Ezell v Black Butterfly Prod.
2010 NY Slip Op 33646(U)
December 27, 2010
Supreme Court, New York County
Docket Number: 100940/2009
Judge: Paul Wooten
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[1]
SCANNED ON 1/11/2011

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

PRESENT: HON. PAUL WOOTEN, Justice — PART 7

MARY GRACE EZELL,

Plaintiff,

- against-

BLACK BUTTERFLY PRODUCTIONS, FORTY ACRES AND A MULE FILMWORKS, INC., AND BLACK BUTTERFLY PRODUCTIONS, LLC,

Defendants.

INDEX NO. 100940/2009

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 3, are read on this motion by defendants for summary judgment, pursuant to CPLR 3212; and cross-motion by plaintiff to dismiss, pursuant to CPLR 3211(b).

FILED
JAN 11 2011
COUNTY CLERK'S OFFICE
NEW YORK

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ■ Yes ☐ No

This is a personal injury action by plaintiff Mary Grace Ezell ("plaintiff") against defendants Black Butterfly Productions, Black Butterfly Productions, LLC (collectively "Black Butterfly"), and Forty Acres and a Mule Filmworks, Inc. ("Forty Acres") (collectively "defendants"), to recover damages for injuries that plaintiff allegedly sustained when she slipped and fell while working as background talent on the set of the film "*The Miracle at St. Anna.*" The parties have completed discovery and the Note of Issue was filed on October 19, 2010. Defendants now move for summary judgment, pursuant to CPLR 3212, dismissing the complaint in its entirety on the grounds that: (1) plaintiff's action is barred by the exclusive remedy provisons of Workers' Compensation Law §§ 11 and 29(6) because Black Butterfly was plaintiff's "special employer"; and (2) Forty Acres has no liability for the incident since it had no

involvement in the production of the film. Plaintiff opposes the motion and cross-moves to dismiss defendants' exclusivity defense under the Workers' Compensation Law, pursuant to CPLR 3211(b).

BACKGROUND

In support of their summary judgment motion, defendants submit, *inter alia*, plaintiff's deposition; an affidavit of Michael Ellis, the First Assistant Director for Black Butterfly; an affidavit of Heather Parish, the Secretary for Black Butterfly and Business Manager at Forty Acres; and an affidavit of Kay Kimmel, the Vice-President of Labor Relations for Entertainment Partners Services Group ("Entertainment Partners"). In opposition, plaintiff submits her own affidavit and portions of a Screen Actors Guild Codified Basic Agreement ("SAG Agreement"). The following facts are undisputed.

A. The Parties

Plaintiff is a professional actress and member of the Screen Actors Guild ("SAG") union. Black Butterfly is an entity that was formed solely for the purpose of producing the film "*The Miracle at St. Anna*," a union film directed by Shelton Spike Lee ("Lee").[1] Forty Acres is Lee's permanent production company, and had no involvement in the production of the film.

On October 2, 2007, Black Butterfly executed a Personnel Services Agreement ("Personnel Agreement") with Entertainment Partners, which is a company that provides payroll services and workers' compensation benefits to movie production companies.[2] Under their agreement, Entertainment Partners was to assist Black Butterfly in paying their employees and paying union benefits to the appropriate benefit funds or plans for the production of "*The*

[1]Lee was originally named as a defendant but the complaint as against him was discontinued, with prejudice, by Stipulation of Discontinuance on April 29, 2009.

[2]The Personnel Agreement was in effect at all times relevant to this action. A redacted copy of the Personnel Agreement is attached as Exhibit A to Parish's affidavit.

Miracle at St. Anna."

Pursuant to the terms of the Personnel Agreement, Black Butterfly was responsible for hiring all personnel for the film and had the ultimate authority to direct, control, and supervise its employees. Black Butterfly was also responsible for day-to-day supervision and direction of film personnel. Entertainment Partners retained a general right to supervise personnel, but such supervision was subject to any instructions or requirements of Black Butterfly, and in the event of any disagreement, Black Butterfly's decision was final. The Personnel Agreement also specifically provided that Entertainment Partners was the "general employer" of film personnel, and that Black Butterfly was the "special employer."

