Gonzalez v Red Hook Container Term., LLC
2022 NY Slip Op 33352(U)
October 4, 2022
Supreme Court, Kings County
Docket Number: Index No. 512988/2016
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

LEONARDO GONZALEZ,

Plaintiff,

-against-

RED HOOK CONTAINER TERMINAL, LLC,

Defendant.

X

DECISION/ORDER

Index No. 512988/2016
Motion Seq. No. 7
Date Submitted: 7/7/2022

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion to reargue its motion for summary judgment.

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed…….	218-227
Affirmations in Opposition and Exhibits Annexed.....	235-251
Reply Affirmation.....	252-253
Additional Affirmations Permitted by Order dated 12/20/2019……..	267, 268

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising from a workplace accident which took place on July 29, 2015. The summons and complaint were filed on July 27, 2016. In 2017, the parties stipulated to discontinue certain of the plaintiff's claims (the Second Cause of Action in the Complaint, which cites NY statutes) by electronically filing Doc 17. A Note of Issue and Jury Demand was filed on March 29, 2018 [Doc 19]. Defendant immediately made a motion to strike it. That motion (MS #1) was decided on September 5, 2018, along with Motion Sequence #4, discussed below, after first being adjourned with an interim discovery order. It was again adjourned to September 5, 2018.

Motion Seq. #2 was an order to show cause by defendant for an order that plaintiff attend an IME by a neuropsychologist "without the attendance of counsel or a

legal representative." That motion was denied by a Judicial Hearing Officer, by order dated July 10, 2018.

Defendant then filed Motion Seq. #3, by notice of motion, to reargue, calling it a "motion to vacate the order". This motion went to the Administrative Judge, who oversees the Judicial Hearing Officers, and his decision, dated August 16, 2018 [Doc 98] states that "a third party observer may be present at the IME as long as he/she does not interfere. However, if movant arranges for observation through a one-way mirror, that is an acceptable alternative." Defendant filed a Notice of Appeal of this order. The Appellate Division affirmed, by Decision and Order dated September 16, 2020 and located at Doc 273.

Defendant then filed Motion Sequence #4 on August 28, 2018, which seeks an order "compelling plaintiff to appear for a second deposition and to provide defendant with a properly executed authorization to obtain his tax returns." This motion was decided on September 5, 2018, along with Motion Seq. #1, the motion to strike the Note of Issue [Doc 120]. The order provides, as relevant herein, that the Note of Issue is not stricken, and that defendant is not entitled to another deposition of the plaintiff, but that plaintiff should provide "authorizations for his union and any disability carrier he has and for any 1099 forms or other tax filings for plaintiff from 2012 to present." It also says that the time "to file for summary judgment is extended to October 5, 2018."

Defendant's motion for summary judgment, Motion Sequence #5, was then filed on October 1, 2018, and, as such, was timely. Plaintiff filed a discovery motion, Motion Seq. #6, on October 4, 2018, which is mentioned here solely to account for all of the prior motions. The defendant's summary judgment motion was denied by another Justice of this Court, Justice Baynes, by order dated April 19, 2019 [Doc 215].

Defendant moved to reargue this decision and order, in Motion Sequence #7, filed May 14, 2019. That motion was granted, by decision and order dated December 20, 2019 and entered January 6, 2020 [Doc 263]. However, instead of either vacating the decision which denied Motion Seq. #5, or adhering to it, the order instead states that "reargument is granted on submission only, and both parties may, within forty five days hereof, submit one further affirmation, of no more than eight pages, summarizing the issues, legal arguments, and documentary evidence in support of, and in opposition to, their respective positions, with no further opposition or reply papers permitted."

