Jacobsen v Supernova N.Y. Realty LLC
2015 NY Slip Op 32074(U)
April 24, 2015
Supreme Court, New York County
Docket Number: 108472/10
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EA 4/28/15 E

PRESENT: DEBRA A. JAMES
Justice

PART 59

Index Number : 108472/2010
JACOBSEN, KATHERINE
vs.
SUPERNOVA NEW YORK REALTY LLC
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

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 for reasons stated in the attached Memorandum Decision and Order.

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

FILED
APR 28 2015
NEW YORK
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NYS SUPREME COURT - CIVIL

Dated: APR 24 2015

DEBRA A. JAMES, 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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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KATHERINE JACOBSEN,

Plaintiff,

-against-

Index No. 108472/10

SUPERNOVA NEW YORK REALTY LLC, STARWOOD HOTELS & RESORTS WORLDWIDE, INC., STARWOOD HOTELS & RESORTS MANAGEMENT COMPANY, INC., SHERATON NEW YORK LLC, THE SHERATON LLC, MANHATTAN SHERATON CORPORATION AND SHERATON LICENSE OPERATING COMPANY, LLC and AUDIO VISUAL SERVICES GROUP, INC. d/b/a PRESENTATION SERVICES (PSAV),

Defendants.

---------------------------------------x

SNYT LLC i/s/a SUPERNOVA NEW YORK REALTY LLC, STARWOOD HOTELS & RESORTS WORLDWIDE, INC., STARWOOD HOTELS & RESORTS MANAGEMENT COMPANY, INC., SHERATON NEW YORK LLC, THE SHERATON LLC, MANHATTAN SHERATON CORPORATION and SHERATON LICENSE OPERATING COMPANY, LLC,

Third Party Plaintiffs,

-against-

AUDIO VISUAL SERVICES GROUP, INC. d/b/a PRESENTATION SERVICES (PSAV),

Third-Party Defendant.

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APR 28 2015
NEW YORK
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SNYT LLC i/s/a SUPERNOVA NEW YORK REALTY LLC, STARWOOD HOTELS & RESORTS WORLDWIDE, INC., STARWOOD HOTELS & RESORTS MANAGEMENT COMPANY, INC., SHERATON NEW YORK LLC, THE SHERATON LLC, MANHATTAN SHERATON CORPORATION and SHERATON LICENSE OPERATING COMPANY, LLC,

Second Third-Party Plaintiffs,

-against-

BROADWAY DANCE PROJECT and PULSE INTERNATIONAL PRODUCTIONS LLC,

Second Third-Party Defendants.
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Debra A. James, J.:

Second third-party defendant Pulse International Productions LLC (Pulse) moves for an order, pursuant to CPLR 3212 and Workers' Compensation Law § 11, dismissing all the second third-party plaintiffs' SNYT LLC i/s/a Supernova New York Realty LLC, Starwood Hotels & Resorts Worldwide, Inc., Starwood Hotels & Resorts Management Company, Inc., Sheraton New York LLC, The Sheraton LLC, Manhattan Sheraton Corporation and Sheraton License Operating Company, LLC (Sheraton Defendants) claims against it.

In this personal injury action, plaintiff Katherine Jacobsen seeks recovery for injuries she sustained in a fall from a chair, on July 5, 2008, at a dance convention being held at the Metropolitan Ballroom East of the Manhattan Sheraton Hotel, located at 811 Seventh Avenue, New York, New York.

At the time of the accident, Jacobsen claims she was

employed by Pulse as the emcee for the dance convention on a trial basis for one week. Before the event, the marketing director of Broadway Dance Center, Pam Chancey, met with Jacobsen and two other people they were considering as emcees, at the Pulse offices. Chancey explained what their responsibilities would be at the Pulse on Tour shows. Pulse emailed Jacobsen a schedule. Jacobsen shadowed Bonnie Ericson, the previous emcee whom Jacobsen believed worked for Pulse, on July 4 and July 5.

