A non-WCB workers comp related issue

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42

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YONAS BERHE

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 151508/13

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and COLUMBIA UNIVERSITY

Defendants

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NANCY M. BANNON, J.

In this action to recover damages for personal injuries, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that the action is barred by the exclusivity remedy provisions of Workers' Compensation Law (WCL) §§ 11 and 29(6). For the reasons set forth below, the defendants' motion is granted.

On November 14, 2010, the plaintiff waiter allegedly sustained personal injuries when he slipped and fell in water on the floor near the sink in the kitchen of defendant Columbia University's on-campus catering hall, Faculty House, while carrying a serving tray. At the time of the accident, the plaintiff was working on a temporary basis through non-party TemPositions, Inc. d/b/a Eden Hospitality, a temporary staffing company. The plaintiff commenced this negligence action against the defendants on February 19, 2013. In their answer, the defendants asserted eight affirmative defenses, including that the action is barred by WCL §§ 11 and 29. The defendants now move for summary judgment dismissing the complaint on that ground, arguing that a special employment relationship existed between the plaintiff and defendants and thus, the plaintiff's receipt of workers' compensation benefits under the policy that insured both the defendants and TemPositions bars this action. The Court notes that the plaintiff failed to appear for oral argument on the motion.

It is well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). Once the movant meets this burden, it becomes incumbent upon the nonmoving party to

demonstrate by admissible evidence the existence of a triable issue of fact in opposition. See CPLR 3212; Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

"In general, workers compensation benefits are the exclusive remedy of an employee against an employer for any damages sustained from injury or death arising out of and in the course of employment." Maropakis v Stillwell Materials Corp., 38 AD3d 623, 623 (2nd Dept. 2007); see Weiner v City of New York, 19 NY3d 852 (2012); Cunningham v State, 60 NY2d 248 (1983); Munion v Trustees of Columbia Univ. in the City of New York, 120 AD3d 779 (2nd Dept. 2014). By applying for and accepting workers' compensation benefits, a plaintiff forfeits his or her rights to maintain an action against his or her employer. See Cunningham v State, supra. Likewise, 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 Fung v Japan Airlines Co., Ltd., 9 NY3d 351 (2007); Gonzalez v Woodbourne Arboretum, Inc., 100 AD3d 694 (2nd Dept. 2012); Villanueva v Southeast Grand Street Guild Hous. Dev. Fund Co., Inc., supra. For the purposes of the Workers' Compensation Law, a plaintiff may be deemed to have more than one employer, a general employer and a special employer. See Slikas v Cyclone Realty, LLC, 78 AD3d 144 (2nd Dept. 2010); Schramm v Cold Spring Harbor Lab., 17 AD3d 661 (2nd Dept. 2005).

A special employee is one who is transferred for a limited time to the service of another. See Thompson v Grumman Aerospace Corp., 78 NY2d 553 (1991); see Warner v Continuum Health Care Partners, Inc., 99 AD3d 636 (1st Dept. 2012); Schramm v Cold Spring Harbor Lab., supra. Whether a person is categorized as a special employee is usually a question of fact, but a "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 issue of fact." Thompson v Grumman Aerospace Corp., supra at 558; see Villanueva v Southeast Grand Street Guild Hous. Dev. Fund Co., Inc., 37 AD3d 155 (1st Dept. 2007).

In order to establish a special employment relationship, the defendant must clearly demonstrate a surrender of control by the general employer and the assumption of control by the defendant special employer. See Thompson v Grumman Aerospace Corp., supra; Lane v Fisher Park Lane Co., 276 AD2d 136 (1st Dept. 2000). The key to determining the existence of a special employment relationship is "who controls and directs the manner, details and ultimate result of the employee's work." Thompson v Grumman Aerospace Corp., supra at 558; see Fung v Japan Airlines Co., Ltd., supra; Warner v Continuum Health Care Partners, Inc., supra; Villanueva v Southeast Grand Street Guild Hous. Dev. Fund Co., Inc., supra; Ugijanin v 2 West 45th Street Joint Venture, 43 AD3d 911 (2nd Dept. 2007).

Here, the defendants established, prima facie, the existence of a special employment relationship. They demonstrated through the affidavit of James Essey, TemPositions' President and CEO, and the deposition transcript and affidavit of David Martin, an employee of the defendants and the general manager of Faculty House, as well as the plaintiff's own testimony, that the defendants controlled and directed the manner, details, and ultimate result of the plaintiff's work. See Thompson v Grumman Aerospace Corp., supra; Munion v Trustees of Columbia Univ. in the City of New York, supra. Essey stated that when a worker accepts an assignment with a customer, TemPositions merely tells them the address and the name of the person to whom they should report. He stated that TemPositions does not direct, control, or instruct the temporary employees on the manner or details of their work and that the temporary employees, like the plaintiff, as well as temporary supervisors, take their direction and orders from the managers of TemPositions' customer, as plaintiff took direction from Martin at Faculty House. Martin stated that he and his assistant supervisor or banquet manager, Marlin Alvarez, managed all full-time and temporary staff including other temporary supervisors brought in to assist in staff supervision. Martin further stated that all full-time and temporary staff took their directions from him and that he had the authority to discharge any temporary employee, including the plaintiff, from their work assignment with the defendants.