On January 31, 2020, plaintiff's attorneys submitted their supplemental affirmation, [Doc 267] and on February 19, 2020, defendant's attorneys submitted theirs. Unfortunately, and sadly, the Covid-19 Pandemic began just a few weeks later, and Justice Baynes was one of the first court employees at this courthouse to come down with Covid. He passed away on March 26, 2020. The court had shut down by then. Apparently, defendant's counsel did not know how to have this "submitted only" motion decided, so they did nothing. Plaintiff then filed another motion, Motion Seq. #8, filed on September 20, 2021, after almost two years had passed since the motion was supposedly "submitted", and asks for an order "restoring this case to the active trial calendar and lifting the automatic stay and have the above matter proceed to trial" [Doc 276]. In his affirmation in support, plaintiff's counsel states that "A conference was held on June 14, 2019 and the case was marked stayed pending a determination on the outstanding motion [filed on May 14, 2019]. The motion was decided on December 20, 2019. Wherefore, it is respectfully requested that the court restore the case to the active trial calendar, lifting the automatic stay and have the above matter proceed to trial." The only thing in plaintiff's statement which is accurate is that the JCP Part had

stayed the case until the summary judgment motion was decided. As the reargument motion has not been decided, the case is still "stayed." It is not an "automatic stay."

By order dated February 18, 2022, the Justice presiding in the CCP Part, Justice Knipel, who is also the Administrative Judge of this Court, heard the plaintiff's motion to restore and issued an order that states that "the motion for summary judgment is hereby randomly reassigned to Justice Debra Silber for resolution." The attorneys requested oral argument, which was held on July 7, 2022, and decision was reserved.

Defendant's Motion for Leave to Reargue

The Affirmation in Support for defendant's motion for leave to reargue fails to state the basis for the motion. It just summarizes the papers which had been submitted on the original motion, and concludes that the motion is timely. The Memo of Law in support of the motion to reargue states that the basis of the original motion was that defendant was "statutorily immune from liability to the Plaintiff in tort" as it was plaintiff's employer at the time of his accident. The cited statute is the U.S. Longshore and Harbor Workers Compensation Act, 33 U.S.C. §900 *et seq*. ("LHWCA"). The Memo of Law states at Page 5 that Justice Baynes' Order was "based upon the mistaken belief that RHCT (defendant) failed to file pleadings in support of summary judgment, RHCT requests that the Court grant its motion for leave to reargue." What the April 19, 2019 decision actually says is "the motion is accompanied by an October 1, 2018 affirmation which essentially merely shepherds in a transcript of plaintiff's deposition and various discovery documents, with no memorandum of law or narrative articulating theories for dismissal."

Finally, at Page 7 of the Memo of Law, counsel explains the basis for the motion. This should have been included in the affirmation in support. She states "However,

RHCT properly filed and submitted a Memorandum of Law as Record Document 139, which comprehensively addressed, *inter alia*, employer immunity under the LHWCA and the legal tests for determining borrowed servant status under applicable case law. Moreover, RHCT properly filed the affidavits of Frank Jordan and Edward McDevitt (Record Documents 136 and 138), individuals with personal knowledge, which attested to facts showing that Plaintiff was RHCT's borrowed servant under the LHWCA. Because the Court overlooked facts and legal theories set forth in these pleadings which were properly filed and submitted, reargument of the summary judgment is warranted in this case." The original motion also argued that defendant was not negligent in connection with plaintiff's accident. This alternative grounds for summary judgment is not mentioned in the notice of motion or the affirmation in support of the motion to reargue and thus was abandoned.

As Justice Baynes granted leave to reargue, and acknowledged that he had not seen the defendant's entire motion, in stating "defendant has established that in addition to its October 1, 2018 and February 12, 2019 affirmations, certain additional material affidavits and exhibits and relevant legal arguments were included in the exhibits thereto as undemarcated and/or improperly demarcated supplemental affirmations, affidavits and memoranda of law, which were overlooked by the Court," this court shall now proceed to review the motion for summary judgment (Seq. #5) *de novo*, but not the claim that defendant was not negligent in connection with the happening of the accident, which is not a stated grounds for reargument, and will also consider the supplemental affirmations, which Justice Baynes permitted [Docs 267 and 268].