On July 5, 2008, before the show began, Jacobsen went to sit in a chair backstage, and she fell off the stage, landing on her back. The next day, she went to Christ Hospital in Jersey City, New Jersey for treatment for back pain. She asserts that she has sustained herniated discs at the T2-3, T4-5, T5-6, T7-8, T8-9, L4-5, L5-S1, as well as pain and weakness in those areas.

On July 11, 2008, Jacobsen, with the help of Diane King, the executive director of Broadway Dance Center d/b/a Rhythm Life Corp, filed a Workers' Compensation claim under a policy issued by The Hartford Fire Insurance Company, under policy number 13 WEC TF3783 (Hartford Policy). This policy was issued to Rhythm Life Corp., and its effective dates were June 11, 2008 to June 11, 2009. It was amended in 2013 to add Pulse as an additional insured. The letter from the Hartford Fire Insurance Company acknowledging Jacobsen's claim indicates that Rhythm of Life Corp. was the employer, and Jacobsen, its employee. By

affidavit, Melissa Driscoll, a Hartford claims adjuster, states that Workers' Compensation benefits are being paid to Jacobsen under the Hartford Policy held by Pulse. Jacobsen testified at her deposition that Workers' Compensation reimbursed her for her medical treatment related to her injuries.

For the work she performed, Jacobsen was paid $600 by check, and was issued an IRS Form 1099. The Form 1099 indicates that Pulse was the payer.

On June 29, 2010, Jacobsen commenced this action for personal injuries against the Sheraton Defendants. The Sheraton Defendants impleaded Audio Visual Services Group d/b/a/ Presentation Services.

On September 28, 2012, the Sheraton Defendants commenced a second third-party action against Broadway Dance Project and Pulse for common-law indemnification, contribution, contractual indemnification/ contribution, and for breach of an agreement to secure liability insurance. Both Broadway Dance Project and Pulse answered, denying the material allegations and asserting various affirmative defenses, as well as cross claims and counterclaims.

Pulse now moves for summary judgment dismissing the second third-party complaint against it. It argues that the claims are barred by Workers' Compensation Law § 11, which prohibits third-party claims for contribution or indemnification against an

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employer for injuries sustained by an employee acting within the scope of employment, unless (1) the employee sustained a "grave injury," or (2) there is a written contract in which the employer expressly agreed to indemnification.

First, Pulse urges that Jacobsen was employed by Pulse on the date of the accident, based on her deposition testimony that she worked for and was compensated by Pulse. It also submits the affidavit of Diane King, who avers that plaintiff was an employee of Pulse, and that she aided plaintiff in filing her Workers' Compensation claim. Pulse also submits Ms. Driscoll's affidavit confirming that Pulse is covered under the Hartford Policy, and that plaintiff has been paid Workers' Compensation benefits. Next, Pulse urges that Jacobsen's injuries, including disc herniation, fail to constitute a "grave injury." Based on this evidence, Pulse argues that the claims for common-law contribution and indemnification (the second and third causes of action) must be dismissed. Further, it contends that there is no written contract between Pulse and the Sheraton Defendants containing an indemnification clause, and, therefore, the contractual indemnification claim (the fourth cause of action) must be dismissed.

In opposition, the Sheraton Defendants counter that Jacobsen was not an employee of Pulse, pointing to the IRS Form 1099 issued to her as proof that she was an independent contractor.

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They point to Pulse's failure to submit a W-4 or a W-2 for Jacobsen, or any payroll records, employment application, work schedule, or even any Workers' Compensation documents, such as C2, C3, or C4 forms. They contend that this documentary evidence, or lack thereof, raises a question of fact. They also assert that there are fact issues as to the precise relationship between Pulse, and Broadway Dance and Rhythm of Life Corp., which have not yet been explored during discovery. They urge that Ms. King's affidavit is self-serving and conclusory, because she fails to explain her connection or position with regard to Pulse, i.e. the source of her personal knowledge. The Sheraton Defendants contend that Jacobsen's deposition testimony only adds to the confusion about which entity employed her on the date of the accident, and submit a letter, dated March 1, 2011, from Steve Jaron, payroll manager for Broadway Dance Center, in which Mr. Jaron stated that plaintiff worked for Broadway Dance Center one day in July 2008. Further, they point out that plaintiff's Workers' Compensation Claim identifies "Rhythm of Life Corp." as her employer, and there is no mention of Pulse. Finally, the Sheraton Defendants submit a copy of the Hartford Policy to show that the policy was not amended until 2013, almost five years after the accident, to add Pulse as a named insured.

