Hargrove v. Sleepy's, LLC

United States District Court for the District of New Jersey

October 25, 2016, Decided

CIVIL NO. 10-1138 (PGS)

Reporter
2016 U.S. Dist. LEXIS 156697 *

SAM HARGROVE, et al, PLAINTIFFS Vs. SLEEPY'S, LLC, DEFENDANT

Prior History: Hargrove v. Sleepy's *LLC, 612 Fed. Appx. 116, 2015 U.S. App. LEXIS 7832 (3d Cir. N.J., 2015)*

Core Terms

delivery, deliverers, trucks, driver, summary judgment, employees, prong, independent contractor, mattress, customers, requires, services

Counsel: [*1] For Sam Hargrove, individually and on behalf of all others similarly situated, Andre Hall, individually and on behalf of all others similarly situated, Marco Eusebio, individually and on behalf of all others similarly situated, Plaintiffs: ANTHONY L. MARCHETTI, JR., MARCHETTI LAW, P.C., Cherry Hill, NJ USA.

For Sleepy's Llc, Defendant, Cross Claimant, Third Party Plaintiff: KIMBERLY J. GOST, LEAD ATTORNEY, HOLLY ELIZABETH RICH, PAUL CALVIN LANTIS, LITTLER MENDELSON P.C., Philadelphia, PA USA; THEO E.M. GOULD, LITTLER MENDELSON PC, New York, NY USA.

Judges: BEFORE: THE HONORABLE PETER G. SHERIDAN, UNITED STATES DISTRICT COURT JUDGE.

Opinion by: PETER G. SHERIDAN

Opinion

COURT'S OPINION OF CROSS-MOTIONS FOR SUMMARY JUDGMENT/DEFENDANT'S MOTION TO STRIKE VITERI DECLARATION

THE COURT: This matter comes before the Court on three motions; two motions for summary judgment, and a motion to strike the declaration of Tito Viteri filed by the plaintiffs. The Court has reviewed the facts of this case several times, but specifically, plaintiffs allege that they were not paid for overtime work under the New Jersey Wage and Hour Law, and that the plaintiffs were employees rather than independent contractors. The resolution of the [*2] cross-motions for summary judgment is a determination of whether the plaintiffs are independent contractors or employees.

In a prior motion several years ago, this Court erroneously applied the right-to-control test as set forth by the Supreme Court in *Nationwide v. Darden*, and determined that the plaintiffs were independent contractors and not employees. The matter went to the Third Circuit; the Third Circuit indicated that the Supreme Court of New Jersey should resolve the standard for determining whether a person is an independent contractor or an employee. As a result, the Third Circuit petitioned the Supreme Court of New Jersey for certification on that question. The Supreme Court and the Third Circuit indicated that this Court should utilize the "ABC test" to determine if the plaintiffs are independent contractors or employees.

Factually, Sleepy's is a New York based mattress and bedding company, has six distribution centers, including one in Robbinsville, New Jersey. Sleepy's frequently contracts with individuals and delivery companies (hereinafter referred to as deliverers or delivery drivers) to deliver mattresses, beds, and other products to customers. Consequently, such deliverers [*3] enter into an Independent Driver Agreement (IDA) with Sleepy's, and these driver agreements state that the deliverers are independent contractors and "not employees of Sleepy's." According to plaintiffs, Sleepy's classified all of its delivery drivers as independent contractors to "save money." Plaintiffs entered into driver agreements with Sleepy's on behalf of businesses they owned or controlled, and/or on behalf of themselves. Hargrove

formed I Stealth and entered into an IDA with Sleepy's in 2008; Hall entered into an IDA with Sleepy's in 2005; Eusebio created Eusebio Trucking in September 2003, and Eusebio entered into two separate IDAs with Sleepy's, one in 2003, one in 2005. Mr. Eusebio also partially owned Curva Trucking, which entered into an IDA with Sleepy's in 2008.

Plaintiffs allege that they work full-time making deliveries for Sleepy's. Plaintiffs could not perform deliveries for other companies while performing deliveries for Sleepy's. Plaintiffs never received any income from any other source. Plaintiffs were free to use their vehicles and personnel to perform deliveries for other companies who are not performing deliveries for Sleepy's. According to the IDAs, plaintiffs [*4] agree that "while performing deliveries for Sleepy's, they would not carry merchandise or any other business until they furnished the delivery manifest given to them by Sleepy's at the end of the day." The delivery invoices indicated that plaintiffs were "independent truckers", and one of the terms and conditions of the customer invoices stated that the "deliverers and deliverers' personnel agree that they were not employees of Sleepy's and are not entitled to and hereby waive any claim to any benefit provided by Sleepy's."

