Simmons v Torrecilla
2025 NY Slip Op 34769(U)
July 7, 2025
Supreme Court, Bronx County
Docket Number: Index No. 33733/2019E
Judge: Patsy Gouldborne

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-13

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ROBERT M. SIMMONS,

Plaintiff,

-against-

SHAFIQ TORRECILLA and FRESH DIRECT, LLC,

Defendants.

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Index №. 33733/2019E
Motion seqs. 2, 3

DECISION & ORDER
Hon. Patsy Gouldborne, J.S.C.

The following papers were read on the motion by Shafiq Torrecilla and Fresh Direct, LLC (Seq. No. 2) for **summary judgment** submitted on June 26, 2025, and on this motion by Robert M. Simmons (Seq. No. 3) for **summary judgment** submitted on June 26, 2025.

Papers	NYSCEF Doc No(s).
Motion Seq. No. 2 Notice of Motion by Defendants: Affirmation and Exhibits Annexed	45-59
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Shafiq Torrecilla (Torrecilla) and Fresh Direct, LLC (Fresh Direct) (collectively, defendants) move pursuant to CPLR 3212 for summary judgment. Plaintiff moves pursuant to CPLR 3212 for summary judgment.

This action stems from a December 14, 2018 motor vehicle accident on East Tremont Avenue near the intersection with Boston Road in Bronx County (NYSCEF Doc No. 27, Roberts tr 23). At the time of the accident, plaintiff was employed by non-party Vertex Global Solutions (Vertex) (Simmons tr 143-144). Fresh Direct contracted with Vertex to supply temporary workers to Fresh Direct (NYSCEF Doc No. 52, Ravenelle aff para 3-4). On the day of the accident, Fresh Direct's employee, Anthony Viera, was training plaintiff to drive trucks for Fresh Direct (Simmons tr 50-51, 63, NYSCEF Doc No. 57, Viera tr 14). Viera was riding in a van with about ten trainees including plaintiff, who took turns driving while Viera instructed them (Simmons tr 72-75). Some of the trainees were Vertex employees and others were Fresh Direct

employees (NYSCEF Doc No. 29, Viera aff para 5). During Fresh Direct employee Shafiq Torrecilla's turn driving the van, he collided with a light pole (Simmons tr 77, Viera tr 20, 26-27). Just before the collision, Torrecilla exclaimed that he could not find the brakes (Viera tr 26, 58-59).

Defendants argue that plaintiff was Fresh Direct's special employee at the time of the accident and that plaintiff's remedy is therefore limited to worker's compensation. Plaintiff argues that he can maintain his lawsuit because he was not a special employee of Fresh Direct, and that defendants are liable for the accident.

I. Summary Judgment Review

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The court's role is "to determine whether there is a material factual issue to be tried, not to resolve it" (*S.A. De Obras y Servicios, COPASA v Bank of Nova Scotia*, 170 AD3d 468, 472 [1st Dept 2019], quoting *Sommer v Fed. Signal Corp.*, 79 NY2d 540, 554 [1992] [internal quotation marks omitted]). The court's role "is limited to issue finding, not issue resolution" (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 717 [2018], quoting *Kriz v Schum*, 75 NY2d 25, 33 [1989] [internal quotation marks omitted]).

Summary judgment disposition is inappropriate "where varying inferences may be drawn, because in those cases it is for the factfinder to weigh the evidence and resolve any issues necessary to a final conclusion" (*Dormitory Auth.*, 30 NY3d at 717). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [citation omitted]).

Where a moving party successfully demonstrates its prima facie entitlement to summary judgment, the burden shifts to the party in opposition to submit admissible evidence demonstrating the existence of a material issue of fact, or to tender an acceptable excuse for its failure to do so (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381, 383-384 [2004]).

II. Plaintiff's Special Employee Status

Defendants argue that plaintiff cannot maintain an action against them because plaintiff was Fresh Direct's special employee at the time of the accident. Workers' Compensation Law (WCL) §§ 11 and 29 (6) restrict an employee from suing his or her employer or co-employee for an accidental injury sustained in the course of employment (*see generally Fung v Japan Airlines*

Co., Ltd., 9 NY3d 351, 357 [2007]). It is not necessary for an entity to be the direct "paper" employer of an injured worker for that entity to benefit from the protection of the WCL (*Fuller v KFG Land I, LLC*, 189 AD3d 666, 668 [1st Dept 2020] [holding that employee who received workers' compensation benefits from employer—one of several separate corporate entities held out to public as one company—was precluded from suing related entities because entities were sufficiently interconnected]). The on-paper employee of one employer may be considered the "special employee" of a different employer, for WCL purposes, when the employee is "transferred for a limited time of whatever duration to the service of another . . . upon a clear demonstration of surrender of control by the general employer and assumption of control by the special employer" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 556 [1991]). Summary determination of special employee status is proper when "the uncontroverted record documents an employer's comprehensive and exclusive daily control over and direction of the special employee's work duties . . . with the corresponding complete absence of any supervision or control of his work duties by the originating general employer (*id.*).

Here, defendants previously moved for the same relief (NYSCEF Seq. No. 1). The court found that triable issues of material fact existed about whether plaintiff was Fresh Direct's special employee because the parties differed on whether Vertex or Fresh Direct controlled the manner and details of plaintiff's work (NYSCEF Doc No. 38). Accordingly, the court denied the motion with leave to renew upon completion of discovery. Plaintiff and Defendants have now testified at depositions. However, their testimony does not resolve the dispute over whether Vertex or Fresh Direct controlled the manner and details of plaintiff's work.

