2015 IL App (1st) 142341-U

SIXTH DIVISION
Order filed: March 31, 2015

No. 1-14-2341

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JAVIER DELGADO,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12 L 2964
	)	
ABRAHAM SOLIVAN ORTIZ, MULTI-TEMPS SERVICES, INC., and MULTI-TEMPS STAFFING, INC.,	)	
	)	
	)	Honorable
	)	Eileen Brewer,
Defendants-Appellees,	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court which granted the defendants' motion for summary judgment based on the loaned-servant defense was affirmed.

¶ 2 The plaintiff, Javier Delgado, appeals from the circuit court order which granted summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2014)) in favor of the defendants, Abraham Solivan Ortiz (Ortiz), Multi-Temps

Services, Inc., and Multi-Temps Staffing, Inc. (collectively referred herein as Multi-Temps). For the following reasons, we affirm the judgment of the circuit court.

¶ 3 On March 16, 2012, the plaintiff filed a negligence action against the defendants for injuries he sustained while working at Ferrara Pan Candy Company (Ferrara) in Bellwood. According to the complaint, the plaintiff was directly employed by Ferrara, and Ortiz was employed by Multi-Temps and assigned to work at Ferrara pursuant to a temporary employment contract between the two employers. The plaintiff alleged that, on September 14, 2010, he and Ortiz were working together at Ferrara when Ortiz negligently operated a forklift, causing the plaintiff to suffer a crushing injury to his foot.

¶ 4 On March 11, 2014, the defendants filed a motion for summary judgment in which they argued that it was undisputed that Ortiz was a co-employee of the plaintiff at the time of the accident because Ortiz was loaned to Ferrara by Multi-Temps. Therefore, the defendants argued that, under the loaned-servant doctrine, the plaintiff's negligence action was barred by the exclusive remedy provision of the Workers' Compensation Act (Act) (820 ILCS 305/5 (West 2012)). The defendants attached numerous documents, including deposition transcripts, supporting their motion.

¶ 5 Domenica Ralls, corporate secretary for Multi-Temps, testified that Multi-Temps was in the business of providing temporary workers to companies and had a contract with Ferrara to provide forklift operators. She described the general protocol for placing a forklift operator at Ferrara as follows: Multi-Temps sent several qualified candidates to Ferrara for consideration; Ferrara administered a forklift-skills test and a written test to each candidate; and Ferrara selected the candidates, if any, that it determined were suitable for employment at one of its

locations. According to Ralls, to the best of her knowledge, this protocol led to Ferrara accepting Ortiz to work at its factory as a forklift operator sometime in August 2009.

¶ 6 Ralls identified the "Staffing Agreement" between Multi-Temps and Ferrara, confirming that the agreement stated that the assigned worker works under Ferrara's direction, control and supervision at all times. According to Ralls, Ferrara selected Ortiz to be a forklift operator at its company, chose which location at which he was to work, decided which projects he was to complete, handled his training and safety training needs, and exercised complete control over the equipment and tools he used while working there. Further, Ferrara controlled Ortiz's hours and work schedule, including approving or denying Ortiz's requests for time off. Ferrara also could terminate Ortiz from its employment at any time without permission from Multi-Temps. Ralls explained, however, that Ferrara's decision to terminate an assigned employee did not end his employment with Multi-Temps, but only ended his assignment at Ferrara.

¶ 7 Regarding payroll and benefits, Ralls testified that, on a weekly basis, Ferrara supplied her with the hours Ortiz worked so that she could issue payroll checks. However, after Ralls issued the payroll checks, she delivered them to Ferrara and its staff disbursed paychecks to all employees. While she admitted that Multi-Temps handled Ortiz's tax deductions, social security and unemployment insurance costs, Ralls explained that she later billed Ferrara for the aggregate costs for all temporary employees assigned to it.

¶ 8 Ralls admitted that, under the agreement, Ferrara was required to obtain prior written approval from Multi-Temps for any substantial changes in the assigned employee's job duties or risks. However, she did not testify to any instance in which Ferrara violated this provision of the Staffing Agreement.

¶ 9 Enrico Buda, a Ferrara warehouse manager, testified consistently with Ralls regarding the protocols for placing temporary workers with Ferrara. Buda stated that he, or other Ferrara managers, evaluated candidates sent by Multi-Temps and decided which candidates, if any, were acceptable to them. Buda also testified consistently with Ralls regarding Ferrara's control over Ortiz, including that it controlled his work schedule, training, worksite location, assignment of projects, and his retention. Buda confirmed that the plaintiff's injury arose out of and in the course of his employment as the plaintiff and Ortiz were working on a project together when Ortiz drove the forklift over the plaintiff's foot.