The defendants also submitted the deposition transcript of the plaintiff, wherein he stated that he had accepted work at Faculty House twenty or thirty times prior to the date of the accident and each time he would receive an e-mail from TemPositions indicating the place, time and location of the assignment. He would almost always have to report to Martin or Alvarez, who assigned his work duties and directed how they should be performed. He explained that Martin and Alvarez assigned each waiter certain tables, and assigned other tasks, such as stocking the bar, on an as needed basis. They also monitored the progress of the meal service and cleanup throughout the shift, and authorized and assigned the break times, where all were provided with a free meal. According to the plaintiff, Martin and Alvarez directed both in-house and temporary staff in the same manner without distinction and all staff even wore the same uniform.

Such evidence is sufficient to establish, prima facie, that the defendants were the plaintiff's special employer. See Bharat v Bronx Lebanon Hosp. Ctr., 106 AD3d 540 (1st Dept. 2013); Gherghinoiu v ATCO Prop. & Mgt, Inc., 32 AD3d 314 (1st Dept. 2006); Lane v Fisher Park Lane Co., supra.

In addition, the defendants submitted the affidavit of Kay Raybar, an attorney employed by the New York State Insurance Fund (NYSIF), the workers' compensation carrier, who averred that the plaintiff was awarded workers' compensation benefits under the single policy covering both TemPositions and Columbia as the employer/alternate employer and, as of October 2014, the plaintiff had received workers' compensation benefits in the amount of $40,863.53 for medical

treatment and $20,235.31 for lost time from work due to the accident. See Munion v Trustees of Columbia Univ. in the City of New York, supra. With this proof, the defendants established, prima facie, that the plaintiff's claims are barred under WCL §§ 11 and 29(6). See Thompson v Grumman Aerospace Corp., supra; Ugijanin v 2 West 45th Street Joint Venture, supra.

In opposition, the plaintiff fails to raise a triable issue of fact. He does not dispute that he received the workers' compensation benefits described above and submits no proof that TemPositions played any role in supervising or directing him at any time in his work at Faculty House. Although he now argues that the defendants did not supervise or direct him exclusively during his assignments at Faculty House because other supervisors provided by TemPositions were physically present, as previously noted he testified otherwise at his deposition, ie. that all employees, both full-time and temporary, including himself, were supervised by Martin and Alvarez, who were both employees of the defendants. Indeed, his deposition testimony is consistent with the defendants' proof, including the statements of Martin and Alvarez that they supervised all staff, including any supervisors provided by TemPositions, and did so in the same manner.

This case presents nearly identical facts to those in Munion v Trustees of Columbia Univ. in City of New York, supra, where the Appellate Division also found Columbia University to be a special employer, and dismissed the complaint as barred by the exclusivity of the Workers Compensation Law. There, the plaintiff, a coat checker, was, like the plaintiff, an employee of TemPositions and working at the Faculty House of Columbia University when she tripped and fell. Like the plaintiff, she had received workers compensation benefits under a TemPositions policy and she also testified at her deposition that, while TemPositions told her where and to whom to report, the defendant's supervisors instructed her on her work duties. In Munion, as in the instant case, defendant Columbia University submitted an affidavit of the chief executive officer of TemPositions and deposition testimony of the general manager of Faculty House, as well as the affidavit of an attorney employed by the New York State Insurance Fund to establish a prima facie case establishing a special relationship and entitlement to summary judgment.

Similarly, in Warner v Continuum Health Care Partners, Inc., supra, the Appellate Division found that the plaintiff, a scrub nurse assigned by the defendant temporary staffing service to St. Luke's Hospital, was a special employee of the hospital so as to bar the plaintiff's personal injury action. Even though she was paid by the temporary staffing service, the hospital interviewed her and had authority to fire her, she was supervised by hospital employees, was assigned to the operating room or other locations by and with permanent hospital staff and she worked exclusively for that hospital for four years. 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." See also Holmes v Business Relocation Svcs., Inc., 117 AD3d 468 (1st Dept. 2014) [issues of fact as to whether defendant was the spacial employer of the plaintiff where he was assigned for two days to drive defendants' truck to pick up voting machines and defendant's employee who rode with plaintiff testified that he did not supervise temporary employees.]

For these reasons, the defendants' motion for summary judgment is granted and the complaint is dismissed.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted ans the complaint is dismissed in its entirety, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: July 14, 2015

, JSC

HON. NANCY M. BANNON