

Barry v Maneen

2010 NY Slip Op 33372(U)

November 24, 2010

Supreme Court, New York County

Docket Number: 396/10

Judge: Roy S. Mahon

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

KEVIN BARRY,

Plaintiff(s),

- against -

ANDREW J. MANEEN,

Defendant(s).

TRIAL/IAS PART 7

INDEX NO. 396/10

**MOTION SEQUENCE
NO. 1 & 2**

**MOTION SUBMISSION
DATE: September 27, 2010**

The following papers read on this motion:

- Notice of Motion** **X**
- Notice of Cross Motion** **X**
- Reply Affirmation** **X**
- Memorandum of Law** **X**

Upon the foregoing papers, the motion by the defendant for an Order pursuant to CPLR §3211 dismissing plaintiff's Complaint in its entirety on the ground that plaintiff's action is barred by the Worker's Compensation Law and the cross motion by the plaintiff for an Order pursuant to CPLR §2215 and under the authority of CPLR §602, consolidating an action commenced by the plaintiff in the Supreme Court of the State of New York, County of Nassau under Index No. 018967/08 entitled *Kevin Barry v Sands Point Golf Club, Inc. and Eagle View Golf, LLC* with the above captioned matter, are both determined as hereinafter provided:

This personal injury action arises out of an incident that occurred on May 22, 2007 at the Sands Point Country Club during renovation work that was being performed on a hole and tee area at the Country Club located at 130 Middleneck Road, Sands Point. The work was being performed by Eagle View Golf, LLC., a defendant in a companion case entitled "*Barry v Sands Point Golf Club, Inc. and Eagle View Golf, LLC*" Index No. 18967/08, the action to which the plaintiff's cross-motion is addressed. The plaintiff was assigned by the non-party Labor Ready, a temporary agency to the site where Eagle View Golf, LLC was undertaking the renovations. The plaintiff reported to the site and in the course of performing work was injured when a vehicle known as a "gator" struck him. At the time of the alleged injury the defendant was the plaintiff's supervisor. The defendant maintains that while the defendant himself was paid his salary by a non-party staffing company known as CSBC Employment Solutions, he was in fact a "special employee" of Eagle View Golf, LLC. As such, based upon the foregoing the defendants seeks the requested relief.

In its entirety, the Court in its prior Order dated July 15, 2010 set forth:

"The Court notes that while captioned as a pre-Answer motion to dismiss pursuant to CPLR §3211, the defendant is in actuality seeking summary judgment pursuant to the provisions of CPLR §3212 by the inclusion of deposition transcripts in a related case which is the subject of the plaintiff's cross-motion. In this regard, the Court pursuant to the provisions of CPLR §3211(c) will consider the defendant's application as one for summary judgment and the defendant's application is adjourned to the Court's motion calendar for September 13, 2010. The respective parties may submit further submissions on notice to the adversary for consideration by the Court in conjunction with the motion.

In light of the fact that the issues raised in the plaintiff's cross-motion relate to the defendant's application, the plaintiff's application should be considered in conjunction with the defendant's application.

Based upon the foregoing, the plaintiff's application for an Order pursuant to CPLR §3211 dismissing plaintiff's Complaint in its entirety on the ground that plaintiff's action is barred by the Worker's Compensation Law and the cross motion by the plaintiff for an Order pursuant to CPLR §2215 and under the authority of CPLR §602, consolidating an action commenced by the plaintiff in the Supreme Court of the State of New York, County of Nassau under Index No. 018967/08 entitled *Kevin Barry v Sands Point Golf Club, Inc. and Eagle View Golf, LLC* with the above captioned matter, **are both adjourned to September 13, 2010.**

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

In examining the issue of a special employee, the Court in **Thompson v Grumman Corp.**, 78 NY2d 553, 578 NYS2d 106 set forth:

"We have consistently found as a general proposition that a general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits (*Stone v Bigley Bros.*, 309 NY 132; *Irwin v Klein*, 271 NY 477; *Murray v Union Ry. Co.*, 229 NY 110, 112-113; *Matter of Schweitzer v Thompson & Norris Co.*, 229 NY 97, 99; see also, *Camili v Pace Univ.*, 131 AD2d 419, 420). A special employee is described as one who is transferred for a limited time of whatever duration to the service of another (*Brooks v Chemical Leaman Tank Lines*, 71 AD2d 405, 407). General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer (*Stone v Bigley Bros.*, *supra*, at 140-143 [and cases cited therein]; *Sweet v Board of educ.*, 290 NY 73, 76-77; *Irwin v Klein*, *supra*, at 484-485; *Ramsey v New York Cent. R. R. Co.*, 269 NY 219, 224).

