COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 11-0313

JOHN BOYD

vs.

COOPERATIVE RESERVE SUPPLY, INC.
Defendant/Third-Party Plaintiff

vs.

F.L. LARSON TRUCKING, INC. and another[1]
Third-Party Defendants

MEMORANDUM OF DECISION AND ORDER ON THIRD PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Introduction

Third party defendant, F.L. Larson Trucking, Inc. ("Larson") submits a Motion for Summary Judgment against third party plaintiff, Cooperative Reserve Supply, Inc. ("Cooperative"). Larson asserts that no genuine issues of material fact exist as to its liability for injuries suffered by the plaintiff, John Boyd ("Boyd"). After reviewing the parties' submissions and the relevant law, the court finds that genuine issues of material facts remain in dispute. As a result, the third party defendant's Motion for Summary Judgment is **DENIED**.

Background

Plaintiff, Boyd, an employee of E.G. Barker Lumber Co. ("Barker"), fell off of a flat bed truck while unloading a shipment of lumber and Styrofoam ("Shipment") from Cooperative, the defendant and third party plaintiff. As a result of the fall, the plaintiff broke both ankles. Richard Palmieri ("Palmieri"), who owns R.J. Palmieri Trucking, delivered the Shipment from

[1] Richard Palmieri d/b/a R.J. Palmieri Trucking

Cooperative to Barker. Palmieri's truck transported the delivery, but he verbally contracted with Larson, the third party defendant, for the use of a flat bed trailer, which Larson owns and upon which the Shipment was delivered. See Joint Exhibits, Ex.13, No. 18.

Cooperative asserts both direct and derivative claims that Larson directed and supervised the loading, delivery, and unloading of the Shipment, through its employees or subcontrators, that contributed to the plaintiff's injury. Both Cooperative and Larson, however, deny that Palmieri fits the description of employee for their respective companies. Larson has not been deposed, nor has it provided Cooperative with descriptions and details about any and all agreements between it and Palmieri, other than stating that Palmieri was an independent contractor who delivered the Shipment to Cooperative. Joint Exhibits, Ex. 14, No. 14.

Larson has submitted a Motion for Summary Judgment, asserting that Palmieri's status as an independent contractor for Larson, not an employee, precludes the attachment of liability for the plaintiff's injuries. Cooperative opposes the motion, arguing that such a motion is premature and that Larson has failed to provide Cooperative with necessary facts through the discovery process, which has yet to expire.

Discussion

A. Standard of Review

Summary Judgment is a "device to make possible the prompt disposition of controversies on their merits without trial, if in essence there is no real dispute as to the salient facts or if only a question of law is involved." Cassesso, 390 Mass. at 422, quoting Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). Summary Judgment is granted when there is no genuine issue of material fact and the summary judgment record entitles the moving party to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso, 390 Mass. at 422. The moving party bears the

burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles it to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989).

Cooperative seeks relief under Mass. R. Civ. P. 56(f), which states:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A request for relief under Rule 56(f) "should show good cause for the failure to have discovered the facts sooner; it should set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist; and it should indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." Alphas Co. v. Kilduff, 72 Mass. App. Ct. 104, 111 (2008), quoting Resolution Trust Corp. v. North Bridge Assocs., Inc., 22 F.3d 1198, 1203-1208 (1st Cir. 1994). These factors are not dispositive, but rather the judge is granted discretion in allowing such relief under Rule 56(f). Id. at 111.

B. Analysis

Generally, an "employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." Santella v. Whynott, 27 Mass. App. Ct. 451, 453, 538 (1989). The Commonwealth's independent contractor statute, G. L. c 149, §148B, provides a standard for determining whether an individual performing services shall be deemed an employee or an independent contractor. Rainbow Dev., LLC v. Commonwealth of Mass. Dept. of Indus. Accidents, 20 Mass. L. Rep. 277, *5-*6 (Mass. Super. 2005). Under the statute, the employer has the burden of proof to demonstrate that the worker is

an independent contractor according to a fact-sensitive, multi-prong test.[2] See id.; see also Athol Daily News v. Board of Review of Employment, 439 Mass. 171, 175 (2003).