The Sheraton Defendants argue that under either the "control test" or the "relative nature of the work test," the evidence

demonstrates that plaintiff was an independent contractor, not an employee. They emphasize that there was no evidence of training or oversight by Pulse managers; the right of Pulse to discharge her; any equipment provided by Pulse to plaintiff to perform her job; and no check for payment or 1099 form issued by Pulse, which would demonstrate an employer/employee relationship. Moreover, they urge that the contract between Broadway Dance Center and Sheraton is applicable, requiring Pulse to contractually indemnify the Sheraton Defendants. The indecisive evidence as to whether plaintiff was an employee of Pulse, coupled with Ms. King's affidavit that Pulse was owned by Broadway Dance Center, raise an issue of fact as to plaintiff's employment relationship, warranting denial of summary judgment dismissal of this claim.

For the first time in its reply, Pulse contends that Jacobsen was a special employee of Pulse; Pulse shared a Workers' Compensation policy with Rhythm of Life Corp. d/b/a Broadway Dance Center, which owned Pulse; Jacobsen had received benefits under that Hartford Policy. According to Pulse, even if Jacobsen was paid as an independent contractor and issued an IRS Form 1099, she was still, at least, a special employee of Pulse on the date of the accident, and, thus, a common-law indemnification claim against Pulse is barred under Workers' Compensation Law § 11.

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DISCUSSION

The motion for summary judgment dismissing the claims in the second third-party complaint as against Pulse is granted to the limited extent that the contractual indemnification claim (the fourth cause of action) is dismissed, and is otherwise denied.

Workers' Compensation Law § 11 prohibits third-party claims for contribution and indemnification against an employer for injuries sustained by its employee, while acting within the scope of his or her employment, unless the employee's injuries are shown to be grave, or there is a written contract entered into prior to the accident in which the employer agreed with the third party to contribution or indemnification (see Castro v United Container Mach. Group, 96 NY2d 398, 401 [2001], quoting Workers' Compensation Law § 11). Section 11 defines "grave injury" as:

> death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Such grave injury list is "exhaustive and not illustrative," and is "narrowly and completely described" (Castro v United Container Mach. Group, 96 NY2d at 402 [quotation marks and citation omitted]).

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The fourth cause of action of the second third-party complaint, seeking contractual indemnification, is dismissed. For that claim, the Sheraton Defendants rely upon the contract between defendant Sheraton New York Hotel & Towers and Broadway Dance Center, which contains a mutual indemnification clause. Pulse, however, is not a party to that contract. It is not true that Pulse is deemed a party or subject to the contractual indemnification provision in that contract by the mere fact that it was owned by Rhthym of Life Corp. d/b/a Broadway Dance Center (see Alexander & Alexander of New York Inc. v Fritzen, 114 AD2d 814, 815 [1st Dept 1985]). Accordingly, summary judgment is granted dismissing the claim.

With regard to the common-law contribution/indemnification claims (the second and third causes of action), however, summary judgment is denied. In order to prevail in its motion contending that section 11 bars recovery on these claims, Pulse must first show that Jacobsen was its employee, and then that she did not suffer a grave injury. It is not disputed by the parties "that independent contractors are not employees covered by the Workers' Compensation Law" (Commissioners of State Ins. Fund v Fox Run Farms, 195 AD2d 372, 374 [1st Dept 1993]). "Whether an actor is an independent contractor or an employee is usually a factual issue for a jury" (Rivera v Fenix Car Serv. Corp., 81 AD3d 622, 623 [2d Dept 2011], citing Carrion v Orbit Messenger, 82 NY2d

742, 744 [1993] and Schiffer v Sunrise Removal, Inc., 62 AD3d 776, 779 [2d Dept 2009]; see also Hernandez v Chefs Diet Delivery, LLC, 81 AD3d 596, 598 [2d Dept 2011] [nature of parties' relationship is fact sensitive, often presenting questions for trier of fact]).

