

Bennett v Logan

2015 NY Slip Op 30000(U)

January 5, 2015

Supreme Court, Wyoming County

Docket Number: 42215

Judge: Michael M. Mohun

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At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 5th day of January, 2015

PRESENT: **HONORABLE MICHAEL M. MOHUN**
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

LLOYD BENNETT,

Plaintiff,

v.

**DIANE LOGAN,
ANDREW F. CROOKS,
KR COMMUNICATIONS, LLC,
and DIRECT TV,**

Defendants.

DECISION AND ORDER
Index No. 42215

LLOYD BENNETT,

Plaintiff,

v.

**DISH NETWORK, LLC,
and DISH NETWORK SERVICES, LLC,**

Defendants.

In these consolidated actions, the defendants, Dish Network, LLC, and Dish Network Services, LLC [hereinafter, "Dish Network"] having

moved, by notice of motion dated July 8, 2014, for an order: 1) granting them summary judgment and dismissal of the plaintiff's complaint against them on the grounds that the plaintiff's causes of action against Dish Network are without merit; and 2) granting Dish Network summary judgment upon their second cross-claim against defendant, KR Communications, LLC [hereinafter "KR Communications"] and declaring that KR Communications has a contractual duty to defend and indemnify Dish Network in these consolidated actions; and said motion having duly come on to be heard.

NOW, upon reading the pleadings of the parties, and on reading and filing the notice of motion, supported by the affidavit of Mackenzie C. Monaco, Esq., attorney for Dish Network, sworn to on July 8, 2014, together with the annexed exhibits and the accompanying memorandum of law; the affidavit of Blake Van Emst, Vice President of Sales Operations for Dish Network, sworn to on July 2, 2014, together with the annexed exhibit; the opposing affirmation of Joshua P. Rubin, Esq., attorney for KR Communications, dated August 18, 2014, together with the annexed exhibit; the opposing affidavit of C. Daniel McGillicuddy, Esq., attorney for the plaintiff, sworn to on August 22, 2014, together with the annexed exhibits; and the letter to the Court of James P. Burgio, Esq., attorney for defendants, Diane Logan and Andrew F. Crooks, dated August 25, 2014, stating that

Defendants, Logan and Crooks, would be taking no part in the motion of co-defendant, Dish Network; the reply affidavit of Mackenzie C. Monaco, Esq., sworn to on August 25, 2014; the reply affidavit of Mackenzie C. Monaco, Esq., sworn to on September 16, 2014; the reply affirmation of Joshua P. Rubin, Esq., dated September 17, 2014; and after hearing Mackenzie C. Monaco, Esq., for Dish Network, C. Daniel McGillicuddy, Esq., for the plaintiff, and Philip P. Oswald, Esq., for KR Communications, due deliberation having been had, the following decision is rendered.

Initially, it is noted that with respect to defendant, Direct TV, the action has been dismissed pursuant to the stipulation of counsel to the parties filed May 29, 2012. Also, it is noted that, because it has become evident that KR Communications did, in fact, add Dish Network as an "additional insured" under its insurance policy with Tower Insurance Company of New York, Dish Network has withdrawn that portion of its motion which had requested a ruling by the Court upon whether KR Communications had a contractual obligation to so add Dish Network as an "additional insured" under the policy.

The matter arises from an automobile accident that occurred on November 6, 2008, in the Village of Perry, New York in which a car belonging to defendant, Diane Logan, collided with the plaintiff's pickup truck. Driving the car was Defendant, Andrew Crooks. At the time, Mr. Crooks worked as a

salesman for KR Communications selling residential satellite television services door-to-door. KR Communications was an authorized dealer for several satellite television carriers, including Dish Network. Crooks had borrowed Logan's car that day because his car was being repaired. When the collision occurred, he and another salesman were "heading in the direction of home" after spending the day selling in the Perry area. Crooks testified that one selling technique that he used was to look for houses that already had a visible satellite television antenna installed – since he could then offer to switch the homeowner to a different service at a savings. Consequently, although he was leaving the Perry area at the time of the accident, Crooks acknowledged in his deposition testimony that he was not quite finished selling for the day; had he spotted a likely sales opportunity on the way home, he intended to stop.