Delivery services appear to be an integral part of Sleepy's business. One of Sleepy's goals is to ensure that Sleepy's customers receive the same type of delivery services. The delivery function of Sleepy's starts with a sale, at which time the Sleepy's customer selects a delivery time and is charged for the delivery. Sleepy's then decides what truck will deliver the mattress. Thereafter, the Sleepy's employee devises a route with delivery time windows and assigns those routes to delivery drivers through the use of a software program. About 90 percent of Sleepy's sales are deliveries. After each delivery, plaintiffs are required to enter the delivery into a Sleepy's [*5] system called an Agentek scanner, which in turn enters a delivery into Sleepy's database. In addition to the Agentek scanner, Sleepy's provides plaintiffs with packing tape, mattress bags, credit card swiper and other paperwork required by Sleepy's. Plaintiffs are also required by Sleepy's to maintain hand tools to accommodate proper delivery. All of the plaintiffs report to Sleepy's warehouse in Robbinsville, New Jersey. At that location they're provided with daily delivery manifests, their trucks are loaded with Sleepy's merchandise, and they also make returns to the Robbinsville facility after completing their deliveries. The plaintiffs spend about two to three hours at the beginning of each day at the Robbinsville warehouse, and they're required to return to the warehouse at the end of the day to make returns of merchandise and pick up delivery and to deposit money orders.

Sleepy's requires all deliverers, that one driver and one helper work on each truck, and both persons must spend their workday together on the road. Plaintiffs are not required to punch a time clock. Plaintiffs are required to obtain worker comp insurance and motor vehicle insurance. Plaintiffs require Sleepy's [*6] to be an additional insured on the motor vehicle and on their worker compensation insurance. Sleepy's requires the employees to maintain a $5,000 employee dishonesty bond. Sleepy's requires plaintiffs to display the Sleepy's logo on their trucks. And Sleepy's prohibits the deliverers to display any other advertising on their trucks without Sleepy's consent. Sleepy's does not schedule meal periods or break times, nor does Sleepy's monitor the hours worked by the delivery trucks. Sleepy's also does not schedule vacation time. Sleepy's does not advise plaintiffs of directions or traffic patterns to use during their workday. Sleepy's requires the deliverers to wear a Sleepy's uniform, which says Delivery Professional on it, and they have Sleepy's ID badges. Sleepy's trains the delivery drivers on how they should act with customers. Sleepy's provides a training manual. Sleepy's performs field audits and inspects the trucks for compliance with Sleepy's policies. If one of the deliverers fails to follow Sleepy's rules, they're subject to discipline, including a loss of pay. Sleepy's advises the deliverers the time at which they should appear at work, and if a driver is late Sleepy's could [*7] reassign the work to another driver. In the IDA between Sleepy's and the deliverer, they may be terminated without cause and without notice. Sleepy's requires deliverers and their helpers to undergo background checks prior to working for Sleepy's.

Summary judgment is appropriate under *Rule 56(c)* when a moving party demonstrates there is no genuine issue of material fact, and that the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex v. Catrett, 477 U.S. 317 at 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. A factual dispute is genuine if a reasonable jury can return a verdict for the non-movant, and it is material if, under the substantive law, it would affect the outcome of the suit. *Anderson v. Liberty Lobby, 477 U.S. 242 at 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202*. Generally, on a motion for summary judgment the district court does not make credibility determinations or engage in any weighing of the evidence, instead the non-moving party's evidence is to

be believed and all justifiable inferences are to be drawn in the non-moving party's favor. *Marino v. Industrial Crating, 358 F.3rd 241, at 246-47*.

Moreover, the only disputes of fact that might affect the outcome of the lawsuit under governing law will preclude entry of summary judgment. *Anderson, 477 U.S. 247, 248*. If the court determines, after drawing all inferences in favor of the non-moving party and making all credibility [*8] determinations in his favor, that no reasonable jury could find for him, summary judgment is appropriate. *Alevras v. Tacopina, 226 Fed. App'x 222, at 227 (3d. Cir. 2007)*.

The ABC test. This Court must apply the decision of the New Jersey Supreme Court in Hargrove v. Sleepy's. The appropriate test is the ABC test. The ABC test is derived from the New Jersey Unemployment Compensation Act, and governs whether a plaintiff is an employee or independent contractor for purposes of resolving wage payments or wage and hour claims. The test is as follows. The ABC test presumes an individual is an employee, unless the employer can make certain showings regarding the individual employed, including: (A) such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; (B) such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; (C) such individual is customarily engaged in an independently established trade, occupation, profession or business. *N.J.S.A. 43:21-19(i)(6)*. See, Hargrove v. Sleepy's, *612 Fed. App'x at 118*. Moreover, the inability to meet any [*9] one of these three criteria results in a finding that the individual is an employee. Hargrove v. Sleepy's, *612 Fed. App'x at 117*.

