICHARD L. DEVALK, ESQ.
 DeValk, Power & Lair, P.C.
 Attorneys for Plaintiff

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 Bond, Schoeneck & King.
 Attorneys for Defendant, C.C. Eastern, Inc.

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 Greene & Reid, PLLC
 Attorneys for Defendant, Freeman Holbdy

MEMORANDUM - DECISION

John B. Nesbitt, J.

Defendant, C.C. Eastern, Inc. ("*C.C. Eastern*") moves pursuant to CPLR §3212 for summary judgment dismissing it as a defendant in the captioned action. Plaintiff Robert A. Pettit opposes the motion, while defendant Freeman Holbdy offers no opposition. Oral argument was had and this decision ensues.

At the outset, the parties recognize the dispositive nature of the relief sought by the defendant C.C. Eastern regarding plaintiff's action and the constraints under which a summary judgment motion is entertained by a court. Such motions require a court to determine whether the cause of action, counterclaim, or defense at issue requires a trial before it can be sustained or rejected (CPLR §3212[b]). A trial is required where there are disputed issues of fact to be resolved before a cause of action, counterclaim, or defense can be determined meritorious or not (Siegel, New York Practice §278 at 438 [3rd ed 1999]). Of course, for a contested factual issue to be sufficient

to defeat a motion for summary judgment, it must relate to a fact of legal consequence; that is, one directly or inferentially supporting a legally cognizable claim or defense. If the facts necessary to sustain or reject a claim or defense are not in dispute, a court must rule thereon as a matter of law, granting summary judgment on the merits (*Id* at 439). If such facts are in dispute, summary judgment must be denied, and the action submitted to plenary trial.

A motion for summary judgment must be supported by proper evidentiary proof that, if uncontroverted, entitles the moving party to such judgment as a matter of law (CPLR §3212[b]). Once such showing is made by the movant, a party opposing such relief must respond with proper proof challenging one or more of the factual claims upon which summary judgment depends (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). In deciding these issues, judges are reminded that summary judgment is a “drastic remedy and should not be granted where there is any doubt as to the existence of triable issues” (*Dal Construction Corp. v City Of New York*, 108 AD2d 892, 894 [2d Dept 1985]). Only where “no reasonable view of the evidence” supports a claim or defense should a court rule upon its merits as a matter of law (*Eddy v Syracuse University*, 78 AD2d 989, 990 [4th Dept 1980][“Where varying inferences are possible, however, the issue is one for the jury”]). Accordingly, evidence adduced upon a motion for summary judgment must be viewed “in the light most favorable” to the party opposing the motion (*Wallice v Waterpointe at Oakdale Shores, Inc.*, 249 AD2d 383 [2d Dept 1998]).

The operative facts tell a disturbing story. Plaintiff Robert Pettit is an elderly man who lives with his wife at his residence at 5731 Limekiln Road in the Town of Wolcott, County of Wayne. On August 13, 2002, he and defendant Freeman Holbdy had a violent encounter that is the basis of this lawsuit. Mr. Holbdy is a fairly large man - six foot, five inches in height, weighing well in excess of two hundred pounds - and drives truck for a living. Marshall Pet Farms is a local business with operations on property adjacent to the Pettit property, and Mr. Holbdy made deliveries to that location. Prior to August 13th, Mr. Pettit had experienced the aggravation of having delivery trucks drive onto and rutting his lawn - anywhere up to a dozen feet - while maneuvering in and out of the Marshall property. Mr. Pettit had complained to the owner of Marshall Pet Farms - one Gary Marshall - about his dissatisfaction with this state of affairs. According to the testimony of Mr. Pettit, the continuation of this situation by Mr. Holbdy on August 13th by driving his truck deeper

into the Pettit lawn than any previous truck had done prompted Mr. Pettit to do what he had not done before - go over to the driver and discuss his displeasure. Again, according to Mr. Pettit, after the Holbdy truck had driven off the lawn and moved onto the Marshall property, Mr. Pettit walked over to the truck to discuss with the driver his dissatisfaction. Mr. Pettit approached the truck waving his arms to garner the attention of Mr. Holbdy, who was the driver. What happened next is subject to the diametrically opposing and irreconcilable testimonies of Mr. Pettit and Mr. Holbdy. Mr. Pettit portrays Mr. Holbdy as nothing less than a thug, who, after noticing Mr. Pettit, rolled down his window, said: "What the hell do you want?". Mr. Pettit rejoined that there was an area to turn around trucks at the rear of the building on the Marshall property and asked why that wasn't used instead of the Pettit lawn. As described by Mr. Pettit, Mr. Holbdy then opened the door of his truck, came "boiling right out," put his face one foot away from Mr. Pettit's, and "blasted" that "no mother-fucking son of a bitch is going to tell me how to drive." Mr. Holbdy was no sooner done with that statement, when he "swung back his left hand" and hit Mr. Pettit on the "right side of the head as hard as he could." That blow knocked Mr. Pettit to the ground, on the back of his head, rendering him temporarily unconscious, coming too at the edge of his driveway. Mr. Pettit could not get up, so he crawled on hands and knees across the lawn to his wife who had out to help him up and onto the porch.