Here, genuine issues of material fact exist as to whether Larson can be held liable for the plaintiff's injuries because Larson has not provided sufficient information about its relationship with Palmieri. Larson, in its partial answers to interrogatories, has merely drawn a legal conclusion that Palmieri is an independent contractor, as no deposition of Larson has occurred on the matter. Joint Exhibit 14, Nos. 13, 14. Cooperative should be permitted to complete discovery and obtain the required facts relating to whether Palmieri is an independent contractor or an employee for Larson.

Exploration of Larson's relationship with Palmieri is also required to determine Larson's liability under the Federal Motor Carrier Safety Regulations ("FMCSR"), which in part set forth regulations for properly securing cargo transported by commercial vehicles, including trailers. 49 C.F.R §§ 390.5; 391.13; 393.100. Larson asserts that because Cooperative's statutory and regulatory claims are based solely on derivative liability, they fall outside the provisions of the Massachusetts "Contribution Statute," G. L. c. 231B, which applies only to direct claims against joint tortfeasors. G. L. c. 231B, § 1(a). However, Cooperative has also asserted a direct negligent supervision claim against Larson.[3] And, Larson may have had a duty to supervise

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[2] General Laws c. 149, § 148B provides, in relevant part, that an individual is an employee unless that worker meets each of the following:

(1) the individual is free from control and direction with the performance of the service, both under his contract for the performance of service and in fact; and,
(2) the service performed is outside the usual course of business of the employer; and,
(3) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

[3] As stated in Cooperative's brief, simply because a party is asserting vicarious liability against a potential employer does not mean that a party can not bring a direct action against that same employer under G. L. c. 231B. See Elias v. Unisys, 410 Mass., 479 (1991) (holding that a claimant's release of an employee for liability could also release liability for the employer *if* the claim was based solely on vicarious liability) (emphasis added).

Palmieri under the FMSCR, if the proper findings are made.[4] Additionally, the FMCSR eliminates an independent contractor defense for motor carriers that lease vehicles and trailers (which Larson could be determined to be) and requires those motor carriers to ensure that their drivers comply with all regulations.[5] 49 C.F.R §§ 390.5; 390.11; 391.13. Summary judgment is inappropriate at this time because additional testimony may reveal essential facts surrounding both Larson and Palmieri's status under the FMCSR.

Moreover, genuine issues of material fact exist regarding the degree of control Larson exercised over Palmieri, even if he was an independent contractor. "One who entrusts work to an independent contractor, but who *retains the control of any part of this work,* is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Cheschi v. Boston Edison Co., 39 Mass. App. Ct. 133, 137, (1995), quoting Restatement (Second) of Torts, § 414 (emphasis added); see also Corsetti v. Stone Co., 396 Mass. 1, 9-10 (1985). Aside from any question of vicarious responsibility, an employer of an independent contractor must exercise reasonable care over a project for which it furnishes equipment. Corsetti, 396 Mass. at 9-10. Such a determination is typically a question of fact for the jury. Id. at 11.

In this case, Cooperative has presented evidence that Larson furnished equipment—the flat bed trailer—to transport the Shipment, and thus insufficient facts exist to show that Larson did not exercise control over Palmieri. Larson responds to Cooperative's assertions by citing

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[4] Cooperative argues that the FMSCR require Larson to supervise Palmieri under 49 C.F.R. § 390.3, and thus a failure to supervise "is an admission of direct, not vicarious liability."

[5] Larson argues that Palmieri could be considered his own "employer" under those regulations, thereby eliminating Larson's status as a statutory employer. See 49 C.F.R. §§ 390.5

Fox v. Pallotta, a case in which the court determined that a truck driver who transported stone was an independent contractor, therefore releasing the alleged employer from liability. 274 Mass. 110, 113 (1931). However in that case, where the driver owned and operated the truck, the court explicitly found that there was no evidence of control by the person who hired him. Here, Larson—not Palmieri—owned the trailer involved in the accident. At this point Larson has not provided further discovery on the matter and thus the court finds that it is not possible to determine the exact nature of Larson's control over Palmieri.

Given the above, Cooperative has demonstrated that it cannot, without further discovery, present facts essential to justify opposition to Larson's Motion for Summary Judgment. Emergent facts relating to the employment relationship between Palmieri and Larson, if adduced, would influence the outcome of a summary judgment decision. Alphas Co., 72 Mass. App. Ct. at 111.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that F.L. Larson Trucking. Inc.'s Motion for Summary Judgment be **DENIED**.

SO ORDERED.

Kimberly S. Budd
Justice of the Superior Court

Date: November 9, 2011