

Pewritt v Compass Group USA, Inc.
2019 NY Slip Op 31702(U)
June 14, 2019
Supreme Court, New York County
Docket Number: 152558/2014
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY

PART

19

Justice

-----X

BRYANT PEWRITT,

Petitioner,

-against-

COMPASS GROUP USA, INC. and COLUMBIA UNIVERSITY,

Defendants.

-----X

INDEX NO. 152558/2014

MOTION DATE _____

MOTION SEQ. NO. 004

DECISION AND ORDER

HON. KELLY O'NEILL LEVY:

In this action to recover damages for personal injuries, Defendant Columbia University moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint on the grounds that the action is preempted by the exclusive remedy provisions of Workers' Compensation Law § 11 and § 29(6). Plaintiff Pewritt opposes and cross-moves for summary judgment on the issue of liability. Defendant's motion is denied. Plaintiff's cross-motion is denied.

In order to succeed on a motion for summary judgment, the movant "must make a prima facie showing of entitlement to a judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact." *See, e.g., Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); CPLR § 3212.

Plaintiff alleges that he sustained injuries when, while temporarily assigned by his employer, Troy Associates, a temporary employment agency, to work in one of defendant's dining halls, he slipped on a wet, soapy substance that had been permitted to remain on the floor. It is undisputed that at the time of the accident Troy was plaintiff's employer; it paid plaintiff's salary and benefits, including workers' compensation, determined which of its clients plaintiff was to report to as well as the duration of any such assignment, monitored plaintiff's performance, and retained the exclusive right to discharge him. Nonetheless, it is defendant's

contention that plaintiff became its special employee when he reported for work, was handed a university food service uniform and directed to his dining hall work station. Further, it is defendant's contention that plaintiff's special employee status at the time of the accident is established as a matter of law and, accordingly, that it is entitled to summary judgment dismissing the complaint as barred by the exclusive remedy provisions of Workers' Compensation Law § 11 and § 29(6).

Following the alleged incident, plaintiff elected to receive workers' compensation benefits from his general employer Troy Associates. When a plaintiff elects to receive workers' compensation benefits from his or her general employer, the plaintiff is precluded from maintaining a personal injury action against his or her special employer. *See, e.g., Cunningham v. State of New York*, 60 N.Y.2d 248, 251 (1985); Workers' Compensation Law § 11 and § 29(6). “[A] person’s categorization as a special employee is usually a question of fact...though...the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issues of fact.” *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557-558 (1991). “General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer.” *Id.* at 557.

In *Thompson*, the staffing agency (ATS) had virtually no connection to the plaintiff. *See id.* at 557-558. The staffing agency’s only proffered connections were that they were “responsible for Thompson’s paychecks and employee benefits” and that the “contract provides that ATS is to be considered Thompson’s employer.” By contrast, the defendant (Grumman) was the functional employer:

As soon as ATS hired Thompson, it permanently assigned him exclusively to Grumman’s plant on a full-time basis for the entire year prior to the work-related accident at Grumman’s facility. Thompson considered a Grumman supervisor to be his boss and he knowingly accepted the terms of his exclusive work at Grumman; thus, he was aware of and consented to his special employee status. He reported daily to this Grumman supervisor only, who regularly directed, instructed, assigned, supervised and controlled his work duties. The work Thompson performed was solely in furtherance of Grumman’s business at its facility. He was recruited and hired by ATS solely to meet Grumman’s specified employee needs. He could not be reassigned by ATS and his assignment to Grumman could be terminated only by Grumman. In no respect could it be said that ATS

itself was performing Grumman's work or had any direct control, knowledge or expertise with respect to the labor Thompson was performing for Grumman. Rather, ATS surrendered direction and control over Thompson to Grumman to perform the latter's work, and Grumman assumed and exercised that exclusive control.

Id. at 558-559. The *Thompson* court established the modern standard for determining whether a special employment relationship exists:

Many 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... focuses on who controls and directs the manner, details and ultimate result of the employee's work.

Id. at 558 (also phrasing the standard as who is "responsible for... all essential, locational and commonly recognizable components of the work relationship."). Thus special employment can readily be found when, as in *Thompson*, there is virtually no connection between the general employer and the plaintiff other than payroll. *See id.*; *see also Fung v. Japan Airlines Co.*, 9 N.Y.3d 351, 360 (2007) (special employment found where there was "no evidence that [the general employer] had any contact with plaintiff at all").