"The terms 'employee' and 'independent contractor' are familiar ones, and their definitions are well known. Broadly speaking, an employee is someone who works for another subject to substantial control, not only over the results produced but also over the means used to produce the results" while an independent contractor works for another but is "subject to less extensive control" (Matter of O'Brien v Spitzer, 7 NY3d 239, 242 [2006] [internal citations omitted]). "[T]he critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results" (Bynog v Cipriani Group, 1 NY3d 193, 198 [2003] [citations omitted]; *see* Matter of Ted Is Back Corp. [Roberts], 64 NY2d 725, 726 [1984]; Akgul v Prime Time Transp., 293 AD2d 631, 633 [2d Dept 2002]).

When confronted with workers' compensation questions, courts employ a combination of factors from two distinct tests to determine whether an employer/employee relationship exists (Commissioners of State Ins. Fund v Lindenhurst Green & White

Corp., 101 AD2d 730, 731 [1st Dept 1984]). The first test involves the issue of control, and four factors are assessed: "(1) [t]he direct evidence of the owner's right to or exercise of control; (2) [t]he method of payment; (3) [t]he extent to which the owner furnishes equipment; and (4) [w]hether the owner retains the right to discharge (*id.* at 731). The second test, referred to as the "relative nature of work" test, looks at the following factors: (1) character of the person's work; (2) whether the person's work is a separate calling from the owner's occupation; (3) whether it is continuous or intermittent; (4) whether it is expected to be permanent; (5) its importance to owner's business; and (6) whether, because of its nature, the person working should be expected to carry her own accident insurance burden (*id.*). In an analogous inquiry under the Labor Law to determine if there is an employment relationship, courts look to "whether the worker (1) worked at his [or her] own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule" (Bynog v Cipriani Group, 1 NY3d at 198 [citations omitted]).

Here, Pulse has presented some evidence that Jacobsen was its employee. Under the control factors, Pulse presented Jacobsen's deposition testimony in which she attested that she "was working for the Pulse" and "worked for Pulse on the night of

the accident".[1] Jacobsen also stated that she met with Pam Chancey, the marketing director of Broadway Dance Center, and Mary Andreason, prior to the date of the accident, at Pulse's offices, and was told of the job expectations and responsibilities. She stated that she was instructed to shadow Bonnie, the prior emcee, and she was given papers to review before the night of the event by a "blond girl" who worked for Pulse. Jacobsen further testified that both of these women gave her instructions on how to use the microphone, and a schedule. Pulse also submitted Diane King's affidavit in which King, the executive director of Rhthym Life Corp. which owns Pulse, attested that Jacobsen was an employee of Pulse, that she was paid by check, and that King helped Jacobsen file a workers' compensation claim under the Hartford Policy. Pulse, however, failed to submit a copy of the paycheck, or any proof of which entity wrote the check. Pulse further submitted Ms. Driscoll's affidavit, the claims adjuster for the Hartford Policy, who stated that Jacobsen applied for and received Workers' Compensation benefits as an employee of Pulse.

Such evidence shifts the burden to the Sheraton Defendants,

[1] The court notes, however, that a lay person, such as Jacobsen, who is not considering that the distinction might be crucial, may state that she is an "employee" even though the term "independent contractor" may have been more legally accurate (*see* Devlin v City of New York, 254 AD2d 16, 20 [1st Dept 1998]).