Defendant's Motion for Summary Judgment

Defendant Red Hook Container Terminal ("RHCT") operates a marine terminal in Red Hook, Brooklyn, NY. Plaintiff was employed as a "lasher," which is a person who attaches and detaches shipping containers from container ships. Defendant claims that plaintiff was employed by defendant at its marine terminal consistently, although part-time, since 1994. Defendant further contends that plaintiff has been receiving the equivalent of Workers' Compensation benefits, pursuant to the federal laws for maritime employees, the U.S. Longshore and Harbor Workers Compensation Act, 33 U.S.C. §900 *et seq*., (LHWCA) since the date of this accident. Thus, defendant argues, the law, which is similar to the New York Workers' Compensation Law, prohibits plaintiff from suing his employer.

Defendant argues that it is not a party to the collective bargaining agreement, and that it cannot directly hire lashers from the union, the ILA. Therefore, it must contract for lashers with American Maritime Services of New York, Inc. ("AMS"). It notifies AMS on a daily basis how many vessels will be loaded or unloaded, and how many containers they are expected to have. AMS then determines the number of employees to send to the worksite the following day. Defendant avers that some of the equipment is supplied by AMS, mostly small items such as hand tools and harnesses, and the rest is provided by defendant. Counsel also discusses the supervision of the lashers, and states that the supervisors are all RHCT employees, and that they supervise the lashers and the lashing foremen, who are also employed by AMS. Therefore, defendant argues, AMS does not exercise any supervisory control over "their ILA labor" working at RHCT, and "AMS does not have any managers or supervisors located at RHCT."

Defendant acknowledges that AMS pays the lashers' wages, withholds taxes, and "purchases LWHCA coverage for the lashers. AMS' obligation to provide LHWCA coverage for the lashers is a condition of the labor provision contract between RHCT and AMS." Thus, the benefits plaintiff is receiving are from AMS' LCHWA insurance. Further, defendant acknowledges that AMS supplies labor to four different marine terminals, and that plaintiff, "between 2006 and 2015, worked over 50% of all his hours at the Red Hook Brooklyn terminal" and the rest at their other marine terminals. The others are in New Jersey, and it is not claimed that they are in any way connected with defendant.

Plaintiff's Opposition to the Defendant's Motion

Plaintiff opposed the motion and argued that he was employed by American Maritime Services ("AMS"), not defendant. He acknowledges that AMS has a collective bargaining agreement with the International Longshoremen's Association, the applicable union, and supplies labor to defendant. He also averred that he is supervised by a foreman who is also employed by AMS. He further argued that whether or not he was a "special employee" of defendant is, at most, a question for the jury, and not appropriate for summary judgment.

Here, plaintiff claims he was injured when he slipped on oily stairs on a spreader, which he alleges he was only using because the equipment he should have been using, a safety cage held by a crane, was broken. Plaintiff claims he was forced to use "dangerous and defective equipment" and/or that there was a "dangerous and defective condition at his workplace."

Discussion

Workers' Compensation Law § 29 (6) provides that "[t]he right to compensation or benefits under this chapter shall be the exclusive remedy to an employee." Here, the LHWCA applies instead, and provides the same protection to employers in §§904(a) and 905(a).

Under both statutory schemes, "an employee who is entitled to receive compensation benefits may not sue his or her employer in an action at law for the injuries sustained" (*Pena v Automatic Data Processing, Inc.,* 73 AD3d 724, 724 [2010]). Furthermore, "the receipt of workers' compensation benefits is the exclusive remedy that a worker may obtain against an employer for losses suffered as a result of an injury sustained in the course of employment" (*Siklas v Cyclone Realty, LLC*, 78 AD3d 144, 150 [2010], citing *Reich v Manhattan Boiler & Equip. Corp.*, 91 NY2d 772, 779 [1998]; *Hofweber v Soros*, 57 AD3d 848, 849 [2008] *lv denied* 13 NY3d 703 [2009]; *Pereira v St. Joseph's Cemetery*, 54 AD3d 835, 836 [2008]). Plaintiff does not dispute that his accident falls within maritime tort jurisdiction.[1] The LHWCA provides workers' compensation benefits to certain "land-based maritime employees" (*Stewart v Dutra Constr. Co*., 543 US 481, 488, 125 S. Ct. 1118, 160 L. Ed. 2d 932 [2005]). Plaintiff's job qualifies. It is noted that there is no "grave injury" exception in the LHWCA. See §908.

