

Pechiva v Lawrence Scott Events, Ltd.

2010 NY Slip Op 33457(U)

December 16, 2010

Supreme Court, New York County

Docket Number: 114282/08

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Saliann Scarpulla

PART 19

Index Number : 114282/2008
PECHIVA, MILAN
 vs.
LAWRENCE SCOTT EVENTS
 SEQUENCE NUMBER : 001
 DISMISS ACTION

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined in
accordance with the accompanying
decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

DEC 17 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/16/10

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X

MILAN PECHIVA,

Plaintiff,

-against-

Index No.: 114282/08

Submission Date: 10/20/10

LAWRENCE SCOTT EVENTS, LTD.,

Defendant.

DECISION AND ORDER

-----X

For Plaintiff:
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For Defendant:
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New York, NY 10005

FILED

DEC 17 2010

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COUNTY CLERK'S OFFICE**

Papers considered in review of this motion for summary judgment:

- Notice of Motion 1
- Aff in Opp 2
- Reply 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant Lawrence Scott Events, Ltd. ("LSE") moves for summary judgment dismissing the complaint.

LSE was hired as party planner and caterer for a Bat Mitzvah party at a private home in Connecticut on June 7, 2008. Top Shelf Staffing provided the staff with uniforms for the party. The Top Shelf Staffing employees, including plaintiff Milan Pechiva ("Pechiva"), met at a car rental place and were driven to the Bat Mitzvah party in vans rented for them by Top Shelf Staffing. Their boss, Vincent Braccia ("Braccia") also went to the party. Pechiva was assigned to work as a soda server at the party.

While setting up for the party, LSE event manager Ralph Bertuccio (“Bertuccio”) instructed Pechiva to place a baseball cap on a four feet tall “silver surfer” statue located atop of a six feet high cylindrical structure. According to Pechiva, he asked Braccia if it was okay for him to do what Bertuccio had asked and Braccia said it was fine. He tried climbing up the structure when it started to tip over. Bertuccio and Braccia said “stop, stop, stop.” Bertuccio then instructed three other workers to hold the sides of the structure for support. Pechiva started climbing up the structure again, lost his balance and slipped and fell. He was on the floor for about two minutes because he was in pain, and then after approximately a half hour, he returned to work serving soda at the party.

Pechiva commenced this action against LSE seeking to recover damages for a back injury sustained as a result of his fall. He alleged a negligence cause of action and violation of Labor Law Sections 200, 240(1) and 241(6). LSE answered the complaint and denied all material allegations.

LSE now moves for summary judgment dismissing the complaint, arguing that (1) Pechiva was a “special employee” of LSE and therefore precluded from suing pursuant to workers’ compensation law; (2) there was no dangerous condition at the premises caused or created by LSE, rather, Pechiva’s accident was caused by his own means and methods; and (3) the Labor Law claims must be dismissed because the accident did not result from a construction site activity in a commercial setting, rather, it occurred in a private home.

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- In support of the motion, LSE submits an affidavit and deposition testimony from Bertuccio. Bertuccio explained that he supervised, directed and controlled the personnel from Top Shelf Staffing at the party. He had the power to remove any personnel who were not performing their job duties satisfactorily. He "checked in" the Top Shelf Staffing employees when they arrived at the party. According to Bertuccio, Braccia was at the party to oversee his staff because Top Shelf Staffing was a new company. Bertuccio maintained that he directed Pechiva's work at the party with regard to operating the soda bar and he directed Pechiva's work when he was placing the hat atop the silver surfer statue. Bertuccio explained that the method of placing the hat atop the statue was left to Pechiva. He saw Braccia give Pechiva support as he climbed up to place the hat on the statue. He did not ask anyone to assist Pechiva in placing the hat on the statue.

LSE also submits Braccia's affidavit in which he avers that the supervision, direction and control of the Top Shelf Staffing staff sent to various events was provided by the on site people running the various events. At the party on June 7, 2008, Bertuccio supervised, directed and controlled all of the staff provided by Top Shelf Staffing. Braccia maintains that he did not witness the accident and was not aware that Bertuccio requested that Pechiva take any action in relation to the statue until after the accident occurred.

In opposition, Pechiva argues that (1) LSE created a dangerous condition when its employee devised a plan to secure an unsteady structure, which plan Pechiva relied upon

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to his detriment when he agreed to climb that structure at LSE's request; and (2) workers compensation law does not bar this action because Pechiva was not a "special employee" of LSE.¹

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). A motion for summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Here, in support of its motion for summary judgment, LSE first argues that Pechiva was a "special employee" of LSE and therefore precluded from suing pursuant to workers' compensation law. The sole remedy of an employee against his employer for injuries in the course of employment is benefits under the workers' compensation law. Employees who are employed and paid by one employer may nevertheless be employees of another with respect to a particular transaction even where the general employer is interested in the work. A special employee is one who is transferred for a limited time of

¹ Pechiva withdraws his Labor Law claims.

whatever duration to the service of another. *See Brooks v. Chemical Leaman Tank Lines, Inc.*, 71 A.D.2d 405 (1st Dept. 1979). The presumption of general employment is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer. In determining special employment status, a significant factor "focuses on who controls and directs the manner, details and ultimate result of the employee's work." *Lane v. Fisher Park Lane Co.*, 276 A.D.2d 136, 140 (1st Dept. 2000).

To establish entitlement to summary judgment, a defendant special employer must make a clear demonstration of surrender of control by the general employer and assumption of control by the special employer through the submission of sufficient competent evidence to overcome the presumption of the continuation of the employee's general employment. *See Broadus v. City of New York*, 20 Misc. 3d 1122A (N.Y. Sup. Kings Co., 2008). Here, both Bertuccio and Braccia averred that although Braccia was present at the party, LSE supervised, directed and controlled all of the staff provided by Top Shelf Staffing at the party and had the power to remove any personnel who were not performing their job duties satisfactorily. However, issues of fact exist as to the degree of control and supervision exercised by LSE over Pechiva's work as a soda server at the party. As such, the court can not determine, as a matter of law, that there was a clear surrender of control by Top Shelf Staffing and a clear assumption of control by LSE over

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Pechiva's work. *See Bellamy v. Columbia Univ.*, 50 A.D.3d 160 (1st Dept. 2008); *cf. Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553 (1991).

Further, while it is undisputed that Bertuccio asked Pechiva to place the hat on top of the statue, conflicting evidence has been presented as to the events surrounding the accident. Pechiva claims that he asked Braccia if it was okay for him to place the hat on the statue and Braccia told him it was fine. Pechiva also claims that Bertuccio asked other workers to support the statue while he was attempting to put the hat in place. Braccia claims that he had no knowledge of the accident or the request to place the hat on the statue until after the accident occurred. Bertuccio claims that he did not ask anyone to assist Pechiva, and he claims that he saw Braccia give Pechiva support while Pechiva attempted to put the hat in place. Due to this conflicting evidence, the court finds that issues of fact exist as to who directed and controlled the manner and details of Pechiva's

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work at the time of the accident and whether LSE was negligent in directing and/or assisting Pechiva when he attempted to place the hat on the statue.

In accordance with the foregoing, it is hereby

ORDERED that defendant Lawrence Scott Events Ltd.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
December 16, 2010

ENTER:


J.S.C.
SALIANN SCARPULLA

FILED
DEC 17 2010
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