However, the consideration is more difficult when the general employer has more than de minimis connections to the plaintiff, and the Court of Appeals has examined only one such employment relationship in-depth.¹ *See Bynog v. Cipriani Group, Inc.*, 770 N.Y.S.2d 692 (2003). In *Bynog*, a restaurant hired temporary banquet waiters from a temporary staffing agency. *Id.* at 694. In finding that the banquet waiters were not special employees, the *Bynog* Court reasoned as follows:

Based upon the undisputed facts before us, MJA conducts interviews and hires temporary professional waiters. MJA furnishes each person it hires with an MJA handbook which tells them how they are to conduct themselves. Additionally, MJA provides any needed training of the individuals it hires. MJA pays each waiter directly and furnishes 1099's for tax purposes. *In most cases Alexander attends the banquets and supervises the temporary waiters personally. If he is not in attendance, one of the temporary waiter captains supervises the others...* After the banquets, MJA sends an invoice to the Cipriani defendants for services rendered. The Cipriani defendants would not pay any of the temporary waiters directly. Instead, they would send a check to MJA, payable to MJA, to settle the accounts. The only involvement that the Cipriani defendants have with the waiters is to meet with them on the day of the banquet to discuss the particular customer

¹ *Holmes v. Business Relocation Services, Inc.*, 25 N.Y.3d 955 (2015) also involved a special employment relationship but only affirmed that summary judgment was premature and more facts were needed to determine whether a special employee relationship existed.

menu and the timing of the various courses being served. In sum, it is clear the plaintiffs, temporary waiters, were not employed by the Cipriani defendants...[and] that the Cipriani did not exert sufficient control over plaintiffs' performance of their work to render them the special employer of plaintiffs.

Id. at 695-696 (emphasis added).² While not dispositive, the *Bynog* court heavily weighed the fact that the general employer was supervising the waiters. Courts continue to heavily weigh the nature and degree of supervision in considering special employment relationships. *See, e.g., Villanueva v. Southeast Grand St. Guild Hous. Dev. Fund Co., Inc.*, 37 A.D.3d 155, 829 N.Y.S.2d 459 (2007) (plaintiff testified his painting work was supervised by the special employer and not the general employer); *Suarez v. Food Emporium, Inc.*, 16 A.D.3d 152, 792 N.Y.S.2d 384 (2005).

In *Bellamy v. Columbia University*, the First Department considered a case remarkably similar to the one at hand. 50 A.D.3d 160 (1st Dep't 2008). *Bellamy* involved the same staffing agency, Troy Associates, as general employer and the same defendant, Columbia University, seeking to be considered a special employer. *See id.*, at 161. In both cases, the general employer paid plaintiff's salary and benefits, including workers' compensation, determined which clients plaintiff was to report to as well as the duration of any such assignment, monitored plaintiff's performance, and retained the exclusive right to discharge him. *See id.* In both cases, Columbia supplied the plaintiff with a work uniform (although in the present case Plaintiff used his own clothes as part of the uniform) and directed them to work as cooks at dining hall work stations, and they also both alleged similar incidents—in *Bellamy* it was an alleged slip and fall on a wet and greasy substance in the Columbia kitchens whereas here it is an alleged slip and fall on a wet and soapy substance in the Columbia dining hall. *See id.* In *Bellamy*, no special employment relationship was found and the Court gave extensive reasoning as to why:

While we have in recent cases involving temporary employment, awarded summary judgment upon finding that a special employment relationship was made out as a matter of law (*see Villanueva v. Southeast Grand St. Guild Hous. Dev. Fund Co., Inc.*, 37 A.D.3d 155, 829 N.Y.S.2d 459 [2007]; *Suarez v. Food Emporium, Inc.*, 16 A.D.3d 152, 792 N.Y.S.2d 384 [2005]), these were cases in which the defendant's direct control over the plaintiff's work was essentially admitted...Here, by contrast, there exists neither admission nor other evidence permitting the legal conclusion that there existed a special employment relation. As noted, the decisions as to where plaintiff was to work from day

² While the *Bynog* court was primarily focusing its analysis on employment relationships pursuant to Labor Law §§ 191, 196 and 198, they used this analysis to explicitly also find that no special employee relationship existed pursuant to Workers' Compensation Law § 11 and § 29(6) and *Thompson*.

to day were made not by the putative special employer, Columbia, but by the general employer, Troy. *Nor does the record establish that once plaintiff reported to work at Columbia he was treated from a supervisory standpoint as a Columbia employee.* The only witness produced by defendant to testify as to its supervision of plaintiff, a sous-chef named McMillian, when asked if he recalled what plaintiff's duties had been, stated: "For that day he was a temp. No I don't—I can't. I don't recall if we called him in as a temp what he was doing." Indeed, *so far as can be discerned from the record, plaintiff, an experienced food preparer, was left essentially unsupervised as he went about his tasks in defendant's kitchen; his testimony to the effect that no one from Columbia told him how to do his job or supervised him stands uncontradicted...* [T]his record...more persuasively supports the inference that defendant sought the services of an experienced temp such as plaintiff precisely because it did not wish to have to supervise the "manner, details and ultimate result" of the temp's work as it would an employee's, and could, if it were dissatisfied, simply ask the temp's employer for a replacement.

... [W]hile the dissent makes much of plaintiff's testimony that he was told what job to do, being told what job to do does not suffice to demonstrate the existence of a special employment relation; independent contractors and their employees are routinely instructed as to what they should do by those purchasing their services, but do not therefore become the purchasers' employees. Nor is plaintiff's testimony that he was provided with a uniform highly probative. Rather, what the law requires is a showing of actual control by the party claiming special employer status over the "manner," "details" and "ultimate result" of the work of the alleged special employee, i.e., that there was between the employer and putative employee "a working relationship ... sufficient in kind and degree" to justify deeming the defendant the plaintiff's employer (*Fung v. Japan Airlines Co., Ltd.*, 9 N.Y.3d 351, 359, 850 N.Y.S.2d 359, 880 N.E.2d 845 [2007]). Yet, here...*there is no evidence affirmatively establishing that defendant did in fact supervise plaintiff as it would have supervised an employee.*

Bellamy, at 162-164 (emphasis added). Thus the *Bellamy* decision weighed many factors nearly identical to those at present but also put emphasis on the absence of evidence in the record regarding the degree of supervision exercised over the plaintiff. The degree of supervision in the record is a critical difference between *Bellamy* and the present case.

In the present record there is considerable evidence that plaintiff was being carefully supervised as the employees were being supervised:

- Q. Who would make the determination as to which cooks worked at each station?
A. The chef.
Q. He works for Columbia?
A. Yes.
...
Q. What were the other chefs doing during that day?

- A. Well, usually the chef is supervising everything, like making sure it is all done right; checking temperatures, checking the logbooks. Just really watching over everything.
- Q. Was he closely watching over the work you were performing?
- A. Yes.
- Q. Okay.
- A. Everybody, though. He moves from station to station.
- ...
- Q. They had a lot of control over what you did and how you did it?
- A. Yes.
- Q. Okay.
- A. They were watching every move. If you had one of their – if you had the person telling you how they wanted things done from Columbia, they watched over you to make sure it was done right.

Pewritt Deposition, 51:10 - 55:2. This is a very different record of the degree of supervision than was present in *Bellamy*.

This same difference in the degree of supervision is critical in *Berhe v. Trustees of Columbia University in the City of New York*, 146 A.D.3d 697 (1st Dep't 2017). In *Berhe*, Columbia University was once again involved but with a different temporary staffing agency. *See id.* The First Department affirmed a Supreme Court ruling finding a special employer relationship existed. *See id.* The lower court ruling that was affirmed distinguished *Bellamy* because of the evidence of supervision on the record:

By way of contrast, in *Bellamy v. Columbia Univ.*, 50 AD3d 160 (1st Dept.2008), there was no special employment relationship since there was 'no evidence affirmatively establishing that the defendant did in fact supervise the plaintiff as it would have supervised an employee.' Rather, the proffered evidence showed that the plaintiff kitchen worker 'was left essentially unsupervised as he went about his task in the defendant's kitchen' and he testified without contradiction that 'no one from Columbia told him how to do his job or supervised him.'

Berhe v. Trustees of Columbia University in the City of New York, 146 A.D.3d 697 (N.Y. Sup.Ct. 2015). Accordingly, there are sufficient differences between the present case and *Bellamy* to warrant a different result, but the fact pattern is still remarkably similar and involves considerable connections between the general employer and the plaintiff that are not typically present in cases where a special employment relationship is found as a matter of law. For example, plaintiff showed up to work on the day of the accident at the general employer's offices and only later went to Columbia and even then only for a lunch shift.

“[A] person's categorization as a special employee is usually a question of fact” and there has not been a “clear demonstration” that Columbia “controls and directs the manner, details and ultimate result of the employee’s work.” See *id*; see also *Bellamy*, 50 A.D.3d at 168 (“[T]he existence of a special employment relationship turns on the resolution of factual issues properly left for trial. While there are, of course, cases in which a finding of special employment may be made on summary judgment, the highly fact-sensitive nature of the issue, combined with the presumption that general employment continues, and the formidable burden placed on a summary judgment movant to demonstrate the absence of any triable issue of fact, militate against summary adjudication.”). Accordingly, Defendant’s motion is denied.

As for Plaintiff’s cross-motion for summary judgment, we agree with Plaintiff that they are not barred from bringing it,³ but it is denied on the merits. Plaintiff relies almost exclusively on his own testimony, the credibility of which is an issue of fact to be considered at trial.

Upon the foregoing, it is hereby

ORDERED, that Defendant Columbia University’s motion for summary judgment is denied; and it is further

ORDERED, that Plaintiff Pewritt’s motion for summary judgment is denied.

This constitutes the decision and order of the court.

6-14-19
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY
JSC

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> DO NOT POST		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

³ Defendant argues that Plaintiff’s cross-motion should be denied due to untimeliness, claiming that the January 29, 2019 stipulation which explicitly extended Plaintiff’s time to cross-move did not actually extend Plaintiff’s time because “it is not intended to waive any defenses available to the parties.” This argument is unpersuasive. Furthermore, courts retain the discretion to award summary judgment if untimely or even without a motion.