

Arrascue v Metropolitan Club, Inc.

2014 NY Slip Op 30143(U)

January 16, 2014

Supreme Court, New York County

Docket Number: 111673/2011

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____
Justice

PART _____

Index Number : 111673/2011
ARRASCUE, MARTHA
vs.
METROPOLITAN CLUB
SEQUENCE NUMBER : 001
COMPEL DISCLOSURE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *denied in accordance with the accompanying decision*

FILED

JAN 22 2014

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/16/14

Ray
_____, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

LOUIS B. YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
MARTHA ARRASCUE,

Plaintiff,

FILED

-against-

Index No.: 111673/11

JAN 22 2014

METROPOLITAN CLUB, INC.,

COUNTY CLERK'S OFFICE
NEW YORK

Defendant.

-----X

YORK, J.:

In this action, in which plaintiff Martha Arrascue (plaintiff) alleges personal injuries as a result of a trip and fall which took place while she was working as a waitress, plaintiff moves, pursuant to CPLR 3124, to compel defendant Metropolitan Club (Metropolitan) to produce employment records created by CTI Hospitality (CTI), the staffing agency utilized by Metropolitan which allegedly employed plaintiff. Plaintiff also moves, pursuant to CPLR 3124, to compel Metropolitan to produce its maitre'd, Vedran Strkalji (Strkalji), for a deposition.

Plaintiff alleges that on October 26, 2009, she tripped and fell on boxes while working as a temporary waitress inside of Metropolitan's restaurant. Plaintiff was an employee of Gotham Personnel, LLC (Gotham), a staffing agency which was utilized by Metropolitan to obtain waiters for its catering facilities. Plaintiff requests that Metropolitan produce plaintiff's employment records from CTI. Metropolitan submits an affidavit from Deirdre Curran (Curran), the catering manager for Metropolitan, which states that the staffing agency used by Metropolitan was originally known as CTI, but that its name was changed to Gotham. Curran states that no other changes were made when CTI's name was changed, and that Metropolitan provided all of its records during the period plaintiff was employed by CTI. A. Jeffrey Spiro, Esq., counsel for

Metropolitan, affirms that the records which were produced by Metropolitan include the records for the period in which plaintiff was employed by CTI. Therefore, because Metropolitan has produced an affidavit from an employee, as well as an affirmation from its attorney, stating that all records from CTI for the period plaintiff was employed were produced, and, because plaintiff fails to demonstrate that Metropolitan is in possession of any other records, this court denies the part of plaintiff's motion seeking to compel CTI's records.

Plaintiff also moves to compel the deposition of Strkalji, an employee of Metropolitan. Plaintiff contends that Strkalji's deposition is necessary in order to understand the type of control Metropolitan had over plaintiff. Plaintiff argues that while she was trained by Gotham, her general employer, she was assigned, trained and supervised by individuals at Metropolitan, and that Metropolitan should be held negligent for her accident. Metropolitan alleges that plaintiff is considered to be a "special employee," and that her recovery should be limited to workers' compensation benefits. In its answer, Metropolitan contends that, at the time of her accident, plaintiff "was in the special employ in one of the occupations enumerated in Section 3 of the New York Workers' Compensation Law," and that plaintiff's action against Metropolitan should be dismissed because "plaintiff's sole and exclusive remedy on account of the occurrence which is alleged in the complaint is pursuant to the New York Workers' Compensation Law"

Gjoni affirmation, ex. B.

In determining whether an individual is considered to be a special employee, and whether the workers compensations laws apply, the Court of Appeals has held that "[m]any factors are weighed in deciding whether a special employment relationship exists, and generally no one is decisive. While not determinative, a significant and weighty feature has emerged that

focuses on who controls and directs the manner, details and ultimate result of the employee's work." *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 558 (1991) (citations omitted); *see also Bharat v Bronx Lebanon Hosp. Ctr.*, 106 AD3d 540 (1st Dept 2013) (holding that plaintiff was considered a special employee because defendant demonstrated that it assumed exclusive control over the manner, details, and result of her work).

Here, it remains unclear from plaintiff's deposition testimony, what type of control Strkalji had over plaintiff. Plaintiff testified that Strkalji gave orders to her, ran the entire event on the day of her accident, could tell her when to clean up, and "could say anything related to the banquet or to the event that was taking place." (Arrascue EBT, at 40). However, when questioned whether Strkalji "directed, controlled and supervised" her work, plaintiff responded "No." *Id.*

Plaintiff maintains that at the time of her accident, she was being supervised by Leonardo Santos (Santos) and Cecilio Robles (Robles), captains of the catering room. However, the deposition testimony of Santos and Robles also fail to clarify what control Strkalji and Metropolitan had over plaintiff. Santos testified at his deposition that the maitre'd was not allowed to fire a bad waiter. However, Robles testified that he was not sure if the maitre'd could fire a waiter. In the affidavit drafted by Curran, Curran states that Strkalji does not have the authority to hire or fire any waiters from Gotham, but the affidavit fails to specify what level of control Strkalji or Metropolitan had over plaintiff.

As it remains unclear from the testimony what level of control Strkalji had over plaintiff and whether plaintiff could be considered a special employee, this court will permit plaintiff to conduct a deposition of Strkalji. This deposition must take place within 45 days from service of

notice of entry of this order. The discovery end date will be extended to February 28, 2014, and the note of issue is to be filed on or before March 7, 2014. There will be no adjournments of the above dates without prior court approval.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that the part of plaintiff Martha Arrascue's motion seeking to compel defendant Metropolitan Club, Inc. to produce records from CTI is denied; and it is further

ORDERED that the part of plaintiff's motion compelling defendant Metropolitan Club, Inc., to produce Vedran Strkalji for a deposition is granted.

Dated: 1/16/14

FILED

ENTER:

JAN 22 2014

fy

J.S.C.

COUNTY CLERK'S OFFICE
NEW YORK

LOUIS B. YORK
J.S.C.