The deposition testimony of Mr. Holbdy contradicts the Pettit account at nearly every turn, and portrays Mr. Pettit as a demented crank. Whereas Mr. Pettit denied ever having spoken to Mr. Holbdy prior to August 13, 2002, Mr. Holbdy testified that Mr. Pettit had complained to him during one of his deliveries to Marshall Farms prior to that date about how "all the trucks come up there and get on his fucking lawn." Mr. Holbdy interpreted that remark to include the one he drives, so he responded that he was not even close to his lawn. On August 13th Mr. Holbdy returned to Marshall Farms for a delivery and stayed clear of Mr. Pettit's lawn. Nevertheless, Mr. Pettit came charging out of his property, yelling something unintelligible. Mr. Holbdy stopped his vehicle, got out to see what he was saying." Then, according to Mr. Holbdy, Mr. Pettit began "cursing [Mr. Holbdy] and he walked up right in [Mr. Holbdy's] face and he slapped [him]." The cursing consisted of Mr. Pettit telling Mr. Holbdy to "[g]et your fucking truck off my fucking grass." After Mr. Holbdy denied that this was the case was when Mr. Pettit slapped Mr. Holbdy, and Mr. Holbdy responded by slapping

him back. After that, Mr. Pettit fell to the ground and said that he was all done. Mr. Holbdy extended him a hand, helped him up and Mr. Pettit walked home without ostensible injury.

Of course, on a motion for summary judgment, the Court does not decide contested factual issues, and whether Mr. Holbdy is liable for actionable assault is a quintessential jury question, determining the credibility of the parties, inasmuch as there were no witnesses, except Mr. Pettit's wife, who is now deceased. But the summary judgment motion brought by defendant C.C. Eastern does not require the Court to judge the veracity of either Mr. Pettit or Mr. Holbdy. We assume the truth of Mr. Pettit's version of the incident, and ask whether under these circumstances if C.C. Eastern can be liable for Mr. Holbdy's tortious conduct. The theory advanced in favor of such finding is the common law doctrine of respondeat superior. This doctrine holds an employer liable for acts of his employee committed within the scope of his employment. Contrasted in the relationship of independent contractor, where the doctrine does not apply.

A black letter description of the distinction between these two types of mercantile relationships follows:

“Broadly speaking, an ‘employee’ is someone who works for another subject to substantial control, not only over the results produced but also over the means used to produce the results; a person who works for another subject to less extensive control is an ‘independent contractor’ has been defined as a person who, exercising independent employment, contracts to do certain work according to his or her own methods and without being subject to the control of his or her employer, except as to the result of his or her work. An independent contractor has also been one who agrees to do a specific piece of work for another for a lump sum or its equivalent, who has control of himself or herself and his or her helpers as to when, within a reasonable time, he or she shall begin and finish the work, as to the method, means, or procedure of accomplishing it, and who is not subject to discharge because he or she does the work as to method and detail in one way rather than another. An independent contractor has further been described as one who contracts to perform a piece of work at his or her own risk and cost, the workmen being his or her servants and he or she being liable for their misconduct.

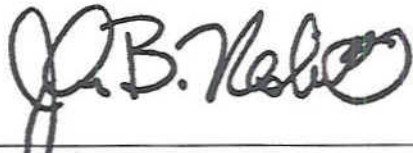
There is no absolute rule for determining whether one is an independent contractor or an employee. Thus, each case must be determined on an ad hoc basis involving fact questions as to who controls the methods and means by which work is to be done, whether the employer furnishes tools or equipment, whether payments are made in lump sums, and whether Social Security withholdings and taxes are withheld from such payments. Stated otherwise, the determination of whether one is an employee or an independent contractor requires an examination of all aspects of

the arrangements between the parties, although the critical inquiry pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results. The fact that a contract exists designating a person as an independent contractor is to be considered, but is not dispositive, in determining whether one is an employee or an independent contractor" (see 52 NY Jur.2d §7 [footnotes omitted]).

Considering the facts submitted in proper evidentiary form by defendant C.C. Eastern in support of its motion, not rebutted by contrary evidentiary showing by the plaintiff, the Court finds, based upon the record, that, while defendant Holbdy was contractually bound to C.C. Eastern, his relationship was independent thereof in the sense that he was not its employee in either form or substance. Holbdy's contractual charge was to get specified goods from Point A to Point B, Point C, Point D, etc. in any given day. Holbdy was not paid for his time, but by the weight of each pallet delivered and so much per mile of travel. He owned his own tractor, and operated under a written agreement clearly delineating his status as an independent contractor and containing the indicia that typically accompanies that status. He was free to haul loads for other businesses at the same time he was hauling loads for C.C. Eastern, and similarly, C.C. Eastern was free to use haulers other than Holbdy at any time or all the time. The fact that the trailer being hauled advertised C.C. Eastern does not alter this result.

Accordingly, the motion of defendant C.C. Eastern for summary judgment dismissing the complaint as against it is granted. Counsel for defendant C.C. Eastern shall submit an order in accordance with this decision.

Dated: August 6, 2009
Lyons, New York



JOHN B. NESBITT
Acting Supreme Court Justice

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