SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0334-15T3

GARY ANDRESS and MARGARET ANDRESS, his wife,

Plaintiffs-Appellants,

v.

CHRISTOPHER BUCKMAN and REPP, LLC,

Defendants,

and

HANOVER INSURANCE CO., and FARM FAMILY CASUALTY INSURANCE CO.,

Defendants-Respondents.

Submitted January 18, 2017 – Decided February 28, 2017

Before Judges Fisher and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-2000-13.

Begelman, Orlow & Melletz, attorneys for appellant (Jordan R. Irwin, on the briefs).

Terkowitz & Hermesmann, attorneys for respondent Hanover Insurance Company (Jon Robinson, on the brief).

Kent & McBride, attorneys for respondent Farm Family Casualty Insurance Company join in the brief of respondent Hanover Insurance Company.

PER CURIAM

The issue in this appeal is whether plaintiff's personal injury complaint, based on the negligence of a fellow employee, is barred by the Workers' Compensation Act (the Act), N.J.S.A. 34:15-1 to -128.5. The answer turns on whether the fellow employee was already in the course of employment when the accident occurred. N.J.S.A. 34:15-8; McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 491 (App. Div. 2011). If he was, then the claim is barred.

In responding further to that inquiry, we look to N.J.S.A. 34:15-36, which states that "[e]mployment shall be deemed to commence when an employee arrives at the employer's place of business to report to work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer." In further refining these terms, the Supreme Court has held that the reach of the Act is governed by the situs of the accident and the employer's control of the situs. Hersh v. Cnty. of Morris, 217 N.J. 236, 244 (2014); Kristiansen v. Morgan, 153 N.J. 298, 316-17 (1998); Livingstone v. Abraham & Straus, Inc., 111 N.J. 89, 96 (1988). Control, in this sense, "is satisfied if the employer has the right of control" even if that right is not "actually exercised," Brower v. ICT

Group, 164 N.J. 367, 373 (2000), but the Act also applies if the injury occurs in a "non-employer-owned location[]" so long as "the employer exercises control over" that area. Hersh, supra, 217 N.J. at 245.

Plaintiff Gary Andress was injured when, on September 8, 2011, he was seated in the rear of his employer's pick-up truck; a co-worker was at the wheel. The pick-up truck was parked on a private driveway in the rear of commercial property owned by REPP, LLC; plaintiff's employer, Panther Technologies, subleased space in the building from a business that leased the space from REPP. Another business also leased space from REPP. Defendant Christopher Buckman, a co-worker, drove his personally-owned vehicle to work and, on arriving, struck the Panther truck in which Andress was a passenger, causing his injuries.

Andress petitioned for workers' compensation benefits, which apparently were awarded. He and his wife also commenced this action against Buckman and, later, REPP, seeking personal injury damages. Because Buckman was uninsured, Andress asserted uninsured motorist claims against his own auto insurer, Farm Family Casualty, which was later joined as a defendant, and Panther's insurer, Hanover Insurance Company, which intervened. By way of subsequent motions, the trial judge granted summary judgment dismissing this suit as to all defendants.

In appealing, Andress argues he and his wife are entitled to pursue their claims for damages against Farm Family and Hanover, and that the trial judge's determination that he was relegated to his workers' compensation remedies — based on a determination that there was no genuine dispute that the accident occurred on premises controlled by the employer — was erroneous.[1] In applying our familiar standard of review in such matters,[2] we conclude the question of control over the premises where the accident occurred was factually disputed or uncertain and could not be resolved by way of summary judgment.

The issue of control over the situs of an accident has troubled our courts since 1979, when the Legislature dispensed with the so-called "going and coming" rule. In its first case following the 1979 amendment, the Supreme Court wrestled with a

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[1] Among other things, Andress contends that the grant of summary judgment unconstitutionally deprived him of his right "to seek justice in a civil court of law." His argument was unfettered by legal citations and is of insufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E). It has been well-established, for example, that the power to grant summary judgment when appropriate does not constitute a deprivation of the constitutional right to trial by jury. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 537 (1995); Nat'l Sur. Corp. v. Clement, 133 N.J.L. 22, 26 (E. & A. 1945).

[2] In reviewing a summary judgment, we apply the same standard — set forth in Rule 4:46, Brill, supra, 142 N.J. at 540, and other cases — that governed the trial court. See Townsend v. Pierre, 221 N.J. 36, 59 (2015).

circumstance where the employee of a tenant in a mall containing many other tenants parked in a far off area of a parking lot that was not leased, maintained, or exclusively controlled by the employer. The divided Supreme Court affirmed the decision of a divided panel of this court in recognizing that an employer may control an area of the premises even if it has no legal right to do so. Livingstone, supra, 111 N.J. at 104-06. Other cases present similar gray areas. In Brower, after punching out on a time clock, the plaintiff was injured on stairs — one of three ways in which the plaintiff could reach the employer's premises — located within a two-story multi-tenant building; the staircase, although maintained by the landlord, was exclusively used by the employer and its employees — facts that generated the Court's holding that the injuries resulting from the plaintiff's fall on the staircase were covered by the Act. Id. at 373-74; see also Ehrlich v. Strawbridge & Clothier, 260 N.J. Super. 89, 90-92 (App. Div. 1992). This case presents some similarities to and some differences from those situations.

Here, the accident occurred on a driveway leading to the employer's leased premises. It was the only way to enter or exit

the employer's premises by vehicle.[3] But it was also the only way to enter or exit the other tenant's place of business. In addition, the lease terms declared that this common area "shall at all times be subject to the exclusive control and management of the [l]andlord." Accordingly, the area was neither exclusively used by the employer or legally within its control. That, however, is not the sole question, since an employer may control a situs of an accident if it actually exercises control even in the absence of a legal right to do so. Hersh, supra, 217 N.J. at 245.

In discovery, the landlord asserted that it, and not the employer or the other tenant, performed general maintenance, snow removal, landscaping, and the pruning of trees and other growth, in the common areas since October 2004. Other discovery suggested the landlord repaired potholes in the driveway and parking surface. There were, however, some discovery responses that revealed Andress's employer filled potholes in the driveway or the precise area where the accident occurred, but that information is far from clear and is also disputed.

In short, the summary judgment submissions revealed a genuine factual dispute about whether Andress's employer exercised actual

[3] Although there is another means of access from the public roadway, at the request of area homeowners the landlord obstructed this alternative route with a chain or gate.

control over the situs. Consequently, if, on remand, it can be proven that the employer maintained exclusive control over the area, either in law or fact, then Farm Family and Hanover would be entitled to dismissal. If, however, the factfinder determines otherwise, then the Act would not cover this accident and Andress and his wife would be entitled to further pursue their claim for damages.

Reversed and remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.