who have come forward with some proof that Jacobsen was an independent contractor. They submit the IRS Form 1099 for the $600 that was paid to her.[2] The failure to withhold taxes and the issuance of a 1099 form, not a W-2 form, does tend to show that Jacobsen was an independent contractor (see Bynog v Cipriani Group, Inc., 1 NY3d at 199; Chaouni v Ali, 105 AD3d 424, 424-425 [1st Dept 2013]; Barak v Chen, 87 AD3d 955, 957 [2d Dept 2011]). "While the manner in which the relationship is treated for income tax purposes is certainly a significant consideration, it is generally not singularly dispositive" (Gagen v Kipany Prods., Ltd., 27 AD3d 1042, 1043 [3d Dept 2006] [citations omitted]). The Sheraton Defendants also submit a July 11, 2008 letter from The Hartford Fire Insurance Company listing "Rhythm of Life" as the employer, and Jacobsen as the employee, and a Workers' Compensation Board Notice of Right to Select a Workers' Compensation Board Authorized Health Care Provider, signed by Jacobsen, in which she stated that Rhythm of Life was her employer.

The relative nature of the work factors also provide some support for the Sheraton Defendants' contention that Jacobsen was not an employee of Pulse. Her work was separate from Pulse's work, as she was hired as an emcee, not a dancer. There is no

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[2] IRS Form 1099 reports compensation amounts paid to persons such as independent contractors when withholding tax is not applicable (see Bynog v Cipriani Group, Inc., 1 NY3d at 199 n 3).

proof as to the importance of an emcee for the Pulse's business, or even any proof as to exactly what was Pulse's business. In addition, while there is no clear evidence from either party, the job Jacobsen was hired for appears to have been intermittent, not continuous, and apparently not permanent. Jacobsen testified that she was hired on a trial basis (*id.*). Further, as the Sheraton Defendants point out, Pulse failed to present any evidence of payroll records or employment application, and appeared to have paid plaintiff by check, without withholding any taxes. Nor is there an affidavit of any person from Pulse, stating who hired Jacobsen, retained the exclusive right to fire her, and supervised and controlled her work. Nor has Pulse come forward with any evidence that Jacobsen was not free to enter into other employment while she was engaged as an emcee at the dance convention, or that she received any fringe benefits. For all those reasons, there are issues of fact about which entity Jacobsen worked for, and in what capacity.

Pulse's argument on reply that Jacobsen was its special employee, and that it shared a Workers' Compensation policy with Rhythm of Life d/b/a Broadway Dance Center, so that all claims are barred by Workers' Compensation Law § 11, is rejected. This argument was raised for the first time on reply and as such may not provide a basis for summary judgment relief to Pulse (Azzopardi v American Blower Corp., 192 AD2d 453, 454 [1st Dept

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1993]). As the Appellate Division explained in Azzopardi (*id.* at 454), "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*id.* [quotation marks and citation omitted]; see also Fischer v Crossard Realty Co., Inc., 63 AD3d 540, 540 [1st Dept 2009]). The Sheraton Defendants had neither the obligation nor the opportunity to respond to this argument. In any event, "a person's categorization as a special employee is usually a question of fact" (Thompson v Grumman Aerospace Corp., 78 NY2d 553, 557 [1991]), and Pulse has failed to demonstrate as a matter of law that Jacobsen was an employee of Rhythm, or a special employee of Pulse.

Similarly, Pulse's collateral estoppel argument, again improperly raised for the first time on reply, is unavailing. The fact that the Workers' Compensation benefits are being paid to Jacobsen does not constitute a determination by the Workers' Compensation Board (WCB) that Pulse was her employer, because there is no indication in the record that this was a disputed issue at any workers' compensation proceeding, or that the WCB specifically decided it (see Vitello v Amboy Bus Co., 83 AD3d 932, 933 [2d Dept 2011]). Therefore, summary judgment dismissing the common-law contribution and indemnification claims in the second third-party complaint (the second and third causes of

action), based on Workers' Compensation Law § 11, is denied.

Accordingly, it is

ORDERED that the motion of second third-party defendant Pulse International Productions LLC for summary judgment dismissing the claims in the second third-party complaint as against it is granted to the extent that the fourth claim is dismissed, and is otherwise denied; and it is further

ORDERED that the parties are directed to attend a pre-trial conference in IAS Part 59, Room 103, 71 Thomas Street, New York, New York 10013, on June 23, 2015 at 2:30 P.M. to set a trial date.

Dated: April 24, 2015

ENTER:

DEBRA A. JAMES J.S.C.

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