SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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JOHN RUSSO,

Plaintiff,

-against-

CBS CORPORATION AND CBS BROADCASTING, INC.,

Defendants.

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Index No. 104294/2011

DECISION/ORDER
Motion Seq. 008

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action arising from a slip and fall incident, defendants CBS Corporation and CBS Broadcasting, Inc. ("CBS Broadcasting") (collectively, "defendants") move for summary judgment dismissing the complaint of the plaintiff John Russo ("plaintiff").

Factual Background

Plaintiff allegedly slipped and fell while working as a Production Assistant on the set of the production of "The Good Wife" (hereinafter also called, the "Series") The set at the time of plaintiff's fall was located in the parking lot of defendant Old Westbury Hebrew Congregation, which CBS Broadcasting (through "business unit CBS Productions") rented pursuant to a Parking Agreement. Specifically, plaintiff was fueling a wardrobe trailer, and slipped on ice as he "got out of the truck." (Injury Report Form). Plaintiff's bill of particulars alleges that defendants were negligent in permitting an ice condition to exist, of which they had notice, and inadequate lighting of subject area.

In support of summary judgment, defendants argue that they were plaintiff's special employer, and thus shielded from liability based on plaintiff's receipt of Workers' Compensation benefits from his general employer, Entertainment Partners. In support, defendants submit, *inter*

alia, plaintiff's deposition testimony, certified employment records from Entertainment Partners, and an affidavit from Entertainment Partners. Such records indicate that Entertainment Partners was a mere payroll company responsible for issuing checks and maintaining workers' compensation policy coverage and that the "production company" delegated, directed, and controlled his work through plaintiff's Teamsters Locals union captain. Defendants also submit the Personnel Services Agreement, in which CBS Broadcasting is expressly identified as the "Special Employer" of all personnel paid by "the employer."

In opposition, plaintiff denies that he was a special employee of defendants. Plaintiff submits an affidavit, in which he attests that he was employed by Entertainment Partners at the time of his accident. Plaintiff also cites to the Workers' Compensation decision, which indicates that plaintiff's employer was "ESPG [sic] Management" (which is Entertainment Partners). Plaintiff maintains that defendants had knowledge of, and chose not to participate in, the Workers' Compensation proceeding, and is thus bound by the finding that Entertainment Partners is plaintiff's employer and collaterally estopped from now arguing that plaintiff was their special employee. Plaintiff points out that he testified at his deposition that he did not receive any formal benefits from defendants and that his Union Captain was "the only person" who told him "what to do," and that the Captain "tells the production company what they need and how many pieces of equipment and stuff like that. . . ." (pp. 37; 33). Plaintiff also points out that the Personnel Services Agreement, which the Court should ignore as improperly redacted, states that Entertainment Partners had the "right to direct, control and supervise the Personnel supplied thereunder. . . ." In addition, an issue of fact exists as to whether Entertainment Partners ceded away complete employment power over plaintiff. The Personnel Services Agreement, the

Entertainment Partner's accident report form directing the production company as to how to handle employee accidents, the contract between Studio Transportation Drivers and of which Entertainment Partners is a participant, and Videotape Electronics Supplemental Basic Agreement of 2003, establish that Entertainment Partners was not a mere payroll company and did not surrender complete or exclusive control of its employee, plaintiff herein. Defendants did not supervise plaintiff's work, and plaintiff exercised autonomy in how to accomplish his work functions, such as driving the gas truck, preparing make-up trailer, and filling up the bigger trucks with gas or fuel. Defendants did not interview or train plaintiff.

Further, defendants are barred under CPLR 3018 from raising the special employer defense as they failed to raise same as an affirmative defense in their Answer.

In reply, defendants submit supplemental affidavits from their executives indicating that all operational supervision is provided by defendants' Series director to other departments such as Transportation including Teamster Captains, who in turn communicate the direction to the Union workers, such as plaintiff. The Union Captain's actions are at the direction of and approved by defendants' senior production management. Also, CBS was named as an "Alternate Employer Endorsement" as to coverage of plaintiff. Defendants point out that although the Court granted plaintiff permission to take the deposition of the Union Captain, plaintiff, after learning "new information," decided to forego such deposition. And, defendants offer to submit the unredacted version of the documentation.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR

3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose" (*Kosovsky v. Park South Tenants Corp.*, 45 Misc.3d 1216(A), 2014 WL 5859387 [Sup Ct New York Cty 2014] *citing Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The opponent "must assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v. Genger*, 123 AD3d 445, 447 [1st Dept 2014] lv to appeal denied, 24 NY3d 917 [2015] *citing Schiraldi v. U.S. Min. Prods.*, 194 A.D.2d 482, 483 [1st Dept 1993]). In other words, the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists*

Ins. Co. v Salvatore, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

A general employee of one employer may also be in the special employ of another, "notwithstanding that the general employer is responsible for the payment of his/her wages, has the power to hire and fire, has an interest in the work that is performed by the employee, maintains workers' compensation and other benefits for the employee, and provides some, if not all, of the employee's equipment (*Gannon v. JWP Forest Elec. Corp.*, *supra*; *see also Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991] [citations omitted]).