¶ 10 Vince Ippolito and TJ Heatherly, warehousing managers at Ferrara, both testified consistently with Buda and Ralls regarding Ferrara's control over Ortiz. While Ippolito testified that Ortiz had been hired initially as a baler, neither he nor Heatherly knew whether Ferrara was required to seek approval from Multi-Temps for the job change or whether Ferrara obtained such approval before Ortiz was re-assigned. However, Heatherly testified that he believed Multi-Temps had to have been informed of the job change in order to process payroll because balers and forklift operators worked different hours.

¶ 11 Ortiz testified that he applied at Multi-Temps in 2008 in order to be placed at Ferrara in a forklift operator position. He testified consistently with the other witnesses regarding Ferrara's control over him while he worked in the Bellwood factory. Ortiz also stated that Multi-Temps informed him that he was required to wear steel-toe shoes while working at Ferrara, but he testified that Multi-Temps supervisors never came to Ferrara to supervise him in any way.

¶ 12 The defendants attached a copy of Staffing Agreement to their motion. Under the terms of the agreement, Multi-Temps promised to maintain workers' compensation and other types of insurance, process payroll, and invoice Ferrara for weekly payroll costs. Another provision

stated that "making substantial changes in the Assigned Employee's job duties or risks" required prior written approval from Multi-Temps.

¶ 13 After hearing the parties' arguments on the defendants' motion, the circuit court ordered supplemental briefing regarding the issue of Multi-Temps' steel-toe shoe requirement. In his supplemental brief, the plaintiff argued that Multi-Temps' steel-toe shoe requirement demonstrated that Ortiz was not wholly freed from its control. He contended that Multi-Temps could have shifted the steel-toe shoe requirement, which was required by the Occupational Safety and Health Act (OSHA) (29 C.F.R §1910.136(a) (West 2010)), to Ferrara, but it chose to retain that control over Ortiz. The defendants countered that the steel-toe shoe requirement had no impact on the right-to-control issue as Multi-Temps exerted no control over Ortiz while he worked at Ferrara's factory. Furthermore, the defendants contended that the steel-toe shoe requirement was intended to protect Ortiz, not others, and both the borrowing and loaning employer were obligated to comply with the OSHA rule.

¶ 14 On July 10, 2014, the circuit court granted the defendants' motion for summary judgment.[1] The plaintiff timely appealed.

¶ 15 Summary judgment is proper where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Behrens v. California Cartage Co*., 373 Ill. App. 3d 860, 861 (2007). We review *de novo* a circuit court's decision to grant a motion for summary judgment. *Behrens*, 373 Ill. App. 3d at 861.

[1] The defendants had filed a third-party contribution claim against Ferrara, but they agreed to non-suit the claim so that the plaintiff had a final order from which to appeal.

¶ 16 The Act is designed to provide financial protection to workers for accidental injuries arising out of and in the course of employment. *Chaney ex rel. Chaney v. Yetter Mfg. Co.*, 315 Ill. App. 3d 823, 826 (2000). "Accordingly, the Act imposes liability without fault upon the employer and, in return, prohibits common-law suits by employees against the employer." *Id.* Further, " 'where the negligence of a co-employee arising out of and in the course of employment results in injuries to a fellow worker, the former may plead the [Act] as a bar to a suit for damages by the injured employee." *Valentino v. Hilquist*, 337 Ill. App. 3d 461, 473 (2003). The Act's exclusive remedy provision applies when an employee is loaned from one employer to another employer, such as when a temporary employment agency sends its employee to another employer. *Behrens*, 373 Ill. App. 3d at 862-63. Thus, if Ortiz was a loaned employee of Ferrara at the time his allegedly negligent conduct injured his co-employee (the plaintiff), the plaintiff's exclusive remedy is under the Act. See *Hastings v. Jefco Equipment Co., Inc.*, 2013 IL App (1st) 121568, ¶ 5; *Valentino*, 337 Ill. App. 3d at 473. Further, Multi-Temps cannot be held liable under a vicarious liability or a *respondeat superior* theory where Ferrara, as the borrowing employer, bears the liability. See *Hansen v. Caring Professionals, Inc.*, 286 Ill. App. 3d 797, 801-02 (1997) (finding that the temporary agency could not be liable under a *respondeat superior* theory where the nurse-employee was loaned to the hospital and the hospital had the right to control the employee).

¶ 17 Our supreme court has held that two factors determine whether a loaned-employee relationship exists: "(1) whether the borrowing employer had the right to direct and control the manner in which the plaintiff performed the work; and (2) whether a contract of hire, either express or implied, existed between the employee and the borrowing employer." *Chaney*, 315 Ill. App. 3d at 827 (citing *A.J. Johnson Paving Co. v. Industrial Comm'n*, 82 Ill.2d 341, 347-48

(1980)). The primary factor, however, is the right to control. *Id.* In this case, there is no dispute as to the second factor, but as to the primary factor, the plaintiff argues that Multi-Temps retained control over Ortiz.

