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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOSE HERNANDEZ, JR., et al.,

Plaintiffs and Appellants,

v.

GRAY LIFT, INC. et al.,

Defendants and Respondents.

F061759

(Super. Ct. No. VCU232572)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Paul Anthony Vortmann, Judge.

Law Office of Mario E. Diaz, Mario E. Diaz; Law Offices of Thomas M. Celli, Thomas M. Celli; Esner, Chang & Boyer, Stuart B. Esner, and Holly N. Boyer for Plaintiff and Appellant.

Wild Carter & Tipton and Robert G. Eliason for Defendant and Respondent.

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Jose Hernandez (decedent) was killed while a passenger in a truck operated by an employee of defendant Gray Lift, Inc. At the time of the accident, decedent was a special employee of Construction Rental Services (CRS), which was a fictitious business name

of Gray Lift, Inc. Plaintiffs, as decedent's heirs at law, filed a wrongful death action against Gray Lift, Inc. and its employee-driver, Cody S. Wells (together defendants), on the theory that Gray Lift, Inc. was not decedent's employer but was a third-party tortfeasor. Defendants moved for summary judgment on the ground that CRS and Gray Lift, Inc. were *one and the same entity* and therefore (i) Gray Lift, Inc. was decedent's employer, and (ii) plaintiffs' lawsuit was barred by the exclusive remedy provisions of workers' compensation law. Plaintiffs opposed the motion, pointing out that CRS was in many respects operated separately from Gray Lift, Inc. The trial court concluded that defendants' position was correct and granted the motion for summary judgment. Plaintiffs appeal, contending that the trial court erred because defendants did not meet their initial burden as the moving parties and, in any event, plaintiffs' evidence created a triable issue of material fact. We disagree with both of plaintiffs' contentions and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

The operative complaint at the time of the motion for summary judgment was plaintiffs' first amended complaint (FAC). In the FAC, plaintiffs Jose Hernandez, Jr., Yunalesca Hernandez, and Noemi Hernandez sought damages under the wrongful death statute against defendants Gray Lift and Wells based upon the alleged negligent driving of Wells while in the scope of Wells's employment with Gray Lift, Inc., resulting in the fatal accident that caused decedent's death. On May 4, 2007, Wells was driving a 30-foot flatbed truck owned by Gray Lift, Inc. in which decedent was a passenger. Allegedly, Wells abruptly attempted a lane change and lost control of the vehicle, sending it crashing into a guardrail, a eucalyptus tree and a concrete bridge support on the right shoulder of Highway 99. Decedent's resulting traumatic injuries were fatal.

The FAC further alleged that Gray Lift, Inc. was not the employer of decedent, but rather CRS and a temporary employment agency were. Decedent was hired by CRS under an employment contract with a temporary employment agency by the name of

Select Personnel Services, Inc. (Select). According to the FAC, at the time of the accident decedent was in the course and scope of his employment with both Select and CRS. Plaintiffs were allegedly “receiving compensation benefits under Select’s workers’ compensation insurance policy for the death of Decedent occurring in the course of and arising out of the general and special employment with Select and [CRS].”

In June 2010, defendants filed a motion for summary judgment on the ground that decedent was an employee of Gray Lift, Inc and a coemployee of Wells at the time of the accident, and therefore the action against these defendants was barred by the exclusive remedy provisions of workers’ compensation law set forth at sections 3600 to 3602 of the California Labor Code, as alleged as an affirmative defense.

Defendants’ motion for summary judgment began with a basic factual description of the accident. According to defendants’ separate statement of undisputed material facts (separate statement), the death of decedent was caused when the truck in which he was a passenger was involved in a single vehicle accident on May 4, 2007. At the time of the accident, the vehicle was being driven by Wells, who was acting in the course and scope of employment with Gray Lift, Inc. At the time of the accident, decedent was an employee of Select, a temporary employment service, and had been assigned to work for CRS as an unskilled manual laborer under the supervision and direction of CRS. The above preliminary facts were not disputed. The clear import of these preliminary facts, not disputed by the parties, was that decedent was, as the FAC had alleged, a special employee of CRS at the time of the accident. (*Santa Cruz Poultry v. Superior Court* (1987) 194 Cal.App.3d 575, 578-579.)

The crux of the motion came next. Defendants’ separate statement presented a number of factual assertions to establish that CRS and Gray Lift, Inc. were the same entity. On this crucial point, defendants’ separate statement set forth the following: “7. Gray Lift, Inc. is a California corporation which, in part, has [a] dba Construction Rental Services [or CRS]. [¶] 8. [CRS] is not a business entity in any manner independent of

Gray Lift, Inc. ¶ 9. For all purposes herein, [CRS] and Gray Lift, Inc. are one and the same.”¹ (Unnecessary capitalization omitted.) The supporting evidence for these asserted facts was the declaration of John L. Waugh, Jr., who was President of Gray Lift, Inc. and had been in that position for the past 20 years. Mr. Waugh stated, based on his personal knowledge of Gray Lift, Inc. and its operations, that CRS was not a separate legal entity but merely a fictitious business name or “dba” under which Gray Lift, Inc. sometimes did business. Mr. Waugh also stated he had personal knowledge of the contract between Select and CRS by which decedent was assigned to work for CRS. He averred that CRS, as mentioned in that contract, was none other than Gray Lift, Inc., and that Gray Lift, Inc. had the right to control and supervise decedent’s work through its managers and employers. Attached to a supplemental declaration of Mr. Waugh was a copy of a “Fictitious Business Name Statement” showing CRS was a fictitious business name registered with the Fresno County Clerk by Gray Lift, Inc. In addition, defendants presented the declaration of Wells, which affirmed that decedent was working for Gray Lift, Inc. and was in fact under Wells’s direction and control on the date of the accident. On that date, just before the subject accident, Wells instructed decedent to ride in the

