Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-401

JULY TERM, 2006

Michael Montgomery, Meagan Maria Clapp } APPEALED FROM:
and Aaron Joy Montgomery }
}
v. } Windham Superior Court
}
Cheshire Handling dba Riverside Reload Center, }
Green Mtn. Railroad Corp dba Green Mtn. } DOCKET NO. 51-2-05 Wmcv
Intermodal, VT Railway Tracking, Inc. & VT }
Railway } Trial Judge: Karen R. Carroll

In the above-entitled cause, the Clerk will enter:

Plaintiff Michael Montgomery was seriously injured at work when he was struck by a forklift operated by a co-employee. Although he received workers= compensation benefits through his employer=s insurer, plaintiff also filed a tort action against his employer, NLR d/b/a Riverside Reload. The Windsor Superior Court granted NLR=s motion for judgment on the pleadings based on the exclusivity provision of the Workers= Compensation Act.[1] Plaintiff and his dependents (hereafter Aplaintiff@) then filed this tort action in Windham Superior Court against several additional corporate entities who: own the premises where NLR does business; share similar corporate officers; and engage in business-related functions loading, unloading, and transporting freight. The

trial court granted defendants= motion for summary judgment on two grounds. First, the court concluded that the general scope of defendants= duty as the owners of the premises did not extend to the negligent acts alleged by plaintiff relating to the supervision and training of forklift operators and the control of forklift operations. Second, to the extent that defendants= business did extend to the acts alleged, they became the Avirtual@ proprietors or operators of the business under the Act, 21 V.S.A. ' 601(3), and therefore were immune from suit as a statutory employers.[2]

On appeal, plaintiff contends the court erroneously: (1) found that defendants are the same corporate entity; (2) concluded that defendants were a Avirtual@ employer under the Act; (3) concluded that defendants owed no duty to plaintiff; (4) failed to consider the Asubstantial certainty@ exception to the exclusivity provision of the Act; and (5) declined to hold a hearing. We affirm.

In his complaint, plaintiff alleged that defendantsCwho were all engaged in the business of loading, reloading, and transporting freightCjointly or severally owned or leased the premises and were negligent in allowing the forklift to be driven in the wrong travel lane and direction and in failing to properly train and supervise the forklift operator. Defendants moved for summary judgment, alleging that they were immune from suit as plaintiff=s statutory employer under the exclusive remedy provision of the Act. Defendants advanced two theories in this regard. First, they claimed that they had the same corporate identity as plaintiff=s employer NLR; second, they argued that they were all engaged in the same business as NLR and therefore were Avirtually the proprietor or operator of the business@ within the statutory definition of employer. 21 V.S.A. ' 601(3). The trial court rejected the first theory, concluding that material facts remained in dispute as to defendants= corporate identity, but accepted the second, concluding that, if defendants controlled the forklift operations as alleged, they were plaintiff=s virtual employers under the statute. The court further noted that, even if defendants did not control the operation, their duty as the owner of the premises was merely to provide a safe workplace and did not extend to the negligent acts alleged by plaintiff. This appeal followed.

Plaintiff first contends the court erroneously found that defendants and NLR were the same corporate entity. As noted, however, the court did not so find; rather, it concluded that the material facts remained in

dispute as to this issue. Accordingly, the claim lacks merit.

Next plaintiff contends the court erred in concluding that defendants were his Avirtual@ employers within the statutory definition of employer, 21 V.S.A. ' 601(3), and therefore immune from suit under the exclusivity provision of the Act. We have explained that the general test for applying this definition of employer is whether the work performed by the plaintiff is essentially part of the defendant=s regular course of business, even if the plaintiff is not the defendant=s direct employee. Frazier v. Preferred Operators, Inc., 2004 VT 95, & 8, 177 Vt. 571 (mem.); Vella v. Hartford Vt. Acquisitions, Inc., 2003 VT 108, & 7, 176 Vt. 151; Edson v. State, 2003 VT 32, & 7, 175 Vt. 330. Although the trial court here framed the issue in terms of whether defendants had the right to Acontrol@ the forklift operations, it was undisputed that defendants and plaintiff=s employer NLR Aare all engaged in the business of loading, unloading, and transporting freight.@[3] See Edson, 2003 VT, && 5, 9 (although trial court and plaintiff focused on defendant warehouse owner=s authority, or lack thereof, to control plaintiff=s work, we affirmed judgment for defendant on ground that defendant was plaintiff=s virtual employer based on evidence that plaintiff was injured while engaged in defendant=s business of distributing liquor).

The facts here are similar to those in Frazier, which also involved several closely held corporations with overlapping ownership. An employee of oneCa trucking businessCinjured himself while working in the lumber yard of a second corporation leased from a third. We concluded that the latter two entities were the employee=s virtual employers for workers= compensation purposes because the work in which he was injured pertained to all of the businesses. 2004 VT 95, && 10-11. Here, similarly, the undisputed factsCalthough not particularly well developedCindicate that defendants and plaintiff=s employer were all engaged in the same business. Accordingly, we discern no error in the court=s dismissal of defendants as plaintiff=s statutory employers.

Nor can we conclude that the court erred in finding that, even if considered as independent landlords, defendants owed no duty to protect plaintiff from the negligent conductCthe training and supervision of forklift operators and control of forklift operationsCthat allegedly caused the accident. As we observed in Vella, while

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the duty of landlords is to maintain their premises in a safe condition, this does not mean that they assume the duty to operate their tenants= business in a safe manner. 2003 VT 108, & 9. Nor did the court err in failing to consider the so-called Asubstantial certainty@ exception to the exclusive remedy rule. See Mead v. Western Slate, Inc., 2004 VT 11, && 13-20, 176 Vt. 274 (noting, without resolving, question whether employers who engage in conduct substantially certain to cause injury or death fall within intentional-injury exception to workers-compensation exclusivity rule). Plaintiff raised the issue only belatedly in a post-judgment motion for reconsideration, and the court properly denied the motion on the ground that plaintiff had been afforded the opportunity to present evidence and arguments with the court before deciding the motion. See Rubin v. Sterling Enters., Inc., 164 Vt. 582, 589 (1996) (holding that court did not abuse its discretion in refusing to entertain new evidence submitted in support of post-judgment motion for reconsideration where defendants had ample opportunity to elicit evidence at trial and failure to do so was not attributable to mistake or inadvertence of court). We note, as well, that although plaintiff submitted an expert=s affidavit in support of the motion stating that certain alleged safety violations made the forklift accident a substantial certainty, it did not claim, or assert facts to show, that defendants Aknew to a substantial certainty@ that the accident would occur. Mead, 2004 VT 11, & 18. Nor, finally, does plaintiff demonstrate that the court abused its discretion, or show that plaintiff was in any way prejudiced, by the court=s failure to entertain oral argument before deciding the motion. See Sandgate Sch. Dist. v. Cate, 2005 VT 88, & 12 (decision to hold hearing on motion for relief from judgment is at discretion of trial court).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

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[1] Plaintiff appealed the judgment to this Court, but the appeal was dismissed as untimely.

[2] The Act defines Aemployer@ to include Athe owner or lessee of premises or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed.@ 21 V.S.A. ' 601(3).

[3] This factual statement is contained in defendants= statement of undisputed facts in support of their motion for summary judgment, and was not affirmatively disputed by plaintiff.