With respect to Dish Network's motion for dismissal of the plaintiff's complaint, the Court finds that Dish Network has met its burden upon the motion to show, prima facie, that it is entitled to judgment. There is no factual basis for the claim that Dish Network is directly liable for negligence in the causing of the accident, and thus the only arguably viable claim raised against Dish Network in the complaint is the claim that Dish Network is vicariously liable for the conduct of Mr. Crooks on the theory that he was acting at the time as an agent or employee of Dish Network.

Unfortunately for the plaintiff, however, the deposition testimony and other evidence submitted by Dish Network establishes that Mr. Crooks was not an agent or employee of Dish Network. On the contrary, the evidence establishes that Mr. Crooks had no direct relationship, at all, with Dish Network. As a salesman for KR Communications, when he identified a person who desired to purchase satellite television service from Dish Network, Mr. Crooks did not complete the sale himself. He referred the sales prospect to KR Communications, and someone else at KR Communications would finalize the sale and schedule the installation. KR Communications then paid Mr. Crooks' commissions on his sales referrals.

Moreover, the fact that Mr. Crooks was not an agent or employee of Dish Network is borne out by his contract with KR Communications. The contract refers to him as an "independent contractor" for KR Communications. Similarly, the contract between Dish Network and KR Communications designates KR Communications as an "independent contractor" for Dish Network. Thus, by the terms of the contracts, Mr. Crooks was, at most, an independent contractor" for an "independent contractor" of Dish Network. Generally, "a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts" (Kleeman v. Rheingold, 81 N.Y.2d 270, 273 [1993]). In addition, this is not a case in which any of the

recognized exceptions to this general rule would be applicable.

Of course, a party may be called an “independent contractor” in a contract, but still be considered an de facto “employee” for tort liability purposes (Araneo v. Town Board for Town of Clarkstown, 55 A.D.3d 516, 518 [2nd Dept., 2008]; Sanabria v. Aguero-Borges, 117 A.D.3d 1024, 1026 [2nd Dept., 2014]). In determining whether vicarious liability exists, the Court must look beyond the language of the contract. The “critical inquiry” that must be made “pertains to the degree of control exercised by the purported employer.” Bynog v. Cipriani Group, 1 N.Y.3d 193, 198, [2003]). Where the purported employer exercises little or no control over the manner in which the independent contractor performs work, there generally will be no vicarious liability. In addition, “incidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship” (Matter of Ted Is Back Corporation, 64 N.Y.2d 725, 726 [1984]). Here, the evidence submitted establishes that Dish Network exercised no control over Mr. Crooks. Accordingly, the Court finds that Dish Network has met its burden to show that it is not vicariously liable for Mr. Crooks’ negligence. The plaintiff’s submissions in response fail to raise a question of fact on this issue. Therefore, the Court will grant Dish Network’s motion to dismiss the plaintiff’s complaint.

A closer question is, was Mr. Crooks an independent contractor or a de facto employee of KR Communications's at the time of the accident? KR Communications requests that the Court find that Crooks was an independent contractor for KR Communications as a basis for denying Dish Network's motion for summary judgment on its counter-claim. This determination is a factual one, ordinarily to be left to a jury. Where, however, "the evidence on the issue of control presents no conflict, the matter may properly be determined by the court as a matter of law" (Anikushina v. Moodie, 58 A.D.3d 501, 504 [1st Dept., 2009]; see also, Lazo v. Mak's Trading Co., 199 A.D.2d 165, 166 [1st Dept., 1993]).

