SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this decision, with notice of entry, upon all parties.

PRESENT:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

FILED & ENTERED
4/11 2012
WESTCHESTER COUNTY
CLERK

MIKA P. SIEKKELI,

Plaintiff,

- against -

MARK MARIANI INC. and MARK VARLEY,

Defendants,

MARK MARIANI INC.,

Third-Party Plaintiff,

- against -

FRANK CRYSTAL & CO.,

Third-Party Defendant.

SHORT FORM DECISION
Index No. 15147/09
Motion Date: 3/28/12

FILED
APR 11 2012
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant Mark Varley (Varley) moves for an order, pursuant to CPLR 3212, dismissing plaintiff's complaint and all cross-claims or alternatively seeking that this Court find that Varley was an employee of Mark Mariani, Inc. (Mariani) and is entitled to a defense and indemnification from Mariani under the doctrine of respondeat superior. Mariani also moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint and all cross-claims. Third-party defendant Frank Crystal & Co. (Crystal) moves for an order, pursuant to CPLR 3212, granting it summary judgment and severing and dismissing the third-party complaint.

The following papers were read:

Notice of Motion-Affirmation-Exhibit A-G-Certification-Affidavit of Service	1-11
Notice of Motion-Affirmation-Exhibits A-F-Affidavit of Service	12-20
Memorandum of Law-Affidavit of Service	21-22
Notice of Motion-Affidavit-Exhibits A-U-Affidavit of Service	23-46
Memorandum of Law-Affidavit of Service	47-48
Affirmation in Opposition-Affidavit of Service	49-50
Affirmation in Opposition-Affidavit of Service-Exhibits A-H	51-60
Memorandum of Law-Affidavit of Service	61-62
Reply Affidavit-Affidavit of Service	63-64
Reply Affirmation-Certification-Affidavit of Service	65-67

By way of background, plaintiff brings this action seeking damages for injuries allegedly sustained a s a result of a 550+ lb. door falling on him, crushing his ankle and foot.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974). The movant must set forth a prima facie showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movant sets forth a prima facie case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York*. 49 NY2d 557 [1980]).

Varley's Motion for Summary Judgment

Varley argues that both he and plaintiff were employees of Mariani and thus summary judgment is appropriate as Worker's Compensation would be plaintiff's exclusive remedy. The determination of whether an employer-employee relationship exists turns on whether the alleged employer exercises control over the results produced, or the means used to achieve the results, control over the means is the more important consideration (*see Rivera v. Fenix Car Serv. Corp.*, 81 AD3d 622 [2nd Dept 2011]; *Chuchuca v. Chuchuca*, 67 AD3d 948 [2nd Dept 2009]; *Kuchinski v. Charge & Ride, Inc.*, 21 AD3d 1062 [2nd Dept 2005]; *Abouzeid v. Grgas*, 295 AD2d 376 [2nd Dept 2002]). Factors relevant to assessing control include whether the worker worked at his or her own convenience, was free to engage in other employment, received fringe benefits, was on the employer's payroll, and was on a fixed schedule (*see Bynog v. Cipriani Group*, 1 NY3d 193 [2003]; *Fenster v. Ellis*, 71 AD3d 1079 [2nd Dept 2010]; *Araneo v. Town Bd.*

for Town of Clarkstown, 55 AD3d 516 [2nd Dept 2008]). Here, the deposition testimony of defendant Mark Varley, plaintiff Mika P. Siekkeli and the affidavit of Varley establishes that both Varley and Siekkeli worked for the convenience of Mariani, as specific tasks and deadlines were created by Mariani, Varley did not engage in other employment while working for Mariani and both were on a fixed schedule. However, the deposition testimony of the parties also raises questions of fact as to their respective status as employees or independent contractors. Both individuals filed IRS 1099 forms rather than W-2 wage statements, neither recieved fringe benefits in the way of paid vacation time, sick leave or health benefits and both were required to carry a certificate of liability inusrance in order to receive payment from Mariani. Accordingly, based upon the deposition testimonies of the parties and affidavit of Varley submitted in support of his motion, triable issues of fact exist as to both Varley and plaintiff's status as independent contractors or employees of Mariani (*see Carrion v. Orbit Messenger, Inc.*, 82 NY2d 742 [1993]; *Rivera v. Fenix Car Serv. Corp.*, 81 Ad3d 622 [2nd Dept 2011). Based upon the foregoing, Varley's motion for summary judgment is denied.