Now, looking at prong (A), in order to satisfy prong (A) the employer must show that it neither exercised control over the worker, nor had the ability to exercise control in terms of completion of work. Hargrove v. Sleepy's, *220 N.J. 289, 305, 106 A.3d 449 (2015)*. The Court finds that Sleepy's exercised control over the deliverers' work. Sleepy's required the deliverers to sign IDAs. The IDA required that the deliverers could not perform any other business while on duty with Sleepy's. The IDA required plaintiffs to purchase insurance and list Sleepy's as an additional insured. The IDA required the deliverers to wear Sleepy's uniforms and to display Sleepy's logos on their truck. Moreover, Sleepy's supervised and monitored plaintiffs' work through the Agentek system, and Sleepy's also directed the time each plaintiff was to start work. Sleepy's also controlled the delivery process in that Sleepy's trained the deliverers on how to interact with customers, how the trucks needed to be loaded, and how to fill out Sleepy's paperwork. In addition, the deliverers were given specific routes to follow in making their deliveries, and Sleepy's could monitor the [*10] deliverers' movements through the Agentek system. And lastly, Sleepy's performed surprise audits to determine whether the deliverers were appropriately delivering bedding products. As such, the plaintiffs have shown that they have not been free from control or direction over the performance of their services. See, generally, Restatement of Agency, Supra, Section 220; and *Carpet Remnant v. N.J. Department of Labor, 125 N.J. 567, 582, 593 A.2d 1177 (1991)*.

Now, looking at prong (B), although the Court did not have to reach any other prong after finding that the deliverers were not free from control of Sleepy's, it will review prong (B) anyway. Part (B) of the ABC test requires that the employer show that the services provided were either outside the usual course of business, or that the service is performed outside of all places of business of the enterprise. See, *Hargrove, 106 A.3d at 459*.

Here, in this case, Sleepy's is not a trucking company, but part of its marketing scheme is quick delivery of mattresses and other mattress accessories. Although Sleepy's advertises white glove delivery services, and employs approximately 100 individuals at its Robbinsville warehouse, the Court is unpersuaded that Sleepy's is not engaged in the delivery business. It is clear Sleepy's is engaged in the mattress business, and [*11] an integral part of its business is the delivery. See, *Carpetland v. Illinois Department of Employment, 201 Ill. 2d. 351, 386 (2002), 776 N.E.2d 166, 267 Ill. Dec. 29*.

The last portion is prong (C). Prong (C) calls for an enterprise that exists and can continue to exist independently of and apart of the particular service relationship. This enterprise must be one that is stable and lasting, one that will survive the termination of the relationship. *Hargrove, 220 N.J. at 306*. Generally, the ABC test is satisfied when an individual has a profession that will plainly persist despite termination of the challenged relationship. As one court noted, when the relationship ends and the individual joins the ranks of the unemployed, this element of the test is not satisfied. See, *Chmizlak v. Levine, 20 N.J. Misc. 339, 27 A.2d 629 (1942)*. Sleepy's cannot meet prong (C)

because plaintiffs were customarily engaged in the delivery service. The plaintiffs contend they did not work for any other company; plaintiffs will rely on Sleepy's for their income. Some of the plaintiffs earned 100 percent of their income from Sleepy's. The plaintiffs also note that they could not deliver other equipment or merchandise while they're working for Sleepy's. In light of these facts, the Court finds that at the time of the end of the relationship between plaintiffs and Sleepy's, the plaintiffs would join [*12] the ranks of the unemployed, and therefore, prong (C) is not met.

Lastly, Sleepy's contends that the FAAAA preempts plaintiffs' case. The FAAAA provides that a state may not enact or endorse a law or regulation or other provision having the force and effect of law related to a price, route or service of a motor carrier with respect to transportation of property. *49 U.S.C. Section 14501(c)(1)*. The Third Circuit has indicated that: It's a well-established principle that the court should not lightly infer preemption. *Gary v. The Air Group, 397 F.3d 183, 190 (3d. Cir. 2005)*. Moreover, this principle is "particularly apt in the employment law context, which falls squarely within the traditional police powers of the states, and, as such, should not be disturbed lightly." See, *International Paper v. Ouellette, 479 U.S. 481, 491, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987)*. The Third Circuit has noted that "garden variety employment claims" in particular, are not preempted by the FAAAA. See, *Id. at 189*. Here, the Court finds that the plaintiffs' claims are in the employment law context, which fall "squarely within the traditional power of the states, and, as such, should not be disturbed lightly." While requiring that Sleepy's classify plaintiffs as employees may have some impact on Sleepy's hiring practices and costs, there is no evidence before the Court that classifying the [*13] drivers as employees would fundamentally impact the business of Sleepy's. The application of the ABC test to Sleepy's only has a tenuous effect on the carriers' prices and services. See, *Rowe, 552 U.S. at 371*. Moreover, because the Court found under prong (B) that Sleepy's is not primarily a motor carrier, the FAAAA preemption does not seem to apply to Sleepy's. See, *Schwann v. FedEx, 813 F.3d 429*; *Portillo v. National Freight, U.S. District Court, District of New Jersey, docket number 15-07908, 2016 U.S. Dist. LEXIS 132180*. For these reasons, the defendant's motions for summary judgment are denied.

For the foregoing reasons, the plaintiffs' motion for summary judgment as to their employment status as employees is granted, and defendant's motion for summary judgment is denied.