Singh v Sukhu
2017 NY Slip Op 30280(U)
February 6, 2017
Supreme Court, Queens County
Docket Number: 23947/12
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

NAZELA SINGH,

Plaintiff,

-against-

MOHABIR SUKHU, DIMPLE SUKHU, DANY CANGE, ODUBER LOPEZ, DNJC CONTRACTING, INC., and DNJC, INC.,

Defendants.

Index No: 23947/12

Motion Date: 11/14/16

Motion Seq. No.: 8

The following papers numbered 1 to read on this motion by plaintiff for an Order vacating his default in opposition the defendants' DNJC Contracting, Inc., and DNJC, Inc.'s, (hereinafter collectively DNJC) prior motion for summary judgment and, upon vacating his default, denying the defendants' motion.

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Order to Show Cause-Affidavits-Exhibits	1 - 4
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Upon the foregoing papers it is ordered that this motion is determined as follows.

This is an action to recover for personal injuries plaintiff sustained on November 4, 2012 when the van owned by defendant, Cange, and operated by defendant, Lopez, and the vehicle owned by defendant, Dimple Sukhu and operated by defendant, Mohabir Sukhu, collided causing the Sukhu's vehicle to strike the plaintiff, a pedestrian who was standing on the sidewalk.

DNJC moved for summary judgment in its favor dismissing the complaint by Notice of Motion returnable on July 22, 2016. The parties by a written stipulation, requested that the motion be adjourned to August 22, 2016. The Central Motion Part (CMP) in accordance with its rules, adjourned the motion to September 2, 2016, a date convenient for the court, and directed opposition to

be served by August 19, 2016. On September 2, 2016 plaintiff's opposition was rejected for untimely service. The defendants' motion was submitted without the plaintiff's opposition and granted by Order dated September 9, 2016.

The plaintiff now moves by Order to Show Cause dated September 29, 2016 to vacate the September 9, 2016 order and his default in opposing the motion; and upon vacature, granting leave to renew/reargue the defendant's motion and upon renewal/reargument denying DNJC's motion.

A party seeking to vacate an order entered upon his default in opposing a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion (see CPLR 5015[a][1]; Paul v Weatherwax, ___ AD3d ___ [2017], 2017 WL 96196; Joon Sung v Feng Ue Jin, 127 AD3d 740, 741 [2015]).

As a reasonable excuse, counsel asserts that the calendar service who appeared on his behalf on July 22, 2016 failed to notify him that opposition was due by August 19, 2016 as opposed to the time limits set forth in the CPLR. Counsel also contends that the opposition should have been accepted in CMP inasmuch as it was served in accordance with the time limitations contained in the CPLR as evidenced by the Affidavit of Service of the opposition[1].

The Court has the discretion to accept law office failure as a reasonable excuse (see CPLR 2005), where the claim of law office failure is supported by a "detailed and credible" explanation of the default (see Aurora Loan Servs., LLC v. Ahmed, 122 A.D.3d 557, 558 [2014]; Kohn v Kohn, 86 AD3d 630 [2011]; Remote Meter Tech. of NY, Inc. v Aris Realty Corp., 83 AD3d 1030 [2011]). Here, the plaintiff's claim of law office failure was supported by a "detailed and credible" explanation of the default. Plaintiff has also demonstrated a potentially meritorious opposition to the defendants', DNJC's, motion for summary judgment.

Accordingly, the court's Order dated September 9, 2016, entered on September 20, 2016 granting the defendants' DNJC's motion for summary judgment dismissing the complaint insofar as

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[1]Although the affidavit of service was not annexed to the moving papers or to the copy of the Affirmation in Opposition dated August 24, 2016, defendants do not deny being served with or receiving the opposition.

it is asserted against DNJC is vacated. The branch of the plaintiff's motion for leave to reargue is granted.

DNJC's moved for summary judgment dismissing the complaint insofar as it is asserted as against DNJC based upon, inter alia, the deposition testimony of Lopez and Dany Cange on the grounds that they cannot be held vicariously liable pursuant to Vehicle and Traffic Law §388 or under the doctrine of *respondeat superior* since the subject van was neither owned by DNJC nor operated by a DNJC employee.

Plaintiff does not dispute that the DNJC cannot be held vicariously liable pursuant to Vehicle and Traffic Law §388 since the van was owned by Dany Cange. However, plaintiff opposes granting summary judgment insofar plaintiff's claim against DNJC is based upon the doctrine of *respondeat superior*. Plaintiff claims that Lopez was DNJC's employee and was, at the time of the accident, acting in the scope of his employment in accordance with the direction of his "boss" Dany Cange.