In accordance with the terms of the Personnel Agreement, Black Butterfly hired all of the personnel for the film. Ellis, along with other Black Butterfly employees, was responsible for day-to-day supervision and direction of all background talent, which included advising the background actors about the scene that was being shot, what role they were playing in the scene, and what they needed to do for the scene. Ellis also had authority to terminate all background talent hired for the film. Every person hired by Black Butterfly was paid by Entertainment Partners upon submitting a voucher. Entertainment Partners, as the general employer, carried a workers' compensation policy for all of its employees.

According to the affidavits of Ellis and Kimmel, no one at Entertainment Partners hired, supervised, or gave any direction to plaintiff at any time. No one from Entertainment Partners was ever present on location during the filming or casting of the film.

B. <u>The Incident</u>

According to plaintiff's affidavit, on January 11, 2008, plaintiff was contacted by a film casting company about working as background talent on the film. . The only description of the scene was that she was to play a customer in a post office and that the story was set in the winter of the 1980's. There was no mention of any stunt work or a murder scene.

On January 14, 2008, plaintiff reported to the set at 49-51 Chambers Street, New York, New York. There were a couple of production assistants from Black Butterfly present, but no one from Entertainment Partners or the casting company were present. Following a lunch break, the background actors entered the room where the scene was to be filmed and Lee, the film's Director, picked plaintiff and four others to be in the line of customers next to the principal actors in the scene. None of the background actors knew what the scene was about or what action was entailed at that point.

Immediately thereafter, plaintiff overheard a safety meeting involving the camera crew and the stunt coordinator regarding the use of a firearm for the scene that plaintiff was involved in. At the end of the meeting, Ellis provided a run down of what the scene would entail. Plaintiff was cast in an action scene that involved a murder of a man that was situated directly next to her. Upon the discharge of a firearm, ninety-one background actors were to start screaming and frantically run toward the nearest exit in unison. Plaintiff had a shawl tied around her upper body that affected her balance and coordination. During the second take of the scene, she allegedly slipped and fell resulting in injuries. A claim was subsequently submitted to Entertainment Partners for workers' compensation benefits, and plaintiff received worker's compensation from its policy in connection with the incident.

Plaintiff concedes that no one from Entertainment Partners ever gave her any directions on the day of the accident. She takes the position that the post office scene was a "dangerous stunt scene," and that pursuant to a union contract between defendants and SAG known as the SAG Agreement, defendants were required to submit a description of the scene to SAG, notify the background talent of the nature of the scene during the casting call, and obtain consent in order to proceed with the stunt work. She alleges that defendants failed to notify her of the nature of the scene or to gain her consent, and thus violated the terms of the SAG Agreement.

DISCUSSION

Defendants move for summary judgment dismissing the complaint, as a matter of law, on the basis that plaintiff's claims are barred by Workers' Compensation Law §§ 11 and 29(6) because Black Butterfly was plaintiff's "special employer." They also argue that the complaint as against Forty Acres should be dismissed since it is undisputed that Forty Acres had no involvement in the production of the film.

Plaintiff opposes the motion and cross-moves to dismiss the workers' compensation exclusivity defense on the grounds that there are questions of material fact regarding whether Black Butterfly was her "special employer" since she did not have a full understanding of the type of work she was hired to perform. Plaintiff further asserts that defendants violated the SAG Agreement by casting her in a dangerous stunt scene without notifying SAG and obtaining her consent. She submits no evidence in opposition to defendants' motion as to Forty Acres.

A. Summary Judgment Standards

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212

[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

B. Workers' Compensation Law § 11 and 29(6)

Workers' Compensation Law §§ 11 and 29(6) provide that workers' compensation is the exclusive remedy that a worker may obtain against an employer for losses suffered as a result of injuries sustained during the course of employment (*see Valenziano v Niki Trading Corp.*, 21 AD3d 818, 820 [1st Dept 2005]). It is well settled that a person may be deemed to have more than one employer for purposes of the Workers' Compensation Law -- a "general employer" and a "special employer" (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]). "[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" (*id.*).

