NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3558-12T3

DANIEL HERNANDEZ,

Plaintiff-Appellant,

v.

PORT LOGISTICS, a corporation or business organization, JOAN LIOTARD, H. CARDEMAS, SMITH CORP., said names being fictitious a corporation or business organization, JAMES SMITH, said name being fictitious,

Defendants-Respondents.

Submitted April 8, 2014 – Decided April 30, 2014

Before Judges Messano and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-95-12.

Freeman & Bass, P.C., attorneys for appellant (Randall Bass, on the brief).

Law Offices of Joseph Carolan, attorneys for respondents (Roseanne Primerano and George H. Sly, Jr., on the brief).

PER CURIAM

Plaintiff Daniel Hernandez appeals from an order granting summary judgment to defendant Port Logistics and dismissing plaintiff's complaint because it was barred by the exclusivity

provisions of the Workers' Compensation Act, N.J.S.A. 34:15-1 to -142 (the WCA). The motion judge concluded that plaintiff was a "special employee" of defendant, and therefore his tort action against defendant was barred by N.J.S.A. 34:15-8, which provides that the employer is not liable to his worker "for any act or omission" during his employment "except for intentional wrong."

On appeal, plaintiff argues there was a genuine factual dispute as to whether he was defendant's "special employee." Alternatively, plaintiff contends that even if he was a "special employee" of defendant, his cause of action falls within the "intentional wrong" exception in N.J.S.A. 34:15-8. Plaintiff also argues that, if an employment contract existed between himself and defendant, defendant breached the implied covenant of good faith and fair dealing. We have considered these arguments in light of the record and applicable legal standards. We affirm.

In reviewing a grant of summary judgment, we apply the same standard as the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). We first determine whether the moving party has demonstrated there were no genuine disputes as to material facts. Atl. Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 230 (App. Div.), certif. denied, 189 N.J. 104 (2006).

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
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> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

We then decide "whether the motion judge's application of the law was correct." Atl. Mut. Ins. Co., supra, 387 N.J. Super. at 231 (citation omitted). In doing so, we owe no deference to the motion judge's conclusions on issues of law, and review those de novo. Ibid. (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

The motion record reveals that on August 23, 2011, plaintiff suffered injury to his left eye while "engaged in the course of his work or employment" at a large freight warehouse and distribution center operated by defendant. He was "placing a box onto a load of pallets when . . . wood . . . splinter[ed]," striking him in the eye, "causing a total loss of vision of [his] left eye . . . ." Ibid. Plaintiff further stated that he was employed by Staff Management Group (Staff), and that he had made a claim for workers' compensation benefits against Staff that was presently pending.

Plaintiff retained engineer Theodore Moss, P.E., who inspected the warehouse and furnished a report. Moss noted that none of the workers who performed plaintiff's tasks were equipped with safety equipment, such as goggles. Plaintiff claimed in his deposition that he had previously asked his managers for gloves and goggles "several times," but they refused to provide them.

Staff had entered into a "Service Agreement" with Distribution Solutions, Inc. In its interrogatory answers, defendant stated it was a corporation, DSJ Acquisition, Inc. (DSJ), doing business as Port Logistics Group, Inc. In support of its motion for summary judgment, defendant provided a form issued by the National Council on Compensation Insurance, Inc., that reflected DSJ had merged with Distribution Solutions, at least as of July 18, 2008. The Service Agreement was executed by the Distribution Solutions' Vice President of Finance and Staff's Regional Vice President. The record also includes an August 29, 2011 invoice from Staff to defendant, indicating that plaintiff was a general warehouse worker supplied to defendant. Defendant's answer to plaintiff's complaint asserted an affirmative defense that the claim was barred by the WCA.

Defendant's summary judgment motion was supported by a statement of undisputed material facts. <u>See</u> <u>R.</u> 4:46-2. That

incorporated provisions of the Service Agreement that indicated Staff's "employees . . . work[ed] under the supervision and control of [defendant] in the specific job position and at the specific worksite as stated above," which was defendant's warehouse. The agreement further provided that defendant was responsible for "workplace safety, security and work performance" of Staff's employees.

In his deposition, plaintiff acknowledged that he was "doing . . . work for Port Logistics loading and unloading the trucks[.]" He further acknowledged that he worked under the direct supervision of defendant's managers, who provided him with daily assignments and directed him to work at specific loading docks. Defendant controlled plaintiff's break times and lunch hours and his overall working hours. Plaintiff stated that the managers could send him home early if there was not enough work to be done. It was further plaintiff's claim that he asked these supervisors for gloves and goggles.

In opposition to the motion, plaintiff disputed that he was an employee of defendant. He cited other provisions of the Service Agreement that provided he and others were "employees of Staff," and that Staff was "solely responsible for payroll, payroll taxes and worker's [sic] compensation . . . ."

The motion judge concluded that plaintiff was a "special employee" of defendant, and that his tort claims were barred by the WCA. She entered the order dismissing plaintiff's complaint, and this appeal ensued.

