

<b>Holmes v Business Relocation Serv., Inc.</b>
2013 NY Slip Op 33872(U)
July 26, 2013
Sup Ct, Bronx County
Docket Number: 307726/2011
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART \_\_\_\_\_ IA - 5 \_\_\_\_\_

\_\_\_\_\_  
KEITH HOLMES,

INDEX NUMBER: 307726/2011

Plaintiff,

-against-

Present:  
HON. ALISON Y. TUITT  
*Justice*

BUSINESS RELOCATION SERVICES, INC.,

Defendant.

\_\_\_\_\_  
BUSINESS RELOCATION SERVICES, INC.,

INDEX NUMBER: 83918/2012

Third-Party Plaintiff,

-against-

UNITED STAFFING SYSTEMS, INC.,

Third-Party Defendant.

The following papers numbered 1 to 5,

Read on this Motions for Summary Judgment

On Calendar of 5/20/13

Notices of Motion-Exhibits, Affirmations \_\_\_\_\_ 1, 2

Affirmations in Opposition \_\_\_\_\_ 3, 4

Reply Affirmation \_\_\_\_\_ 5

\_\_\_\_\_  
Upon the foregoing papers, defendant/third-party plaintiff Business Relocation Services, Inc.'s (hereinafter "BRS") motion for summary judgment and third-party defendant United Staffing Systems, Inc.'s (hereinafter "United") motion for summary judgment are consolidated for purposes of this decision. For the

reasons set forth herein, BRS's motion is denied and United's motion is granted.

This is an action that stems from an accident that occurred on October 30, 2009, in which plaintiff claims to have sustained serious injuries. Defendant BRS moves for summary judgment arguing that plaintiff was a special employee of BRS and is therefore barred from maintaining an action against BRS under the Worker's Compensation Law.

Plaintiff had been assigned to drive a truck and perform deliveries of voting machines on behalf of BRS. BRS supplied the truck and directed plaintiff as to where to deliver them. BRS is in the business of moving business machinery and equipment. Third-party defendant United is engaged in the business of supplying temporary, part-time and/or specialized employees for corporate and other clients. BRS and United entered into a contract dated January 22, 2009, whereby United agreed to supply BRS the services of certain United employees. Plaintiff was one of those employees.

On October 29, 2009, plaintiff was employed by United as a per diem truck driver. United assigned plaintiff to drive a truck and perform delivery services on behalf of BRS. Plaintiff testified that he received a phone call from United the night before telling him to pick up a truck at a certain location. The day of the accident was the second day plaintiff was assigned to work with BRS. Plaintiff met two other men at the designated location, one from BRS, who plaintiff knew only as Joe and who he believed to be the foreman. Joe gave plaintiff the keys to the truck.

Michael Vailes, a supervisor employed by BRS, testified at a deposition that his assignment on the day of the accident was to deliver voting machines. He met plaintiff, the driver of the truck, and they received their assignment and directions from the BRS project manager who they knew only as Joe or Joe C. Mr. Vailes further testified that the drivers of the truck are to load and unload the truck, but he does not know too much of what they do. It was not part of his responsibilities to oversee the drivers. It was his job to make sure that everyone was safe, that the job was done correctly and to make sure there were no damaged goods. He did not inspect the vehicles. Mr. Vailes also testified that he was not aware of any instructions given by BRS to temporary employees on how to remove commercial objects.

The truck was not owned, operated or maintained by United. Plaintiff testified that the lettering on the side of the truck said BRS from Secaucus, New Jersey. Plaintiff testified that the voting machines were already in the truck when he arrived that morning. Plaintiff had been told by a BRS employee to be careful

when moving the voting booths because they were dangerous and very heavy. No one told him how to load and unload the voting booths, and he learned to do it on site by being "hands on".

It is undisputed that at the time of the accident, plaintiff was employed by United which temporarily assigned him to its client BRS. United paid plaintiff's salary and benefits, including worker's compensation, and determined to which of its clients plaintiff was to report to as well as the duration of the assignment. BRS did not provide plaintiff with a uniform, equipment, training or benefits. Moreover, in its contract with United, BRS expressly warranted not to hire, for any basis, a United employee because "...all personnel assigned under this agreement are its [United] employees and not Business Relocation Services Inc. employees...". Under its agreement with BRS, United assumed sole responsibility for hiring, firing, paying and providing worker's compensation and/or unemployment benefits to plaintiff. All temporary personnel like plaintiff were employees of United and not BRS.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1<sup>st</sup> Dept. 1997).

