

Conzoneri v Balazs

2010 NY Slip Op 33127(U)

October 29, 2010

Supreme Court, Nassau County

Docket Number: 6799/09

Judge: Daniel Palmieri

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Scan

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
MATTHEW CANZONERI,

TRIAL TERM PART: 45

Plaintiff,

-against-

INDEX NO.: 6799/09

**MOTION DATE: 10-12-10
SUBMIT DATE: 10-12-10
SEQ. NUMBER - 003**

**THERESA BALAZS, B & H ASSOCIATES OF NY,
LLC., d/b/a PRUDENTIAL DOUGLAS ELLIMAN
REAL ESTATE and DOUGLAS ELLIMAN REALTY,
LLC, d/b/a DOUGLAS ELLIMAN REAL ESTATE,**

Defendants

-----x

The following papers have been read on this motion:

- Order to Show Cause, undated1**
- Affirmation in Opposition, dated 10-9-10.....2**
- Case of Shah v. Lohandwala, separately submitted.....3**
- Letter from Deanne M. Caputo, dated 10-12-10.....4**

The motion of defendants other than defendant Balazs (said moving parties collectively referred to as defendants) for summary judgment pursuant to CPLR §3212 is denied.

Balazs and plaintiff were involved in an automobile accident. At the time of the accident Balazs worked as a "real estate agent" for defendants in the Franklin Square Office

and was heading from Wantagh were she had been conducting an open house to Baldwin for an open house scheduled to start a short time later.

Plaintiff alleges that at the time of the accident, Balazs was employed by and engaged in the business of the defendants and as such, they are vicariously liable for her negligence.

On this motion, defendants contend that they are not responsible for the negligence of Balazs because she was an independent contractor over whom they lacked that degree of control that would make them responsible. Plaintiff argues to the contrary and each side has directed the Court to a litany of facts in the record which support their respective contentions.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's

affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Ciccione v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner*

Corp., 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. See *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

It has been held, for purposes of determining whether unemployment insurance benefits should be paid that similarly situated real estate salespersons are not employees. “A determination that an employer-employee relationship exists must rest upon evidence that [defendant] exercises control over the results produced by its salespersons or the means used to achieve the results. *12 Cornelia St. Inc., v. Ross*, 56 NY2d 895, 897 (1982). Lack of such control or means to achieve results has been found in a case of battery committed by a salesperson whose hours, compensation and conditions of employment fell short of establishing an employer-employee relationship. *Armacida v. D.G. Neary Realty Ltd.*, 65 AD3d 984 (1st Dept. 2009). A similar result occurred when a one employee corporation was engaged to perform work at a town dump. *Araneo v. Town Board for Town of Clarkstown*,

55 AD3d 516 (2d Dept. 2008), *see also*, *Geller v. Russo*, 45 AD3d 1301 (4th Dept. 2007) involving a vehicle reposessor. A contrary result was reached in *Shah v. Lokhandwala*, 265 AD2d 396 (2d Dept. 1999), where it was held that there were triable factual issues as to whether the real estate agent in that case was truly independent.

“The test is the existence of a right of control over the agent in respect of the manner in which his work is to be done. A servant is an agent who works under supervision and direction of his employer; and independent contractor is one who is his own master.” *Isik Jewelry v. Mars Media Inc.*, 418 F. Supp.2d 112,131 (E.D.N.Y. 2005)

In the realm of unemployment insurance, courts have considered in finding a relationship that all sales were entirely channeled through the employer, approval of advertising, desk space, access to telephones, business cards identifying the employer, an inference of employer expectation with regard to business generating, instruction sessions and sales guidance. *Claim of Cohen*, 112 AD2d 687 (3rd Dept. 1985) affirmed on opin. of App. Div. 57 NY2d 683 (1986).


Although both sides raised numerous factors to be considered, all of which have been noted, the Court has found persuasive on the issue of fact finding that defendants' website included contact information for Balazs, she had access to input on defendants website, rules governing advertising, help in the form of regular meetings, literature and materials, business cards with logo, desk with direct line, testimony as to a bar against other employment, testimony as to portability of clients, testimony as to work hours and testimony as to execution by defendants of listing agreements.

In sum, while there are factors and considerations on both sides of the issue, the Court is not able to state that as a matter of law Balazs should not be considered an employee for the purposes of determining whether defendants are vicariously responsible for her negligent conduct. The defendants motion for summary judgment is denied.

This shall constitute the Decision and Order of this Court.

E N T E R

DATED: October 29, 2010


HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: Sullivan Papain Block McGrath & Canavo PC
By: Deanne M. Caputo
Attorney for Plaintiff
55 Mineola Boulevard
Mineola, NY 11501

ENTERED
NOV 03 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Robert J. Pape, Jr., Esq.
Paganini, Cioci, Cusumano & Farloe, Esqs.
Attorneys for Defendants
B&H Associates of NY, LLC
1979 Marcus Avenue, Ste. 220
Lake Success, NY 11042

Christina A. Leonard, Esq.
Martyn, Toher & Martyn
Attorneys for Defendant Balazs
330 Old Country Road, Ste. 211
Mineola, NY 11501