Mariani Motion for Summary Judgment

Mariani alleges that summary judgment is appropriate on two grounds: (1) plaintiff as an employee would be barred from recovery against Mariani under the exclusivity provisions of New York's Workers' Compensation statutes; or (2) if plaintiff was considered an independent contractor summary judgment would be appropriate as Mariani had no direct involvement in the accident, nor did it direct, supervise or control the means and methods of work that allegedly caused the accident. As stated above issues of fact remain as to plaintiff and Varley's status as employees or independent contractors. However, if considered an employee, workers compensation benefits are the exclusive remedy of an employee against an employer or fellow employee for any damages sustained from injury or death arising out of and in the course of employment (*see* Workers' Compensation Law §11;Workers' Compensation Law §29 [6]; *Maropakis v. Still Materials Corp.*, 38 AD3d 623 [2nd Dept 2007]). To the extent that plaintiff and Varley could be considered independent contractors, Mariani alleges it bears no responsibility as it is clear that no Mariani employee supervised directed or controlled the construction or moving of the door unit which fell and allegedly resulted in injuries. The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts (*see Kleeman v Rheingold*, 81 NY2d 270 [1993]). This rule is based on the premise that one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor (*see Zedda v. Albert*, 233 AD2d 497 [2nd Dept 1996]). However, to the extent that Varley could be found to employee of Mariani and plaintiff deemed an independent

contractor this Court cannot grant summary judgment to Mariani based upon the doctrine of respondeat superior. The doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting within the scope of employment *(see State Farm Ins. Co. v. Central Parking Sys., Inc.*, 18 AD3d 859 [2nd Dept 2005]). Here as there has been no finding that Varley is not an employee of Mariani and if found to be an employee his alleged negligent actions in the transport of the door and operation of the forklift could expose his employer, Mariani, to liability (*id.*). Accordingly, Mariani's motion for summary judgment is also denied, as Mariani fails to establish its prima facie entitlement to judgment as a matter of law.

Crystal's Motion for Summary Judgment

Crystal alleges that it obtained exactly the coverage that Mariani requested. Crystal was named Mariani's broker on July 5, 2005, at that time Mariani was insured by Mutual Marine Insurance Company. After evaluating the marketplace, Crystal recommended that Mariani renew its policy with Mutual Marine, which included the coverage limitations-subcontracted work endorsement. This endorsement states that Mariani would only have coverage for damages resulting from the work of a subcontractor if Mariani: (a) entered into a valid and enforceable contract with the subcontractor, including a contractual indemnity provision; or (b) required the subcontractor to carry at least One Million Dollars ($1,000,000.00) in general liability insurance and named Mariani as additional insured on the policy. An insurance agent has a common-law duty to obtain requested coverage, but generally not a continuing duty to advise, guide or direct a client based on a special relationship of trust and confidence *(see Murphy v. Kuhn*, 90 NY2d 266 [1997]). Here, Crystal obtained the exact coverage Mariani requested, Mariani signed all of the contractors/developers supplemental applications indicating that subcontractors were used (Crystal Exhibit "O"), Mariani indicated that it understood the application for insurance and all answers were correct, however, Mariani failed to enter into contracts with either Varley or plaintiff and failed to have plaintiff and Varley name Mariani as an additional insured on their respective commercial general policies. Moreover, to the extent that Mariani alleges that plaintiff is an employee, the third-party action must fail as the employee exclusion provision of the subject policy excludes coverage for bodily injury of an employee arising out of and in the course of employment by the insured (*see Essex Ins. Co. v. Michael Cunningham Carpentry*, 74 AD3d 733 [2nd Dept 2010]).

Since movant has made a prima facie showing of entitlement to judgment as a matter of law (*see Zuckerman v. City of New York.* 49 NY2d 557 [1980]), third-party plaintiff must show that genuine triable issues of material fact exist in order to defeat the motion (*id.*).

In opposition, Mariani alleges that Crystal failed to advise Mariani that individuals who were members of Mariani's "full-time labor force," such as plaintiff and Varley, were not covered by the commercial general liability insurance policy recommended by Crystal to Mariani in the event these individuals were injured unless they had a written contractual agreement containing a hold harmless provision. Initially, this Court notes that it is unclear what Mariani means by using the term "full-time labor force." If these individuals were employees as discussed above the policy exclusion would specifically prohibit recovery in this third-party action. To the extent that Crystal allegedly failed to advise Mariani of the coverage limitations for subcontractors, where, as here, Mariani had received the subject policy years prior to the incident for which coverage was sought and had renewed the policy as originally written, Mariani is presumed to have read and assented to its terms (*see Portnoy v. Allstate Indem. Co.*, 82 AD3d 1196 [2nd Dept 2011]). Moreover, Mariani repeatedly signed applications confirming that it obtained written contracts from all subcontractors that included both the contractual indemnity and additional insured provisions. Accordingly, Mariani's opposition papers fail to raise a triable issue of fact.

Based upon the foregoing, Varley and Mariani's motions for summary judgment are denied. Crystal's motion for summary judgment is granted and the third-party action is severed and dismissed A copy of this decision and order is forwarded to the Settlement Conference Part.

Dated: April 11, 2012
White Plains, New York

Hon. Orazio R. Bellantoni

HON. ORAZIO R. BELLANTONI
Justice of the Supreme Court

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