Here, the record establishes that KR Communications paid Mr. Crooks strictly on a commissions basis. He was not paid from the company's payroll account, nor did KR Communications withhold payroll taxes from his commission checks. Although Crooks testified that he was provided with shirts bearing the KR Communications logo that he would wear on sales calls "[i]f one was clean," that the owner of KR Communications once helped him pay for a car repair, that he occasionally received a "gas card" from KR Communications as a bonus, and that KR Communications covered the cost of his hotel room when he traveled out-of-state to make sales, the record shows that these gratuities were not given pursuant to any employment agreement with KR Communications. Mr. Crooks always used his own

vehicle when making sales, and KR Communications did not otherwise reimburse him for mileage, maintenance or insurance for that vehicle. Mr. Crooks controlled where, when and how he made his sales calls, with KR Communications exercising no more than “incidental control over the results produced” (Matter of Ted, supra). Also, it appears that nothing in his arrangement with KR Communications prevented Mr. Crooks from engaging in other employment if he chose to do so. Based upon the evidence presented by all parties, the Court concludes, as a matter of law, that Mr. Crooks was an independent contractor for KR Communications.

In moving for summary judgment upon its counter-claim against KR Communications for indemnification, Dish Network relies on Section 13(ii) of its contract with KR Communications. As KR Communications points out, however, that subsection explicitly applies only to claims arising from the “lawful and unlawful acts or omissions” of KR Communications and KR Communications’s “employees.” KR Communications contends that the indemnification clause should be limited to its explicit terms, and that it should not be read to extend indemnity to the acts of independent contractors. To the extent that it may be argued that the section is ambiguous, permitting a construction under which independent contractors are included in the term “employees” by implication (see, Section 7.1 of the contract), KR Communications contends that any such ambiguity must be

resolved against the drafter of the contract, Dish Network, and in favor of the KR Communications.

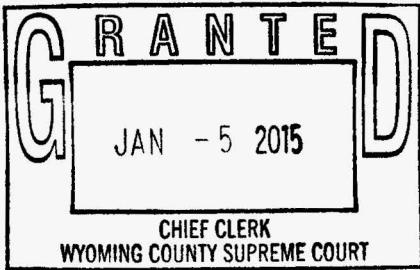
Upon consideration, the Court agrees with KR Communications that the indemnification clause must be limited to its explicit terms. Therefore, having found that Mr. Crooks was not an “employee” of KR Communications, the Court rules that KR Communications is not contractually bound to defend and indemnify Dish Network in these consolidated actions. Having concluded that the motion for summary judgment on the counter-claim shall be denied on this ground, the Court finds it unnecessary to examine the other bases for denial advanced by KR Communications. In denying the motion for indemnification, the Court expresses no opinion on whether KR Communications’s insurance company has a duty to defend Dish Network in these consolidated actions. That issue, which must be determined pursuant to the terms of the insurance policy, not the terms of the underlying business contract between KR Communications and Dish Network (see, Travelers Indemnity Co. v. American Foreign Insurance Co., 286 A.D.2d 626 [1st Dept., 2001]), is not before the Court.

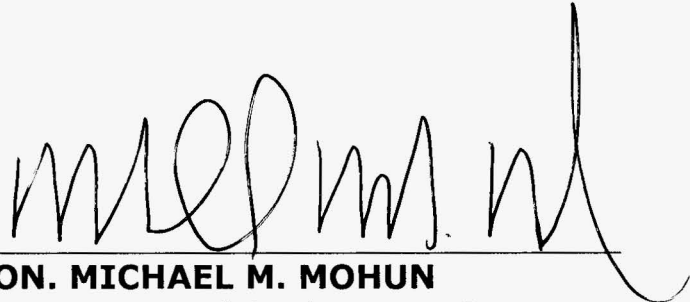
NOW, THEREFORE, it is hereby

ORDERED that the motion of Dish Network for summary judgment against the plaintiff is granted and the plaintiff’s complaint against Dish Network is dismissed in its entirety; and it is further

ORDERED that the motion of Dish Network for a declaration that KR Communications is contractually obligated to defend and indemnify Dish Network in these consolidated actions is denied.

DATED: January 5, 2015
Warsaw, New York




HON. MICHAEL M. MOHUN
Acting Justice of the Supreme Court