Thus, the court must determine if defendant is entitled to dismissal as a matter of law because the LHWCA is plaintiff's exclusive remedy. The Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C.S. § 901 *et seq*., establishes a comprehensive federal workers' compensation program to provide harbor workers and

[1] Plaintiff discontinued all of his NY Labor Law claims. (see *Lee v Astoria Generating Co., L.P.*, 13 NY3d 382 [2009]).

their families with medical, disability, and survivor benefits for work-related injuries and death.

It must be noted that in addition to receiving benefits, a harbor worker covered under the LHWCA may commence an action against a vessel owner for its negligence, and the vessel owner is prohibited from then recovering from the harbor worker's employer. 33 U.S.C.S. § 905(b). Negligence, for which a vessel owner may be liable under the LHWCA is to be determined in accordance with accepted principles of tort law and in the ordinary process of litigation (*Schnapp v Miller's Launch, Inc.*, 150 AD3d 32, 34 [1st Dept 2017]). Here, plaintiff has not brought suit against the vessel owner for breach of its duty to intervene, or for breach of any of its other legal duties. The duty to intervene requires the vessel owner to intervene in areas under the principal control of the stevedore (here, defendant) if the vessel owner has actual knowledge that a condition of the vessel or its equipment poses a risk of harm and the stevedore or other contractor is not exercising reasonable care to protect its employees from that risk (*Schnapp v Miller's Launch, Inc.*, 150 AD3d 32, 34 [1st Dept 2017]). In 1972, the Longshoremen's and Harbor Workers' Compensation Act (33 USCS 901 et seq.) was amended to relieve the stevedore (defendant) of its duty to indemnify the shipowner for damages paid to longshoremen for injuries caused by the stevedore's breach, “but did not otherwise disturb the contractual undertaking of the stevedore nor the rightful expectation of the vessel that the stevedore would perform its task properly without supervision by the ship” (*Scindia Steam Nav. Co. v De Los Santos*, 451 US 156, 158 [1981]). Here, plaintiff has not sued the vessel owner, and the court has no opinion whether such a claim would have had merit. However, it is clear that the equipment which plaintiff claims caused his injuries was owned and controlled solely by defendant.

Plaintiff cites *Ruiz v Shell Oil Co.*, 413 F2d 310 [5th Cir 1969] as a case which provides a good discussion of general/special employees under the LHCWA. In that case, "the principal question at issue is whether or not an injured employee was a borrowed servant at the time of his injury." The court states "This Circuit (the Fifth), the Seventh and Ninth Circuits have, in the absence of substantial evidence to the contrary, held the issue of whether a relationship of borrowed servant existed is a matter of law." Other factors which the court states should be considered are the furnishing by the temporary employer of the necessary instruments and the place for performance of the work in question, employment of the servant over a considerable length of time, the fact that the work being performed is that of the temporary employer, and the customary right to discharge the servant and the obligation for payment of his wages." That court concludes "the factor of control is perhaps the most universally accepted standard for establishing an employer-employee relationship, and what constitutes 'control' has been the subject of much litigation."