The WCA "seeks to protect injured workers from becoming mired in costly and protracted litigation that could delay payment of their claims." Crippen v. Cent. Jersey Concrete Pipe Co., 176 N.J. 397, 411 (2003) (Verniero, J., concurring). "[T]he quid pro quo . . . [i]s that employees . . . receive assurance of relatively swift and certain compensation payments, but . . . relinquish their rights to pursue a potentially larger recovery in a common-law action." Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 174 (1985); and see Walrond v. Cnty. of Somerset, 382 N.J. Super. 227, 234 (App. Div. 2006) ("In exchange for receiving workers' compensation benefits, which are awarded without regard to fault, the employee surrenders common law tort remedies against his or her employer and co-employees, except for intentional wrongs.") (citing N.J.S.A. 34:15-8; Ramos v. Browning Ferris Indus., 103 N.J. 177, 183 (1986)).

Our jurisprudence "allows an employee, for the purpose of workers' compensation[,] to have two employers, both of whom may be liable in compensation. However, recovery against one bars

the employee from maintaining a tort action against the other for the same injury." Antheunisse v. Tiffany & Co., Inc., 229 N.J. Super. 399, 402 (1988) (citing Blessing v. T. Shriver and Co., 94 N.J. Super. 426, 429-30 (App. Div. 1967)). Whether a common law tort action is precluded depends on a determination as to whether the "borrower" of the employee is a "special employer." Blessing, supra, 94 N.J. Super. at 430. The special employer/employee relationship is determined by consideration of the following factors: whether 1) the employee had made a contract of hire, express or implied, with the employer; 2) the employee is essentially doing the work of the employer; 3) the employer has "the right to control the details of the work"; 4) the employer pays the borrowed employee's salary; and 5) the employer has the power to hire, fire, or recall the employee. Walrond, supra, 382 N.J. Super. 235-36 (citations omitted). In weighing these factors, no single factor is "necessarily dispositive," and it is not necessary that all five be satisfied. Id. at 236.

Plaintiff primarily relies upon the language of the Service Agreement that explicitly said he was an employee of Staff. However, that alone does not determine whether he was a special employee of defendant.

Here, there is no dispute that plaintiff was doing defendant's work. Defendant controlled the details of plaintiff's work, including his specific assignments, lunch breaks and overall hours of work. Defendant paid plaintiff's wages through the contract it had with Staff. Lastly, defendant sent plaintiff home whenever it did not have enough work. In short, under the precedent cited, defendant was a special employer of plaintiff, despite any contract language to the contrary. As a result, plaintiff's tort claim against defendant was barred by N.J.S.A. 34:15-8.

We also reject plaintiff's claim that defendant breached the covenant of good faith and fair dealing implicit in his contract with defendant. There was no contract, expressed or implied between the parties, which is, of course, the sine qua non of a finding of a breach of an implied contractual covenant. See Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997) ("[E]very contract in New Jersey contains an implied covenant of good faith and fair dealing."). The argument lacks sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

We also reject plaintiff's contention that summary judgment was improvidently granted because he presented a prima facie case that defendant committed an "intentional wrong." N.J.S.A.

34:15-8. The motion judge determined that while plaintiff's expert identified various areas of concern in the working environment, nothing in the report "created a substantial certainty that the employee . . . would be hurt." We agree.

An employer loses the immunity of N.J.S.A. 34:15-8, if two conditions are satisfied:

> (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the [WCA] to immunize.
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> [Laidlow v. Hariton Mach. Co., 170 N.J. 602, 617 (2002).]

Assessing plaintiff's claim of an intentional wrong requires a two-step analysis:

> First, a court considers the 'conduct prong,' examining the employer's conduct in the setting of the particular case. Second, a court analyzes the 'context prong,' considering whether 'the resulting injury or disease, and the circumstances in which it is inflicted on the worker, [may] fairly be viewed as a fact of life of industrial employment,' or whether it is 'plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the [WCA].
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> [Van Dunk v. Reckson Associates Realty Corp., 210 N.J. 449, 461 (2012) (alteration

in original) (emphasis removed) (quoting Millison, supra, 101 N.J. at 178-79).]

In this case, accepting for purposes of the motion defendant's alleged refusal to supply plaintiff with goggles, plaintiff failed to satisfy the conduct prong. Defendant did not intentionally remove safety devices or deceive government inspectors about the safety of its warehouse. See e.g., Laidlow, supra, 170 N.J. at 622. Plaintiff's reliance on Mabee v. Borden, Inc., 316 N.J. Super. 218 (1998), is therefore misplaced. In Mabee, supra, the plaintiff was injured at work when her hand became caught in a labeling machine. Id. at 221. We reversed the grant of summary judgment because the plaintiff demonstrated that the employer was aware of the substantial danger posed by the labelling machine, yet it nevertheless removed two different safety measures in the interest of economy. Id. at 231-33. There simply is no evidence in this record that defendant ignored known safety concerns in the loading process, or that plaintiff was operating any machinery that had been altered in the interests of economic efficacy.

To the extent we have not specifically addressed plaintiff's other arguments, it suffices to say they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION