SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2542-15T2

VINCENT INNARELLA,

Plaintiff-Appellant,

v.

WEDGEWOOD CONDOMINIUM ASSOCIATION, INC., WEDGEWOOD GARDEN CONDO ASSOCIATION, INC., PROGRESSIVE BUILDING MANAGEMENT COMPANY, INC., GARDEN HOMES, INC., THE PROGRESSIVE COMPANIES, and LAKEVIEW GARDENS,

Defendants-Respondents.

Submitted April 3, 2017 – Decided June 14, 2017

Before Judges Haas and Currier.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2201-13.

Gill & Chamas LLC, attorneys for appellant (Paul K. Caliendo, of counsel and on the briefs).

Hannum Feretic Prendergast & Merlino LLC, attorneys for respondents (Michael J. White, on the brief).

PER CURIAM

Plaintiff Vincent Innarella appeals from the November 6, 2015 grant of summary judgment to defendants, Wedgewood Condominium Association, Inc., Wedgewood Garden Condo Association, Inc., Progressive Building Management Company, Inc., and The Progressive Companies (defendants). After reviewing the record in light of the contentions advanced on appeal and the applicable principles of law, we affirm.

This case arises out of a personal injury action in which plaintiff alleges that he tripped and fell on a broken step while walking down an exterior staircase at the Wedgewood Gardens (Wedgewood) condominium complex.

At the time of the accident, plaintiff was employed as a superintendent for the Wedgewood Gardens Condominium Association, Inc. (Association), which owned the Wedgewood property. Pursuant to a written superintendent agreement plaintiff had signed in 2007, he was considered an employee of the Association. The agreement provided that "[a]ll assignments of work related duties will be through [the property management company]," and that plaintiff could not "delegate, subcontract or transfer any part of [his] job . . . without the authorization of the Property Manager."

In 2010, Progressive Building Management Company, Inc. (Progressive) became the property manager for Wedgewood pursuant

to a management agreement. Peter Johnson was the Progressive representative for Wedgewood. Plaintiff testified during his deposition that he received his assignments directly from Johnson. When Johnson was on the property, he would ask plaintiff to do tasks such as picking up branches and emptying the garbage. Plaintiff picked up his paycheck at the Progressive offices; the payee on the check was Wedgewood Gardens Condominium Association c/o Progressive Companies.

In September 2011, Johnson recommended to the Board of Directors of the Association (Board) that plaintiff should be terminated for his inappropriate behavior to a resident in addition to other infractions. The Board agreed and voted for plaintiff to be discharged. Johnson met with plaintiff at Progressive's offices to advise him of the Board's decision and his termination.

As a result of the injuries sustained in his fall, plaintiff filed a workers' compensation action against Wedgewood and received benefits. He subsequently instituted a civil action against defendants, seeking compensation for his injuries. After the completion of discovery, defendants filed motions for summary judgment; plaintiff filed a cross-motion for summary judgment.

Defendants argued that plaintiff held the relationship of a special employee with their entities, and therefore his third party claim was barred under the workers' compensation statute,

N.J.S.A. 34: 15-1 to -69.3. Plaintiff disagreed, contending that the facts presented did not support a special employee relationship. In an oral decision issued from the bench on November 6, 2015, the judge referred to Walrond v. County of Somerset, 382 N.J. Super. 227 (App. Div. 2006) and found that there was an implied contract between Progressive and plaintiff. He concluded that Progressive had the right to control and did control plaintiff's job duties of the inspection, repair and maintenance of the property. The court was satisfied that there was sufficient evidence presented to find that a special employment relationship existed, and summary judgment was granted to defendants. Plaintiff's motion for reconsideration was denied on January 22, 2016.

We review a trial court's grant of summary judgment de novo, Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007), using the same standard as the trial court. Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 41 (2012). We consider whether there are any material factual disputes and, if not, whether the facts viewed in the light most favorable to the non-moving party would permit a decision in that party's favor on the underlying issue. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file,

together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2. A "non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, supra, 142 N.J. at 529.

The Workers' Compensation Act provides an employee with an "exclusive remedy" against the employer for injuries "arising out of and in the course of the employment." Gore v. Hepworth, 316 N.J. Super. 234, 240 (App. Div. 1998); N.J.S.A. 34:15-1, -7, -8. In exchange for receiving workers' compensation benefits, the employee surrenders common law tort remedies against his or her employer and co-employees, except for intentional wrongs. N.J.S.A. 34:15-8.

However, in a situation where an employee of one entity is borrowed by another employer, that employee may prevail in a common law action against the borrowing employer depending on whether the employer is determined to be a "special employer." Blessing v. T. Shriver and Co., 94 N.J. Super. 426, 430 (App. Div. 1967). If the borrowing employer is determined to be a special employer, then the borrowed employee is precluded from bringing an action against the special employer. Ibid. A special employment relationship exists where "(a) [t]he employee has made a contract

of hire, express or implied, with the special employer; (b) [t]he work being done is essentially that of the special employer; and (c) [t]he special employer has the right to control the details of the work." Volb v. Gen. Elec. Capital Corp., 139 N.J. 110, 116 (1995).

Courts also utilize two additional factors in determining special employment: "whether the special employer [d] pays the lent employee's wages, and [e] has the power to hire, discharge or recall the employee." Blessing, supra, 94 N.J. Super. at 430. No one factor is dispositive; all five are weighed to evaluate a special employment relationship. Walrond, supra, 382 N.J. Super. at 236 (citations omitted). Additionally, "not all five [factors] must be satisfied in order for a special employment relationship to exist." Ibid. However, "it is believed that the most significant factor is the third: whether the special employer had the right to control the special employee." Ibid. (citing Volb, supra, 139 N.J. at 116); see also, e.g., Mahoney v. Nitroform Co., 20 N.J. 499, 506 (1956) (stating that the right to control is an "essential" element of the employment relationship); Gore, supra, 316 N.J. Super. at 241; Santos v. Std. Havens, Inc., 225 N.J. Super. 16, 22 (App. Div. 1988) (recognizing the significance of an employer's "right to exercise a higher degree of authority" over any actual discretion exercised by an employee).

On appeal, plaintiff contends that the trial judge erred in finding a special employment relationship. Specifically, plaintiff contends that he did not have an implied contract with Progressive, the work he performed at Wedgewood was not the same character as the business of Progressive, and Progressive did not have the right to control the details of his work. He also asserts, without specificity, that summary judgment was inappropriate because material issues of fact existed as to whether plaintiff was a special employee of Progressive.

In turning to a consideration of the factors expressed in Volb, we begin with a determination of whether there was an implied contract between plaintiff and Progressive. An employment contract "may be express or implied." White v. Atlantic City Press, 64 N.J. 128, 133 (1973). A contract for hire does "not require formality." Gomez v. Federal Stevedoring Co., Inc., 5 N.J. Super. 100, 103 (App. Div. 1949). While agreement to the offer of employment "must be manifested in order to be legally effective, it need not be expressed in words." Ibid. The assent can be "implied from conduct without words." Ibid. In determining whether an implied contract exists in the context of a special employment relationship, our focus is on the relationship between plaintiff and each of his potential employers. Pacenti v. Hoffman-La Roche, Inc., 245 N.J. Super. 188, 193 (App. Div. 1991).

Here, although plaintiff's employment contract stated he was an employee of Wedgewood, it further advised that all of his work assignments would be through the management company. If plaintiff was going to be away from the property for an extended period, he had to advise the management company.

After Progressive became the property manager, plaintiff received assignments from Johnson in addition to his everyday duties at the complex. Johnson was the conduit between an owner who needed something done in his unit and plaintiff. Plaintiff not only picked up his paycheck at Progressive's offices, it was there that Johnson terminated his employment. The judge's finding that there was an implied contract between plaintiff and Progressive is supported by the evidence in the record.

Plaintiff asserts that his job duties were not of the same character of the work of Progressive, and therefore, the second factor in Volb cannot be met. We find this argument to be without merit.

Under its contract with Wedgewood, Progressive was required to "manage, operate and maintain the Property in an efficient and satisfactory manner in accordance with standard management practices." In doing so, Progressive could "employ adequate personnel to exclusively perform services at the Property, including but not limited to janitorial, security and maintenance

functions." The general repairs and maintenance of the property fell under the scope of Progressive's duties as property manager. Plaintiff described his job duties as superintendent to include the inspection, maintenance and cleaning of the property as well as remedying and repairing any complaints in residents' units communicated to him by Johnson. Plaintiff was described by Johnson as the "eyes and ears" of Progressive at the property. Plaintiff's role, in performing the repairs and maintenance of the property, served to complete and satisfy a large component of Progressive's duties to the Association.

The third factor of the special employment test, described as "the most significant factor," is whether the special employer had the right to control the special employee. Walrond, supra, 382 N.J. Super. at 236. "[I]t is well-settled that '[u]nder the control test, the actual exercise of control is not as determinative as the right of control itself.'" Santos, supra, 225 N.J. Super. at 22 (citing Mahoney, supra, 20 N.J. at 506).

Johnson, along with several Board members, testified that Johnson was plaintiff's supervisor who provided his work assignments. All work requested by any homeowner was conveyed to plaintiff by Johnson; plaintiff had been instructed not to have any direct contact with the residents. In addition, plaintiff testified that when Johnson came to the property he would instruct

plaintiff to do various tasks with which he would comply. The Board members considered Johnson to be plaintiff's supervisor. One member recalled a meeting in which the Board directed plaintiff that he was to follow all instructions given to him from Johnson. We are satisfied there was sufficient evidence presented to support the trial judge's finding that Progressive had the right to and did control plaintiff.

For completeness, we briefly comment on the additional special factors that plaintiff has asserted were not met. It is true that plaintiff was not on Progressive's payroll. We, however, give little weight to this factor and have stated that "it is not necessary . . . [to determine if] a special relationship exists." Kelly v. Geriatric and Med. Serv., 287 N.J. Super. 567, 577 (App. Div. 1996). We disagree, however, with plaintiff's argument that Progressive did not have the power to hire or fire him. After multiple instances of inappropriate behavior for which plaintiff received letters of reprimand from Johnson, a recommendation was made by Johnson to the Board that plaintiff should be terminated. In a "joint decision," the Board agreed with Johnson and plaintiff was discharged.

In analyzing the special employment relationship through a consideration of a totality of the Volb factors with particular scrutiny given to the right to control, we are satisfied that the

trial judge properly weighed the relevant factors and determined that plaintiff was a special employee of Progressive. Therefore, plaintiff was barred under the workers' compensation statute from bringing a third-party claim against Progressive, and the grant of summary judgment to defendants was supported by the credible evidence presented to the trial court.

Affirmed.