Defendant argues that in a case with similar facts, the lasher was found to be a special employee/borrowed servant and summary judgment was granted. It is an unreported case, *Maldonado v Hapag-Lloyd Ships, Ltd.*, 2015 US Dist LEXIS 42785 [EDNY March 31, 2015, No. CV 2009-0018 (MDG). In that case, plaintiff was a lasher who was injured on the job. He was injured when he touched an exposed electrical cable connected to a refrigerated container. He sued the owner of the vessel and the stevedores, New York Container Terminal, Inc. ("NYCT") and Howland Hook Container Terminal, Inc. The court granted the stevedore defendants summary judgment, and denied the vessel defendants' motion for summary judgment in a separate opinion. In that decision, the court [a Federal Magistrate] explains:

The Second Circuit has identified several tests, depending on the circumstances, for determining who should be considered an employer under the LHWCA and similar labor statutes: the relative nature of the work, the right to control details of the work, the Second Restatement of Agency § 220(2), and the borrowed employee test. *See American Stevedoring Ltd. v Marinelli*, 248 F3d 54, 61 (2d Cir. 2001).

The "relative nature" test looks at two factors: 1) the nature of the claimant's work, which is analyzed according to the skill required for the work, the degree to which the work constitutes a separate enterprise and the extent to which a worker is expected to carry his own accident burden; and 2) the relation of the claimant's work to the employer's business, which is determined according to whether the work is a regular part of the employer's enterprise, whether the work is intermittent or continuous and whether the duration of the work makes the engagement analogous to hiring as opposed to contracting. *See id.* at 62-63.

Under the second test, courts focus on whether the master has the right to control the details of the employees' work. The elements of this test are: the right to control the details of the work, the method of payment, the furnishing of equipment, and the right to fire. *See id.* at 62 n.10. The third test, which is derived from the Second Restatement on Agency, similarly requires consideration of "the extent of control which . . . the master may exercise over the details of the work." *See id.* at 62 n.11.

Finally, under the borrowed servant test, while courts may consider "a variety of factors," the "primary inquiry [is] whether the borrowing employer has authoritative direction and control over a worker." *See id.* at 64.

As a preliminary matter, it is undisputed that the moving defendants are in the stevedoring business and operate a marine terminal in Staten Island known as the New York Container Terminal. By conducting longshoring operations, they are engaged in maritime employment, as defined in the LHWCA as maritime employment. Furthermore, the Second Circuit has held that "any employment that is an integral or essential part of loading or unloading a vessel" shall be considered maritime employment. Lashers are responsible for securing and releasing containers in a ship's cargo for the purpose of loading or unloading them and therefore are essential to this process. Thus Mr. Maldonado, who was employed as a lasher and was performing work as a lasher at the time of the accident, is also subject to the LHWCA.

. . . After review of the submissions, this Court finds that the stevedore defendants clearly qualify as Mr. Maldonado's employer, fitting the definition of employers as described in the LHWCA and generally under maritime law. As they explain, although Mr. Maldonado was paid from an account belonging to an entity called ISM, ISM is an alter-ego of the stevedore defendants that was created solely for the purpose of managing the payroll of employee longshoremen and lashers who