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" (Brothers v New York State Elec. & Gas Corp., 11 NY3d 251, 257-258 [2008], quoting Kleeman v Rheingold, 81 NY2d 270, 273 [1993]). However, "[u]nder the doctrine of *respondeat superior*, an employer can be held vicariously liable for the torts committed by an employee acting within the scope of the employment" (Fernandez v Rustic Inn, Inc., 60 AD3d 893, 896 [2009]; see Riviello v Waldron, 47 NY2d 297, 302 [1979]; Wood v State of New York, 119 AD3d 672, 672 [2014]). "An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his [or her] employer, or if his [or her] act may be reasonably said to be necessary or incidental to such employment" (Davis v Larhette, 39 AD3d 693, 694 [2007]; see Judith M. v Sisters of Charity Hosp., 93 NY2d 932, 933 [1999]; Pinto v Tenenbaum, 105 AD3d 930, 931 [2013]).

"The determination of whether an employer-employee relationship exists turns on whether the alleged employer exercises control over the results produced, or the means used to achieve the results. Control over the means is the more important consideration" (Raja v Big Geyser, Inc., 144 AD3d 1123, 1124 [2016] quoting Abouzeid v Grgas, 295 AD2d 376, 377 [2002]; see Rivera v Fenix Car Serv. Corp., 81 AD3d 622, 623 [2011]). "Factors relevant to assessing control include 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 193, 198 [2003]; see PJI 2:255; Rivera v Fenix Car Serv Corp., supra). Whether a person is treated for tax purposes as an independent contractor or designated in a contract as an independent contractor, although not dispositive, are also factors to be considered (see Sanabria v Aguero-Borges, 117 AD3d 1024, 1026 [2014]; Hernandez v Chefs Diet Delivery, LLC, 81 AD3d 596, 599 [2011). The issue of whether an employee-employer relationship exists is a factual one for the jury (see Carrion v Orbit Messenger, Inc., 82 NY2d 742 [1993];Sikes v Chevron Companies, 173 AD2d 810, 812 [1991]; Blincoe v Newsday, Inc., 26 AD2d 687 [1966]).

Lopez testified that for about four years prior to the accident he worked for Dany Cange and Dany's company DNJC as a painter on various construction projects on which Dany was his boss. He testified that the van involved in the accident was used in DNJC's business, that the paint and all tools for the work were provided by Dany and were in the van. Lopez also testified that Dany let him take the van to use for going to work because he did not have a car, though he also used it for personal errands. Lopez testified that on Sunday, November 4, 2012, the day of the accident, he was not working, but Dany gave him money and told him to go get gas for the van.

Cange testified that he is a self employed general contractor and operates a home improvement business through DNJC Contracting, Inc. Cange claims that he hires subcontractors to do most of the DNJC's work on the projects and he, the only employee of the company, acts as the manager. He further testified that from time to time he hires three other laborers to perform work on the projects, one of which was Lopez. Cange testified that Lopez worked as a painter 3-4 times a month for about 4 years prior to the accident as an independent contractor pursuant to a 1099[2] from DNJC. Cange also testified that he owns two cars for personal use and the van involved in the accident which he admitted was used in connection with DNJC's business. Gange testified that the day after hurricane Sandy, he let Lopez take the van to get gas for his home generator because there was no electricity in his home. Cange testified that about 3-4 days after giving Lopez his van, Cange received a call from police regarding the subject accident.

The issuance of a 1099 is not dispositive of the issue of whether Lopez was an independent contractor (see Sanabria v Aguero-Borges, supra ; Hernandez v Chefs Diet Delivery, LLC,

[2] Dany Cange, by separate counsel, submitted his attorney's affirmation in support of DNJC's motion together with a copy the 1099 issued by DNJC to Lopez for the year 2012.

supra). The conflicting deposition testimonies of Cange and Lopez raise triable issues of fact as to whether Lopez was DNJC's employee (see e.g. Sikes v Chevron Companies, supra) and whether, at the time of the accident, Lopez was engaged in the business of DNJC, or whether his activity could reasonably be said to be necessary or incidental to the employment (see Riviello v Waldron, supra; Brandford v Singh, 136 AD3d 726 [2016]).

A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Lopez v Beltre, 59 AD3d 683, 685 [2009] quoting Scott v Long Is. Power Auth., 294 AD2d 348 [2002]). "Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact" (LeBlanc v Skinner, 103 AD3d 202, 211-212 [2012] quoting Gille v Long Beach City School Dist., 84 AD3d 1022, 1023 [2011]).

Accordingly, and upon reargument, DNJC defendants' motion for summary judgment is granted to the extent that the plaintiff's claim to hold the DNJC defendants vicariously liable pursuant to Vehicle and Traffic Law §388 is dismissed.

The branch of the motion for summary judgment dismissing the plaintiff's claim as against the DNJC defendants based upon the doctrine of *respondeat superior* is denied.

Dated: February 6, 2017
D# 55

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J.S.C.