¶ 18 Several factors may be considered to determine whether an alleged borrowing employer has the right to control an alleged borrowed employee, including: the manner in which the performance of the employee's duties is directed; the mode of payment; the right to discharge; the terms of any written contract between the employers; the general employer's ability to substitute loaned employees to the borrowing employer; the level of skill required to perform the work; who deducts or pays for insurance, social security, and taxes for the employee; and the length of service for the borrowing employer. *Hastings*, 2013 IL App (1st) 121568, ¶ 6. Whether a loaned-employee status exists is generally a question of fact, but it constitutes a question of law if the facts are undisputed and capable of one inference. *Id.*, ¶ 7.

¶ 19 Reviewing the record evidence in the light most favorable to the plaintiff leads to only one inference; that is, Ortiz was under the control of Ferrara at the time of his allegedly negligent conduct. No witness disputed the facts that Ferrara: controlled the decision to allow Ortiz to work at its factory; controlled his work schedule; provided him with training and safety training; chose which location he would work at; decided what projects he would complete; provided him with all necessary equipment and tools; and retained the right to discharge him from its employment. There is also no dispute that Multi-Temps did not supervise Ortiz while he worked at Ferrara and that Multi-Temps could not substitute another employee for Ortiz at his Ferrara assignment.

¶ 20 While the plaintiff is correct that Multi-Temps processed Ortiz's payroll checks, handled his unemployment insurance, social security, and tax deductions, and carried liability and

workers' compensation insurance for him, it is undisputed that Ferrara supplied Multi-Temps with the number of hours Ortiz hours worked each week and reimbursed it for payroll expenses. These facts suggest that Multi-Temps was merely a conduit through which Ortiz was paid, supporting the inference that he was a loaned employee under Ferrara's control. See *Russell v. PPG Industries, Inc.*, 953 F. 2d 326, 330 (7th Cir. 1992) (similar arrangement of payment of temporary employee favored inference of a borrowed or loaned-servant finding); *compare with, Hastings*, 2013 IL App (1st) 121568, ¶ 35.

¶ 21 The plaintiff also contends that Ferrara did not have the right to discharge Ortiz from his employment with Multi-Temps. However, in the context of the loaned-servant doctrine, the borrowing employer is only required to have the power to discharge the employee from the borrowed employment. *Hastings*, 2013 IL App (1st) 121568, ¶ 9. It is undisputed in this case that Ferrara had the right to discharge Ortiz from its employment.

¶ 22 The plaintiff argues at length that a question of fact remains regarding Multi-Temps' right to control Ortiz where (1) it imposed the steel-toe shoe requirement and (2) Ferrara was required to obtain prior written approval from Multi-Temps before making a substantial change in Ortiz's job duties. Both of these contentions fail, however, as neither involves an issue of *material* fact. First, both employers were required to comply with OSHA rules and regulations, including the steel-toe shoe requirement. And, despite the fact Multi-Temps informed Ortiz of the requirement, there is no dispute that Ferrara had the control to enforce the rule as it solely supervised and directed Ortiz at the factory. As to the latter contention, no witness testified that the manner in which Ferrara allegedly changed Ortiz's assignment from baler to forklift operator violated the Staffing Agreement. Regardless, whether Ferrara violated this provision of the

Staffing Agreement does not impact the undisputed facts that Ferrara controlled Ortiz at the time of the workplace accident.

¶ 23 Finally, we find that the plaintiff's reliance on *Hastings* for his position that a question of fact exists regarding Ortiz's loaned-servant status is misplaced. The facts of *Hastings* are easily distinguishable from the facts of the case at bar. In *Hastings*, the plaintiff, who worked for Area Erectors, sued Jefco Equipment Company after its crane operator, who was operating a Jefco crane on Area Erectors' property, caused a beam to fall on her leg. *Hastings*, 2013 IL App (1st) 121568, ¶ 2. The circuit court granted summary judgment in favor of Jefco, finding that its crane operator was loaned to Area Erectors. *Hastings*, 2013 IL App (1st) 121568, ¶ 3. The appellate court reversed because there was a question of fact as to whether Area Erectors had any power to discharge the crane operator if it was unhappy with his performance. *Id.*, ¶ 12. Further, the court noted that the record evidence demonstrated a dispute as to whether Area Erectors had the power to direct the crane operator in the performance of his work (*id.*, ¶¶ 17-20) and that evidence related to the method of paying the crane operator weighed against the finding that he was loaned to Area Erectors (*id.*, ¶ 35).

¶ 24 Unlike in *Hastings*, there is no dispute that Ferrara had the power to direct and supervise Ortiz as he performed his work and had the power to discharge him if it was unhappy with his performance at any time. Also, contrary to the facts of *Hastings*, there is undisputed evidence in this case establishing that Multi-Temps was merely the conduit to process Ortiz's paychecks. Accordingly, we find *Hastings* does not support the plaintiff's position; rather, the holding and analyses employed in *Hastings* is consistent with our discussion herein.

¶ 25 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.