A "special employer may avail itself of the Workers' Compensation Law to bar negligence claims against it for injuries sustained by a special employee in the course of special employment" *(Bellamy v. Columbia University*, 50 A.D.3d 160, 851 N.Y.S.2d 406 [1st Dept 2008]). A special employee is described as one who is transferred for a limited time of whatever duration to the service of another (*id.*). "Although no single factor is dispositive in determining whether a special employment relationship exists, a number of factors must be weighed, including: the right to and degree of control by the purported employer over the manner, details, and ultimate result of the special employee's work; the method of payment; the right to discharge; the furnishing of equipment; and the nature and purpose of the work. Of primary importance amongst these factors is the degree of control the alleged special employer has over the work of the employee" (*Gannon v. JWP Forest Elec. Corp.*, 275 A.D.2d 231, 712 N.Y.S.2d 494 [1st Dept 2000]; *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 585 N.E.2d 355, 578 N.Y.S.2d 106 [1992]).

Here, defendants made a *prima facie* showing that they were the special employer of the

plaintiff.

According to the affidavit of Jerry Brandt, Senior Vice President, Production Finance for CBS Studios Inc. and other related CBS entities, "CBS exercised *sole control*" over plaintiff's workplace, the duties he was requested to perform and all aspects of his employment while he was employed on the Series" (¶7) (emphasis added). Plaintiff was "to follow the instruction and direction of CBS directors and other supervisory personnel regarding their day to day work performance" (¶7). Eugene J. Mellevold, Vice President Risk Management & Insurance for defendants, also adds that Entertainment Partners "was not involved in directing the day-to-day work of John Russo or any other CBS employees on the Series." (Affidavit, ¶6). Consistent with Jerry Brandt's and Eugene J. Mellevold's statements, Entertainment Partners' Vice President of Payroll Operations, New York, Florence Mitchell-Brown (plaintiff's employer) also states that it "did not exercise authority or control over John Russo's workplace, working conditions or the duties he was to perform. Rather, CBS" did (¶6).

Although Entertainment Partners issued payroll checks to plaintiff, Mitchell-Brown of Entertainment Partners adds that plaintiff was placed on the payroll of Entertainment Partners "as an employee of the Series at the direction of CBS" (Mitchell-Brown affidavit, ¶5).[1]

The record also indicates that the "wardrobe trailer" plaintiff was fueling when his accident occurred was provided by defendants (*see* Parking Agreement, granting defendants the "right to enter upon and park its vehicles . . . ." on the subject parking lot). Plaintiff's deposition testimony also indicates that defendants provided the equipment necessary for the production (The Union Captain, who delegated the work to union workers such as plaintiff, would advise the

[1] The record is unclear as to which entity had the right to discharge plaintiff.

production company of what equipment was needed (EBT, p. 33)).

As to the nature and purpose of plaintiff's work, plaintiff was employed as a set production assistant for the production of The Good Wife, a Series produced by defendants. According to the declaration of Mary McDonnell, the custodian of records for Entertainment Partners, Entertainment Partners is a "payroll company," and does not maintain personnel records ("Please note that we are a payroll company, therefore personnel records do not exist"). Plaintiff's deposition testimony also indicates that Entertainment Partners is "the payroll company" (EBT, p. 31), and that it was "the production company, CBS or - -" for whom he completed paperwork concerning his pedigree information and sent him "for a drug test." (EBT, p. 32). Mitchell-Brown attests that Entertainment Partners provides temporary services, such as payroll and workers' compensation services, and employees in the entertainment industry (¶3) (*see also* Affidavit of Jerry Brandt of CBS Studios Inc. ¶6). Further, Entertainment Partners does not produce television or motion pictures (¶4); instead, Entertainment Partners provided employees to defendants in connection with The Good Wife Series. Specifically, Mitchell-Brown confirmed that "Entertainment Partners did not produce" The Good Wife and had no involvement with the production of The Good Wife, except to provide temporary services, such as payroll and workers' compensation administration, and workers in the entertainment industry (¶¶4, 6).

Based on the above, defendants established that they had the right to, and exercised a significant degree of control over the manner, details, and ultimate result of plaintiff's work on the set of the production of The Good Wife. That Entertainment Partners issued plaintiff's checks is insignificant in light of the showing that plaintiff was placed on Entertainment

Partners' payroll at defendants' direction. The defendants furnished the equipment for the set production, to be utilized by plaintiff in the course of his duties in furtherance of the production of the Series. All of these factors militate in favor of a finding that plaintiff was the special employee of defendants.