A special employee is described as one who was transferred for a limited time of whatever

duration to the service of another. Thompson v. Grumann Aerospace Corp., 78 N.Y.2d 553 (1991). General employment is presumed to continue, and special employment will not be found absent an affirmative showing that complete and exclusive control has in fact been surrendered by the general employer and assumed by the special employer. Id. Essential to the special employment relationship “is a working relationship with the injured plaintiff sufficient in kind and degree so that the [special employer] may be deemed plaintiff’s employer.” Fung v. Japan Airlines Co. Ltd., 9 N.Y.3d 351 (2007). Important in determining whether a special relationship exists is “who controls and directs the manner, details and ultimate result of the employee’s work, in other words, who determines all essential locational and commonly recognizable components of the [employee’s] work relationship.” Id. Whether such a complete transfer of control has occurred is ordinarily a fact-sensitive inquiry not amendable to resolution on summary judgment. Thompson, 78 N.Y.2d at 557; Bellamy v. Columbia University, 851 N.Y.S.2d 406 (1<sup>st</sup> Dept. 2008). Only where defendant is able to conclusively demonstrate that it has assumed exclusive control over “the manner, details and ultimate result of the employees work” (see, Thompson, 78 N.Y.2d at 558), is summary adjudication of special employment status and consequent dismissal of an action proper. Bellamy, 851 N.Y.S.2d at 408.

In the First Department, cases involving temporary personnel are summarily decided in favor of a defendant “special employer” only when its direct control over the plaintiff’s work is essentially admitted. See, Villanueva v. Southeast Grand St. Guild Housing Development Fund Co., Inc., 829 N.Y.S.2d 859 (1<sup>st</sup> Dept. 2007); Suarez v. Food Emporium, Inc., 792 N.Y.S.2d 384 (1<sup>st</sup> Dept. 2005).

In the instant action, defendant has not conclusively demonstrated that it assumed exclusive control over the work plaintiff performed. The record is devoid of any evidence permitting the legal conclusion that plaintiff was a special employee of BRS. BRS neither supervised plaintiff nor instructed plaintiff on how to do his work. The only BRS employee with plaintiff at the time of the accident, Mr. Vailes, specifically testified that he did not oversee temporary drivers like plaintiff and he did not instruct plaintiff on how to do the job. Plaintiff himself testified that he learned to do the job on his own, being “hands on”. That plaintiff was told to be careful when moving the voting machines because they were dangerous and heavy is not tantamount to instructing plaintiff on how to move them. Accordingly, defendant/third party plaintiff BRS’s motion for summary judgment is denied.

Third-party defendant United moves for summary judgment on the grounds that plaintiff did not

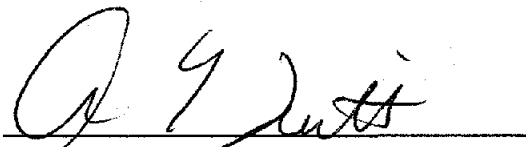
sustain a "grave injury" and therefore no cause of action lies against United. BRS has pled five causes of action against United. BRS conceded during oral argument of the motion that, pursuant to the Workers' Compensation Law §11, no liability lies against United for contribution and indemnity and the First, Second and Fourth causes of action must be dismissed.

BRS' Third cause of action sounds in negligence and the Fifth cause of action alleges breach of contract. The negligence cause of action against United must be dismissed. There is no evidence of negligence of United's part. The truck on and by which plaintiff alleges he was injured was owned, operated and maintained by BRS. The resting of liability for an allegedly unsafe condition arises frequently in the context of real property, but it is equally applicable to the facts herein. "In the absence of any authority to maintain or control the area in question, or to correct any unsafe condition, HKM owed no duty of care with respect to any unsafe condition on MSG premises." Gibbs v. Port Authority of New York, 794 N.Y.S.2d 320 (1<sup>st</sup> Dept. 2005).

United seeks contractual indemnification against BRS. In the absence of a grave injury pursuant to the Worker's Compensation Law, BRS is unable to obtain indemnification from plaintiff's employer unless, prior to the accident, the parties entered into a written contract whereby the employer expressly agreed to contribute to or indemnify the claimant Flores v. Lower East Side Service Center, Inc., 770 N.Y.S.2d 855 (1<sup>st</sup> Dept. 2004); Acosta v. S.L. Green Management. Corp., 699 N.Y.S.2d 402 (1<sup>st</sup> Dept. 1999). Here, the parties entered into a written contractual indemnity agreement. However, since there has been a finding of no negligence on the part of United, the third party cause of action must be dismissed. BRS' assertion that discovery is necessary in order to oppose third-party defendant's motion is based on nothing more than unsubstantiated hope of discovering something relevant to its claims, and is an insufficient reason to deny the motion. Leonard v. Gateway II, LLC, 890 N.Y.S.2d 33 (1<sup>st</sup> Dept. 2009).

This constitutes the decision and order of this Court.

Dated: 7/26/2013



Hon. Alison Y. Tuitt