We recognize that a person's categorization as a special employee is usually a question of fact (*Stone v Bigley Bros.*, *supra*; *Irwin v Klein*, *supra*, at 486-487; *Wawrzonek v Central Hudson Gas & Elec. Corp.*, 276 NY 412, 419; *Ramsey v New York Cent. R. R. Co.*, *supra*; *Braxton v Mendelson*, 233 NY 122). These cases usually involve arrangements under which a general employer performed work and provided services for another business and, in the course of doing so, an employee and equipment of the general employer were necessarily used and temporarily assigned to work for that business. These lent employee cases, not surprisingly, rest on their particular facts. They do not create a *per se* rule that a question of fact always exists in these cases. They do not require that the question of special employment inevitably go to a jury. That is true here where, combined with other indicia of special employment, the uncontroverted record documents an employer's comprehensive and exclusive daily control over and direction of the special employment inevitably go to a jury. That is true here where, combined with other indicia of special employment, the uncontroverted record documents an employer's comprehensive and exclusive daily control over and direction of the special employee's work duties for almost a full year with the corresponding complete absence of any supervision or control of his work duties by the originating general employer.

Indeed, though recognized as an exception to the general approach and analysis, we have held that the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact (*Sweet v Board of Educ.*, 290 NY, at 76, *supra*; *Irwin v Klein*, 271 NY at 487, *supra*; *Ramsey v New York Cent., R.R. Co.*, 269 NY, at 223-224, *supra*; *Charles v Barrett*, 233 NY 127, 129; *Murray v Union Ry. co.*, 229 NY, at 112, *supra*; see also, *Delisa v Arthur F. Schmidt, Inc.*, 285 NY 314, 320; *Fallone v Misericordia Hosp.*, 23 AD2d 222, 227, *affd without opn* 17 NY2d 648; *Richiusa v Kahn Lbr. & Millwork Co.*, 148 AD2d 690, 692; *Cameli v Pace Univ.*, 131 AD2d at 420, *supra*; *Doboshinski v Fuji Bank*, 78 AD2d 537, 538; *Brooks v Chemical Leaman Tank Lines*, 71 AD2d, at 407, *supra*). Thus, we have never held that

the issue of special employment must always be submitted to a fact finder where the undisputed facts establish that the general employer was performing no work for the employee. This, when combined with other factors, allows a determination of special employment status as a matter of law (*compare, Andre v Pomeroy, 35 NY2d 361*).

Many factors are weighed in deciding whether a special employment relationship exists, and generally no one is decisive (*Braxton v Mendelson, 233 NY 122, 124, supra*). While not determinative, a significant and weighty feature was emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work (*Stone v Bigley Bros., 309 NY 132, supra; Sweet v Board of Educ., 290 NY 73, 76-77, supra; Irwin v Klein, 271 NY 477, 484, supra; Ramsey v New York Cent. R.R. Co., 269 NY 219, 224, supra; Wawrzonek v Central Hudson Gas & Elec. Corp., 276 NY 412, 419, supra; Wyllie v Palmer, 137 NY 248, 257*).

Thomson v Gruman Corp., supra at 557-558

In support of the defendant's application, the defendant submits an affidavit of the defendant Andrew J. Manus as to his employment including supervision, control and payment which is sworn to before a notary from the State of Louisiana. The plaintiff objects to said affidavit on the grounds that said affidavit does not contain a certificate as required by CPLR §2309. In examining such an issue, the Court in **Betz v Daniel Conti, Inc.**, 69 AD3d 545, 892 NYS2d 477 (Second Dept., 2010) stated:

"Although the affidavit of the defendants' expert, which was notarized outside the state, failed to conform to the requirements set forth in CPLR 2309©, contrary to the Supreme Court's determination, such defect was not fatal, as the plaintiff was not prejudiced thereby (*see CPLR 2001; Smith v Allstate inc. Co., 38 AD3d 522 [2007]; see also Falah v Stop & Shop Cos., Inc., 41 AD3d 638 [2007]*).

Betz v Daniel Conti, Inc., supra at 477

Notwithstanding, the Court's determination in *Betz v Daniel Conti, Inc., supra* that the absence of a certification was not "fatal", the affidavit of the defendant submitted herein is seminal to the issue of the defendant's employment status in relation to the defendant's application (*see, Thomson v Gruman Corp., supra*). As such, the affidavit is required to be in admissible form (*see CPLR §2309(c)*). As such, the defendants' application is **denied without prejudice to renew** upon proper papers.

In the absence of opposition, the plaintiff's application for an Order pursuant to CPLR §2215 and under the authority of CPLR §602, consolidating an action commenced by the plaintiff in the Supreme Court of the State of New York, County of Nassau under Index No. 018967/08 entitled *Kevin Barry v Sands Point Golf Club, Inc. and Eagle View Golf, LLC* with the above captioned matter, is **granted**. The caption of the action shall now read:

KEVIN BARRY,

INDEX NO. 396/10

Plaintiff,

- against -

SANDS POINT GOLF CLUB, INC., EAGLE
VIEW GOLF, LLC and ANDREW J. MANEEN,

Defendant.

SO ORDERED.

DATED: 11/24/2010

Roy S. Mahon
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J.S.C.

ENTERED
DEC 01 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE