

Raymond v Hillebert
2020 NY Slip Op 35201(U)
April 20, 2020
Supreme Court, Erie County
Docket Number: Index No. 2016-805976
Judge: Timothy J. Walker
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STATE OF NEW YORK
SUPREME COURT, ERIE COUNTY

MARY P. RAYMOND,

Plaintiff

v.

DECISION AND ORDER

Index No.: 2016-805976

JON HILLEBERT,
RYDER TRUCK RENTAL, INC.,
HOME DELIVERY LINK, INC.,
HOME DELIVERY, INC., and
JOHN DOE CORPORATION,

Defendants.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES

WILLIAM MATTAR, PC

Arienne J. Irving, Esq., Of Counsel
Matthew J. Kaiser, Esq., Of Counsel
Attorneys for Plaintiff, Mary P. Raymond

GOLDBERG SEGALLA, LLP

Christopher G. Floreale, Esq., Of Counsel
Paul D. McCormick, Esq., Of Counsel
Attorneys for Defendants, Home Delivery Link, Inc.,
and Home Delivery, Inc.

WALKER, J.

Defendants, Home Delivery Link, Inc. (“Home Delivery Link”) and Home Delivery, Inc.,
have applied, pursuant to CPLR section 3212, for summary judgment¹.

¹ The moving defendants are the sole defendants remaining in this matter, because Defendant, Ryder Truck Rental, Inc., was dismissed from the action by Order, dated December 12, 2018 (NYSCEF Doc. 35), and the same order found Defendant, Jon Hillebert (“Hillebert”), to be in default and permitted a default judgment to be taken against him.

Background

This action for personal injuries arises out of a motor vehicle accident that occurred on June 3, 2015, in the Town of Alden, New York (the “Incident”). Plaintiff, Mary P. Raymond (“Raymond”), contends that Hillebert backed the vehicle he was operating - a delivery truck - into the vehicle she was operating - an automobile. On the other hand, Hillebert contends that Raymond rear-ended the delivery truck while he was stopped on the side of the road.

Home Delivery Link is a retail logistics company, which provides delivery services to retailers, such as department, furniture, and appliance stores. At the time of the Incident, Hillebert was making a delivery on behalf of Home Delivery Link. As relevant to this matter, Home Delivery Link had subcontracted its delivery services to nonparty, ECC Movers, LLC (“ECC Movers”), and the moving Defendants contend that ECC Movers was a subcontractor of Home Delivery Link and that Hillebert was a subcontractor of ECC Movers at the time of the Incident.

Standard of Review

To obtain summary judgment, the moving party must make a *prima facie* showing of entitlement to judgment as a matter of law (*Ferluck AJ v. Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]). This requires sufficient evidence to shift the burden to the opposing party to produce evidentiary proof sufficient to establish the existence of genuine issues of material fact (*Id.*, at 320). “Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat summary judgment (*Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 NY2d 966, 967 [1988] [citation omitted]).

Moreover, factual issues raised by the party opposing summary judgment must be genuine, as opposed to speculative (*Trahwen LLC v. Ming 99 Cent #7, Inc.*, 106 AD3d 1467, 1468 [4th Dept 2013]).

Discussion

Preliminarily, Raymond contends that the motion should be denied on the procedural ground that the moving Defendants failed to attach copies of the Summons, Complaint, and Answer to their submission, in derogation of CPLR 3212(b). Such error was inadvertent, as the supporting affirmation of attorney Christopher Floreale, dated January 17, 2020, refers to these pleadings as being attached thereto as Exhibit B. However, upon electronically filing the Floreale Affidavit and its exhibits, counsel's office inadvertently left out exhibit B to the Floreale Affidavit and electronically filed Exhibit C twice. Mr. Floreale's office subsequently corrected the error by electronically filing the missing pleadings prior to the return date of the pending application. The courtesy copy of the submission which Mr. Floreale's office delivered to the Court includes the missing pleadings as Exhibit B to the Floreale Affidavit.

Moreover, in this electronic age of filings via NYSCEF, the Court would have been able to access these pleadings without leaving Chambers, had Mr. Floreale's office not provided the Court with a corrected courtesy copy of the moving Defendants' submission.

The Court shall overlook the moving Defendants' inadvertent failure to initially comply with CPLR 3212(b), because neither the Court, nor Raymond, have been prejudiced (*Long Island Pine Barrens Society, Inc. v. County of Suffolk*, 122 AD3d, 688, 691 [2d Dept 2014] [as regards a failure to comply with CPLR 3212(b), CPLR 2001 permits a court to disregard a party's mistake or omission where a substantial right of a party is not prejudiced]).

Christopher Catton was Home Delivery Link's Director of Compliance at the time of the Incident, and his job duties included monitoring Home Delivery Link's contract carriers' compliance with the US Department of Transportation's regulations. He described "contract carriers" as "[i]ndependent contractors, small business owners that provide the trucks and labor" (Catton EBT Transcript, p. 8; NYSCEF Doc. 45).

At his deposition, Mr. Catton further testified, in relevant part, that at the time of the Incident, Home Delivery Link did not employ any drivers in New York State (*Id.*); Home Delivery Link did own any delivery trucks in New York State (*Id.*, at p. 15); Home Delivery Link hired subcontractor companies, such as ECC Movers, to make its deliveries one hundred percent (100%) of the time (*Id.*, at p. 8); such subcontractor companies hired the individual delivery drivers (*Id.*, at pp. 36-37); and Home Delivery Link's association with these drivers was limited to confirming whether they possessed a valid CDL license (*Id.*, at p. 37). Home Delivery Link did not train or supervise the drivers, and had no role in ECC Movers' hiring of them.

The determination whether one is an independent contractor typically involves a question of fact concerning which party controls the methods and means by which the work is to be done (*Matter of Rivera [State Line Delivery Serv. - Roberts]*, 69 NY2d 679 [1986]), and this question may properly be determined by the court, as a matter of law (*Crage v. Kissing Bridge Ski Area*, 186 AD2d 987 [4th Dept 1992])

Clearly, ECC Movers was an independent contractor, and it - as opposed to Home Delivery Link - hired Hillebert. Under these circumstances, Home Delivery Link has demonstrated *prima facie* entitlement to summary judgment, because "[t]he general rule is that 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 NY2d 270, 273 [1993]). The rationale for this rule is that "one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor" (*Id.*).

The burden thus shifted to Raymond to submit evidence in admissible form to create a genuine issue of material fact sufficient to defeat summary judgment (*Ferluck*, 12 NY3d at 320).

There are exceptions to the general rule pronounced in *Kleeman*, which "are derived from public policy concerns" and "fall roughly into three basic categories: negligence of the employer in selecting, instructing or supervising the contractor; employment for work that is especially or 'inherently' dangerous . . . ; and, finally, instances in which the employer is under a specific nondelegable duty" (*Crage*, 186 AD2d at 988).

The delivery work performed by Hillebert was neither inherently dangerous, nor were Hillebert, the moving Defendants, or non-party ECC Movers under a specific nondelegable duty, meaning those exceptions to the rule pronounced in *Kleeman* do not apply to this matter.

Thus, Raymond contends that Home Delivery Link should be liable for Hillebert's negligence (as established via default judgment), because it allegedly controlled the method and means of how the delivery work was to be completed. The sole fact upon which this contention is based is that Home Delivery Link created the delivery routes that ECC Movers used to make deliveries (Catton EBT Transcript, p. 36; NYSCEF Doc. 45).

At the time of the Incident, William Rager worked for ECC Movers as an independent contractor; he was paired with Hillebert at the time of the Incident; and he witnessed the Incident.

On February 1, 2019, Mr. Rager appeared, pursuant to a subpoena, for a deposition, and testified, in relevant part, as follows: that at the time of the Incident, he and Hillebert worked for ECC Movers as independent contractors (Rager EBT Transcript, p. 15; NYSCEF Doc. 51)²; that at the time of the Incident, Luke Windnagle was employed by Home Delivery Link at the warehouse where Mr. Rager and Hillebert worked for ECC Movers, but they did not report to Mr. Windnagle, nor did he instruct them in connection with the performance of their work for ECC Movers (*Id.*, at pp. 40-41); that if Mr. Rager needed to call in sick from work, he would contact ECC Movers' owner, Adam Wilson, not Mr. Windnagle or anyone from Home Delivery Link (*Id.*, at p. 43); and that neither Mr. Windnagle, nor anyone else from Home Delivery Link, controlled "the means or methods of how [he] actually physically made the deliveries" (*Id.*, at p. 60).

Based upon the testimony of Messrs. Catton and Rager, Home Delivery Link could not be found negligent "in selecting, instructing or supervising [ECC Movers]" (*Crage*, 186 AD2d at 988). Merely creating delivery routes does not rise to instructing or supervising. Moreover, Raymond has not submitted any evidence in admissible form that the route Hillebert used on the day of the Incident was dangerous. Nor has she asserted any such allegations.

Raymond's contentions that Home Delivery Link controlled the actions of Hillebert, an independent contractor of ECC Movers, twice removed from Home Delivery Link, are the type of "expressions of hope or unsubstantiated allegations" that are insufficient, as a matter of fact and law, to defeat summary judgment (*Ferluck*, 12 NY3d at 320).

² Accordingly, Hillebert's relationship with Home Delivery Link is appropriately described as that of a double independent contractor, because ECC Movers was an independent contractor of Home Delivery Link and Hillebert was an independent contractor of ECC Movers.

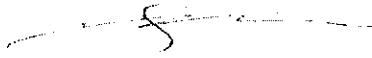
In light of the forgoing, it is hereby

ORDERED, that the motion for summary judgment is granted, and the Complaint is hereby dismissed as against Defendants, Home Delivery, Inc. and Home Delivery, Link.

This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: April 20, 2020
Buffalo, New York

HON. TIMOTHY J. WALKER, J.C.C.


Acting Supreme Court Justice