In opposition, plaintiff failed to raise an issue of fact as to whether defendants were his special employer. That plaintiff "was employed by Entertainment Partners" (Plaintiff's Affidavit in Opposition, ¶2, Workers' Compensation Decisions, plaintiff's EBT, p. 31) is insufficient to raise an issue of fact, given that a general employee of one employer may also be in the special employ of another (*see Maldonado v. Canac Intern., Inc.*, 258 A.D.2d 415, 685 N.Y.S.2d 715 [1st Dept 1999] ("despite plaintiff's being in A & A [Staffing Temporary Personnel's] general employ, plaintiff's status as special employee is established by the record)). Nor is the fact that plaintiff did not receive any benefits from defendants material (*Bautista v. David Frankel Realty, Inc.*, 54 A.D.3d 549, 550, 863 N.Y.S.2d 638, 639 [1st Dept 2008] (an employee "may 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*.") (emphasis added)).

Although plaintiff testified that his Union Captain was the only person who told him "what work responsibilities [he] needed to do" and who "tells a teamster what to do," (Affidavit, ¶5; EBT, pp. 33, 37), in response, Brandt of defendants attests that "Direction for operational supervision is provided from the top down from the Series director and various unit production managers for all departments, like Props, Wardrobe, and Transportation [Teamster Captains] who in turn communicate that direction to the subordinate Teamster workers." (¶9). Further,

according to Brandt, "Captains' actions, including hiring and firing and equipment rentals, are at the direction of and approved by senior production management" (¶9).

And, plaintiff's belief that his Captain was employed by Entertainment Partners is insufficient, especially in light of Brandt's response that "Teamster union personnel *including Driver Captains, Teamster Captains* and drivers working on the Series are employees of CBS. . . . the Teamster Captain on the Series is also a CBS employee." (Brandt Supplemental Affidavit, ¶9) Brandt also added that "CBS hires and fires all production workers." (¶5).

The Court does not rely upon the redacted personnel services agreement (*Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 585 N.E.2d 355, 578 N.Y.S.2d 106 [1991] (finding that although "contract provides that ATS is to be considered [plaintiff's] employer, that provision alone is insufficient to establish as a matter of law that [plaintiff] was not also a special employee of Grumman")).

Nor is the fact that Entertainment Partners is a party to the union contract, that guaranteed certain work conditions, wages, compensation, and hours of the plaintiff sufficient to defeat defendants' showing that defendants directed and controlled the manner, details, and ultimate result of plaintiff's work at the production set.

Finally, collateral estoppel and *res judicata* principles do not bar defendants from raising the issue of its special employer status in this proceeding. Plaintiff's reliance on *Guaman v 1963 Ryer Realty Corp.* for the proposition that the Workers' Compensation board's conclusion, that Entertainment Partners was plaintiff's employer, is binding on defendants is misplaced (127 A.D.3d 454, 8 N.Y.S.3d 40 [1st Dept 2015] (finding that AP was estopped from re-litigating whether it was plaintiff's employer, and "collaterally estopped from contending that Saad was

plaintiff's special employer, since this argument was raised during the worker's compensation hearing and rejected by the board)). There is no indication that the issue of defendants' special employer status was raised or decided; indeed, the record indicates that hearings were aimed at the type and level of injuries plaintiff sustained. Nor is this is an instance where the Workers' Compensation panel decided the issue of whether defendants *or* Entertainment Partners were the employers of plaintiff at the time of the incident (*cf.*, *Vogel v. Herk Elevator Co., Inc.*, 229 A.D.2d 331, 645 N.Y.S.2d 32 [1st Dept 1996] (Where "Herk's counsel was given notice of the pendency of the [Workers' Compensation] proceeding in which the Panel stated its intent to "develop[ ] ... the issue of correct legal entity and employer-employee relationship between claimant and Herk" and found that "Kent was plaintiff's proper employer," "barred the motion court's review of the identical issue")).

And, the failure of defendants to assert the Workers' Compensation bar as an affirmative defense does not preclude defendants from moving on such ground. "The affirmative defense of workers' compensation may be waived 'only by a defendant ignoring the issue to the point of final disposition itself'" (*Feliciano Delgado v. The New York Hotel Trades Council and Hotel Ass'n of New York City Health Center, Inc.*, 281 A.D.2d 312, 722 N.Y.S.2d 498 [1st Dept 2001]; *Miraglia v. H & L Holding Corp.*, 67 A.D.3d 513, 892 N.Y.S.2d 2 [1st Dept 2009]) and "such waiver is accomplished only by a defendant ignoring the issue to the point of final disposition itself" (*Murray v. City of New York*, 43 N.Y.2d 400, 372 N.E.2d 560, 401 N.Y.S.2d 773 [1977]). Prior to the instant motion, there has been no final disposition of this matter (see *e.g.*, *Goodarzi v. City of New York,* 630 N.Y.S.2d 534, 535, 217 A.D.2d 683, 684 [2d Dept 1995] ("because there was no finding as to damages, final disposition has not been reached")).

Therefore, summary judgment dismissing the complaint of the plaintiff is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants CBS Corporation and CBS Broadcasting, Inc.'s motion for summary judgment dismissing the complaint of the plaintiff John Russo is granted, and the complaint is hereby dismissed; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: June 16, 2016

Hon. Carol Robinson Edmead, J.S.C.