> belong to the International Longshoreman Association ("ILA") Local 1814. After generating the payroll for ILA Local 1814 employees, NYCT transferred funds to ISM to cover that payroll. ISM is wholly owned by NYCT, and has the same directors and officers as its parent.
>
> In contrast to the limited role of ISM, the stevedore defendants establish without dispute that NYCT directed and controlled the lashing work performed at its terminal, while ISM never engaged in any activity at the NYCT's terminal. In fact, ISM did not engage in any activity other than issuing paychecks to ILA Local 1814 employees, having neither its own assets, bank account or office. In short, ISM is nothing more than a vehicle for paying employees belonging to ILA Local 1814, including lashers such as Mr. Maldonado. Since the undisputed facts show that ISM merely pays wages, and the stevedore defendants controlled work at the terminal, I find that the stevedore defendants have established they were the employers of Mr. Maldonado.
>
> The stevedore defendants argue in the alternative that even if Mr. Maldonado were considered an employee of ISM, he was a special employee or "borrowed servant" of the stevedore defendants and therefore barred from pursuing a lawsuit against them because he has received compensation as mandated by LHWCA. *See* Defs.' Mem. at 20-23. Again, neither Mr. Maldonado nor the vessel defendants have offered any argument to the contrary. Notably, Mr. Maldonado filed for, and received, workers compensation benefits as an eligible maritime employee under the LHWCA. The stevedore defendants not only provided the funds for Mr. Maldonado's wages and benefits under a collective bargaining agreement, they furnished him with equipment for his work and storage facilities, directed when and where he worked, employed about two dozen other lashers, coordinated cargo operations at the terminal, provided longshore workers to vessels as part of their regular services, and disciplined workers such as Mr. Maldonado. Under such circumstances, there can be no doubt that Mr. Maldonado was employed by the stevedore defendants directly or, at the very least, as a special employee. Because the stevedore defendants are engaged in maritime employment, were Mr. Maldonado's employer, and have compensated him according to the compensatory plan set out in the LHWCA, Mr. Maldonado is barred from pursuing any claims against them [internal citations omitted].

In New York, “while special employee status is an issue of fact, summary judgment is appropriate where "undisputed facts" establish that the general employer retained no control over the employee” (*Forjan v Leprino Foods, Inc.*, 209 F App'x 8, 10

[2d Cir 2006]). In *Thompson v Grumman Aerospace Corp.,* 78 NY2d 553 [1991], the Court of Appeals held that the plaintiff was a special employee of Grumman Aerospace Corp. as a matter of law because "Grumman exerted comprehensive control over every facet of [the plaintiff's] work." *Thompson*, 78 NY2d 553 at 555. The Court of Appeals also noted that the plaintiff "reported daily to a Grumman supervisor . . . who assigned, supervised, instructed, oversaw, monitored and directed his work duties on a daily basis." *Id.* at 556. In *Thompson*, "all essential, locational and commonly recognizable components of the work relationship were between [the plaintiff] and Grumman."

Also, “a special employee is ‘one who is transferred for a limited time of whatever duration to the service of another’” (*Fung v Japan Airlines Co, LTD.*, 9 NY3d 351, 364 [2007], quoting *Thompson,* 78 NY2d at 557). The action against a special employer is barred, “regardless of the general employer’s responsibility to pay the employee’s wages and maintain workers’ compensation and other benefits” (*Gonzalez v Ari Fleet, Ltd.*, 25 Misc 3d 1235[A], 2009 NY Slip Op 52418[U] [Sup Ct, Queens County 2009], *affd* 83 AD3d 891 [2d Dept 2011], citing *Thompson*, 78 NY2d at 557; *Jaynes v County of Chemung*, 271 AD2d 928, 930 [2d Dept 2000], *lv denied* 95 NY2d 762 [2000]). Furthermore, the receipt of Workers’ Compensation benefits from a general employer precludes an employee from commencing a negligence action against a special employer (*see e.g., Hofweber v Soros*, 57 AD3d 848, 849 [2d Dept 2008]; *Croche v Wyckoff Park Assoc*., 274 AD2d 542 [2d Dept 2000]).

“Although a person’s status as a special employee is generally a question of fact, it may be determined as a matter of law ‘where the particular undisputed critical facts compel that conclusion and present no triable issue of fact’” (*Degale-Selier v Preferred Mgt. & Leasing Corp*., 57 AD3d 825, 826 [2d Dept 2008], quoting Thompson, 78 NY2d

at 557; *see also Fajardo v Mainco El. & Elec. Corp.*, 143 AD3d 759, 763-764 [2d Dept 2016] [holding that "(t)he evidence submitted indicated that Bronx Center Management, Inc. was nothing more than a payroll company, established to pay employee salaries and maintain Workers' Compensation, and was the plaintiff's general employer (and) Bronx Center demonstrated, prima facie, that it was the plaintiff's special employer"]).