A "special employee" is defined as "one who is transferred for a limited time of whatever duration to the service of another" (*id.*). While the determination of an employee's status is usually a question of fact, "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" (*id.* at 557-58). "A key factor in determining whether a special employment relationship exists is 'who controls and directs the manner, details and ultimate result of the employee's work" (*Villanueva v Southeast Grand St. Guild Hous. Dev. Fund Co.*, 37 AD3d 155, 156 [1st Dept 2007] [quoting *Thompson*, 78 NY2d at 558]; *see also Suarez v*

Food Emporium, 16 AD3d 152, 153 [1st Dept 2005]). "Other factors include 'who is responsible for payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or general employer's business'" (*Franco v Kaled Mgt. Corp.*, 74 AD3d 1142, 1142-43 [2d Dept 2010] [quoting *Schramm v Cold Spring Harbor Lab.*, 17 AD3d 661, 662 [2d Dept 2005]).

The Court finds that defendants have prima facie established their entitlement to judgment as a matter of law under the exclusive remedy provisions of the Workers' Compensation Law. Defendants have made the requisite prima facie showing that Black Butterfly controlled and directed the manner, details and ultimate result of plaintiff's work on the film (*see Villanueva*, 37 AD3d at 156-57; *Gherghinoiu v ATCO Prop. & Mgt., Inc.*, 32 AD3d 314, 315 [1st Dept 2006]; *Maldonado v Canac Intern., Inc.*, 258 AD2d 415, 415 [1st Dept 1999]). The affidavits of Ellis and Kimmel, which are based upon their personal knowledge, establish that Black Butterfly was ultimately responsible for all hiring, supervision, and termination of all background talent for the film. Black Butterfly employees, in accordance with the Personnel Agreement, handled day-to-day supervision and the manner in which plaintiff performed her role as background talent. It is undisputed that no one from Entertainment Partners was ever present on the set, and that no one at Entertainment supervised or directed plaintiff regarding the film. Moreover, the Personnel Agreement itself expressly set forth Black Butterfly's status as plaintiff's special employer.

In opposition, plaintiff has failed to raise a triable issue of fact concerning her status as a special employee of Black Butterfly (*see Thompson*, 78 NY2d at 559; *Hill v Warner Bros., Inc.*, 277 AD2d 10, 10 [1st Dept 2000]). Plaintiff does not dispute that her work was ultimately controlled by Black Butterfly, and she has conceded that no one from Entertainment Partners was ever present on the set or gave her any directions on the day of the accident (*see Hill*, 277 AD2d at 10; *Gherghinoiu*, 32 AD3d at 315; *Villanueva*, 37 AD3d at 157; *Suarez*, 16 AD3d at 153-54).

The Court, moreover, is unpersuaded by plaintiff's argument that a special employee relationship cannot be established, as a matter of law, due to plaintiff's lack of a full understanding of the type of work she was hired to perform. Defendants' purported failure to submit a scene description to SAG or to obtain plaintiff's consent to cast her in a "dangerous stunt scene" as required by the SAG Agreement are immaterial to the issue of plaintiff's special employee status (*see Thompson*, 78 NY2d at 559 [contract between employers failed to raise question of fact as to plaintiff's special employee status where plaintiff was not a party to the contract and it did "not purport to define or resolve the issue of [plaintiff's] *special* employment status, generally or with respect to workers' compensation benefits or consequences"]; *Villanueva*, 37 AD3d at 156).

Therefore, the Court concludes that plaintiff's claims are barred by the exclusivity provisions of the Workers' Compensation Law, and, accordingly, defendants' motion for summary judgment is granted. Plaintiff's cross-motion to dismiss the exclusivity defense is denied as moot.

C. Forty Acres

Defendants further argue that plaintiff's complaint as against Forty Acres should be dismissed since Forty Acres had no involvement in the production of the film. Plaintiff submits no evidence in opposition to this branch of defendants' motion.

Since the undisputed evidence unequivocally indicates that Forty Acres took no part in the production of the film on which plaintiff was working when she was allegedly injured, Forty Acres cannot be held liable for plaintiff's claimed injuries. Dismissal of the complaint as against Forty Acres is thus warranted (*see Hill*, 277 AD2d at 11 [dismissing action against Forty Acres where undisputed evidence established that it did not have "any part in the production of the

film on which plaintiff was working when allegedly injured"]).

For these reasons and upon the foregoing papers, it is,

ORDERED that defendants' motion for summary judgment dismissing the complaint in its entirety is granted; and it is further,

ORDERED that plaintiff's cross-motion for summary judgment is denied as moot; and it is further,

ORDERED that defendants shall serve a copy of this order, with Notice of Entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: December 27, 2010

Paul Wooten J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

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