John Ravenelle, vice president of human resources for Fresh Direct, affirms that plaintiff was solely supervised by Fresh Direct's employee, Viera (Ravenelle aff para 7-8). Plaintiff testified that he was supervised by two Vertex employees, Justyna Kopel and Sam (Simmons tr 33-34, 53, NYSCEF Doc No. 79, Simmons aff para 5). Plaintiff affirms that he reported to Justyna each morning, and she told him where to go that day (Simmons aff para 5). Plaintiff does not describe Viera as his supervisor; plaintiff refers to Viera as a "trainer" (Simmons tr 63). Plaintiff describes himself as a "borrowed employee," working at a Fresh Direct facility but under Vertex's supervision (Simmons tr 167-168). According to plaintiff's understanding, Fresh Direct could not hire or fire him, but could only submit a complaint to Vertex (Simmons tr 168).

The contract between Vertex and Fresh Direct states that Vertex "shall at all times and for all purposes be the sole and exclusive employer of all Temporary Workers," and that Vertex shall represent such to its employees (NYSCEF Doc No. 26, service contract at 1). Fresh Direct is not permitted to reassign workers to new job duties or locations without Vertex's consent, though Vertex may not unreasonably withhold consent (service contract at 2). Vertex retains the right to remove its workers at any time and for any legal reason (service contract at 3). While on Fresh Direct's premises, Vertex's employees are required to follow Fresh Direct's written rules, policies, and regulations (service contract at 2).

The contractual provision that Vertex shall be the sole and exclusive employer of all temporary worker is not dispositive because plaintiff is not a party to that contract (*Thompson*, 78 NY2d at 559-560 [finding that "an agreement between the employers may not be determinative of the issue of special employment"]). The court must assess plaintiff's actual relationship with Fresh Direct to ascertain the special employment status for workers' compensation purposes (*id.* at 560 [finding that contract between employers did not "displace judicial assessment of the employee's actual relationship" with proposed special employer]).

Analyzing plaintiff's actual relationship with Fresh Direct reveals triable issues of material fact about whether plaintiff was Fresh Direct's special employee. Plaintiff submits evidence that he reported daily to a Vertex supervisor, that Fresh Direct could not reassign him without Vertex's consent, and that Vertex could withdraw him without Fresh Direct's consent. Therefore, defendants do not demonstrate an uncontroverted record that Fresh Direct's supervision of plaintiff was comprehensive and exclusive, with a complete absence of any supervision or control by Vertex (*cf. id.* at 555-556 [finding that plaintiff, paper employee of ATS, was special employee of Grumman because, inter alia, plaintiff reported exclusively to Grumman supervisor, and only Grumman could reassign plaintiff or terminate plaintiff's assignment]). Accordingly, defendants' motion for summary judgment is denied.

III. Liability

Plaintiff moves for summary judgment on the issue of liability. It is undisputed that plaintiff was a passenger in a van driven by Fresh Direct's employee, Torrecilla, who lost control of the vehicle and collided with a pole. Defendants do not present a non-negligent explanation for the accident. Accordingly, plaintiff is granted conditional summary judgment on the issue of liability, if the trier of fact determines that plaintiff was not Fresh Direct's special employee at the time of the accident (*see Pane v Cisilino*, 144 AD3d 567, 567 [1st Dept 2016] [awarding summary judgment to plaintiff in one-car accident where plaintiff was passenger of defendant-driver who lost control of vehicle and did not provide non-negligent explanation]).

IV. Affirmative Defenses

Plaintiff moves to strike defendants' fourth, sixth, ninth, and tenth affirmative defenses. These affirmative defenses respectively allege culpable conduct of third parties, comparative negligence and assumption of risk, superseding and intervening causes of the accident, and that defendants are entitled to a reduction in damages by any settlement amount paid by other tortfeasors in proportion to their negligence. On a motion to dismiss affirmative defenses, a movant "bears the burden of demonstrating that the defenses are without merit as a matter of law" (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011]).

Defendant's affirmative defenses, as noted above, are dismissed. Plaintiff demonstrates that neither plaintiff nor any third parties negligently contributed to the accident. Viera testified

that there was nothing he could have done to prevent the accident, and that none of the other passengers in the van contributed to the accident (Viera tr 26). He testified that the accident occurred because Torrecilla could not find the brake pedal (Viera tr 26). No evidence exists in the record that the van suffered a mechanical failure, or that any other cause contributed to the accident. Therefore, there are no other tortfeasors to proportionally reduce defendants' damages, and no intervening or superseding causes of the accident. Finally, plaintiff did not assume the risk of the accident (*Vasquez v Strickland*, 211 AD3d 414, 415 [1st Dept 2022] [dismissing "irrelevant" defense of assumption of risk]; *Webb v Scharf*, 191 AD3d 1353, 1353 [4th Dept 2021] [holding that motorists on public streets do not generally assume the risk of others driving negligently]). Accordingly, defendants' fourth, sixth, ninth, and tenth affirmative defenses are dismissed.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by any movant was not addressed by the court, it is hereby denied.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment (Seq. No. 2) is **DENIED**; and it is further

ORDERED that plaintiff's motion for summary judgment (Seq. No. 3) is **GRANTED TO THE EXTENT** that plaintiff is awarded conditional judgment on liability if the trier of fact determines that plaintiff was not Fresh Direct's special employee at the time of the accident, and that defendants' fourth, sixth, ninth, and tenth affirmative defenses are dismissed.

Dated: July 7, 2025

Patsy Gouldborne

HON. PATSY GOULDBORNE, J.S.C.