To determine whether a party is a special employee, courts consider (1) the right to control the employee's work; (2) the method of payment; (3) the furnishing of equipment; (4) the right to discipline and discharge; and (5) the relative nature of the work. A "significant and weighty" factor is "who controls and directs the manner, details, and ultimate result of the employee's work." (see *Thompson v Grumman Aerospace Corp.,* 78 NY2d 553 [1991]; *Flanagan v. Kajima USA, Inc.*, 163 AD3d 775 [2d Dept 2018]).

Here, both parties agree that plaintiff was employed by AMS and assigned to work, on the day of his accident, at defendant's marine terminal. They also agree that plaintiff was paid his salary by AMS, and that AMS withheld taxes and paid for LHCWA insurance. In line with this, AMS maintained LHCWA insurance for the lashers it employed. However, there is no evidence that AMS supervised the lashers' work, disciplined, them, trained them, or provided the equipment they used at the terminal. AMS merely served as a conduit for RHCT's funds, similar to a payroll service. It is not necessary for defendant to prove that AMS is a wholly owned subsidiary of defendant, as was the case in *Maldonado*, *above*, to prevail. In that case, the alter ego status resulted in the finding that the worker was an employee of the stevedore, or "at the very least" a special employee. Here, based on the undisputed facts, defendant has established that dismissal of the complaint is warranted under the LHWCA, as a matter

of law. The burden then shifts to plaintiff to raise a triable issue of fact that would require a jury, as opposed to the court, to determine if he was a special employee of defendant.

Plaintiff argues that all of the factors which the court must consider are in dispute, and thus, a jury must decide if plaintiff was a special employee of the defendant. His attorney claims that whether he was supervised by defendant is in dispute, as his foreman worked for AMS, that defendant had no right to fire any of the lashers directly, that defendant's witness Frank Jordan is not credible, and that the parties have not submitted a written agreement between defendant and AMS.

In opposition to the motion, other than affirmations from counsel, memos of law and the pleadings, plaintiff provides [Doc 237] a photo of a work vest which says "American Maritime" on it, a photo of a jacket that says "American Maritime" on it [Doc 238], a photo of a spreader [Doc 250], a photo of a safety cage [Doc 249], various discovery demands and subpoenas, "excerpts" of the EBTs of plaintiff, Frank Jordan, Jose Gomez and Rafael Ramos [Docs 245-248], and an item which counsel calls a collective bargaining agreement, but it is between the ILA [the union] and a non-party named Metropolitan Marine Maintenance Contractors' Association, Inc., for members of Locals 1804-1 and 1814, and is not in admissible form in any event.

First, it must be noted that the defendant's original summary judgment motion (#5)also only included "excerpts" of plaintiff's EBT transcript, of Gomez' EBT transcript and of Frank Jordan's EBT transcript. In opposition to that motion, plaintiff provided an affidavit from plaintiff, and "excerpts" of the EBTs of plaintiff, Frank Jordan, Jose Gomez and Rafael Ramos [Docs 189-192].

As plaintiff's attorney does not argue that plaintiff's foreman (Gomez) is not credible, the court tried to review his EBT transcript [Doc 247] to see if he could shed any light on plaintiff's claim that he was not a special employee of defendant. But only an excerpt was provided by plaintiff's attorney. The court could not determine if he was asked any questions with regard to the factors to be considered by the court. The transcript of Mr. Ramos, who is employed by defendant and testified as defendant's witness, is also "excerpted." He testified that he is a crane operator. He does not supervise the lashers. He said he had not heard of American Maritime Services before the EBT.

There is nothing in the plaintiff's submissions which overcomes the defendant's prima facie case that, as a matter of law, plaintiff was a special employee of defendant Red Hook Container Terminal.

Accordingly, it is **ORDERED** that the defendant's motion is granted and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: October 4, 2022

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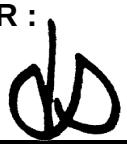

Hon. Debra Silber, J.S.C.