¹ Defendants’ separate statement further stated: “12. Gray Lift, Inc., provided all tools used by Plaintiffs’ decedent in his work for Gray Lift, Inc. doing business as [CRS]. ¶ 13. Gray Lift, Inc. by and through its managers and employees, had the sole right to supervise the work of Plaintiffs’ decedent while he was performed [sic] work for Gray Lift, Inc. doing business as [CRS]. ¶ 14. Gray Lift, Inc. by and through its managers and employees, had the sole right to specify intended results of work assigned to Plaintiff’s decedent while he was acting in the course and scope of employment with Gray Lift, Inc. doing business as [CRS]. ¶ 15. Gray Lift, Inc., by and through its managers and employees, had the sole right to control all means and methods of work by Plaintiffs’ decedent while he was acting in the course and scope of employment with Gray Lift, Inc. doing business as [CRS]. ¶ 16. At the time of the accident, [decedent] was under the supervision and control of Gray Lift, Inc. employee, [Wells]. ¶ 17. [Decedent] was directed to ride in truck as of time of accident by Gray Lift, Inc. employee, [Wells].” (Unnecessary capitalization omitted.)

passenger seat of the work truck which had been provided by Gray Lift, Inc. for their assigned duties.

Plaintiffs' opposition to the motion was filed in August 2010. Plaintiffs claimed that even though CRS was a fictitious business name or a department of Gray Lift, Inc., CRS could still be found to be the actual employer of decedent (rather than Gray Lift, Inc.) if CRS was operated separately. According to plaintiffs, if such separate operations were shown to exist, then Gray Lift, Inc. could be sued as a third-party tortfeasor for purposes of workers' compensation law. In support of this proposition, plaintiffs referred to the case of *Gigax v. Ralston Purina Co.* (1982) 136 Cal.App.3d 591 (*Gigax*).

Pursuant to this theory, plaintiffs separate statement presented evidence indicating that in many respects CRS was operated separately of Gray Lift Inc., including that it was a "separate division" or "department" or "profit center" of Gray Lift, Inc.; CRS rented, installed and then took down temporary fences; its profits and losses were separately tracked; invoices and contracts were entered in the name of CRS; Gray Lift, Inc.'s president was not familiar with certain details regarding contracts with temporary agencies; CRS had a separate logo which was used as a marketing objective to attract more customers; and Gray Lift Inc. was primarily in the business of sales, service, parts, rental of forklift equipment and personnel lifts, and dock equipment. Based on this showing, plaintiffs argued there was a triable issue of fact whether CRS was decedent's employer, not Gray Lift, Inc.

The motion was argued and taken under submission. On September 24, 2010, the trial court issued its ruling granting the motion for summary judgment, explaining: "Plaintiffs admit that [CRS] is a 'division,' 'department,' or 'profit center' of Gray Lift, Inc. Plaintiffs further admit that CRS is a dba of Gray Lift, Inc., yet they attempt to sue Gray Lift, Inc. as a separate entity. It is undisputed that Plaintiffs' decedent was sent by a temporary agency to work for CRS and was in the course and scope of his employment with his co-employee Defendant Cody Steven Wells at the time of the accident. [¶] With

these admissions there are no triable issues of fact that Gray Lift, Inc. dba [CRS] was the dual employer or ‘special employer’ of decedent. Under Labor Code sections 3600-3602, this action is barred as workmen’s compensation is Plaintiffs’ exclusive remedy. (See *Santa Cruz Poultry v. Superior Court*[, *supra*,] 194 Cal.App.3d 575.) [¶] The case cited by Plaintiffs, *Gigax*[, *supra*,] 136 Cal.App.3d 591 is distinguishable based upon the court finding that Ralston was the parent corporation, and that Van Camp was a corporation totally separate and distinct, in location, function and identity from its corporate parent. [¶] Unlike in *Gigax*, no facts have been presented here by Plaintiff to prove that CRS is a separate business entity from Gray Lift, Inc. Plaintiffs have not presented any facts to prove CRS is anything other than a ‘division,’ ‘department,’ or ‘profit center’ of Gray Lift, Inc. and/or to dispute that CRS is anything more than a dba of Gray Lift, Inc.”

A formal order and judgment was filed on October 29, 2010. Plaintiffs’ notice of appeal was timely filed.

DISCUSSION

I. Summary Judgment Motion And Standard Of Review

Summary judgment is appropriate when all of the papers submitted show there is no triable issue of any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)² “The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

A defendant may move for summary judgment if it is contended that the action has no merit. (§ 437c, subd. (a).) A defendant meets its initial burden of showing a cause of action is without merit if that party has shown that one or more elements of the cause of

² Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

action cannot be established or, as in this case, there is a complete defense to a cause of action or the complaint. (*Id.*, subd. (p)(2).) Once the defendant makes such a showing, the burden shifts to the plaintiff to produce evidence demonstrating the existence of a triable issue of material fact. (*Ibid.*; *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.)

On appeal from a summary judgment, our task is to independently determine whether an issue of material fact exists and whether the moving party is entitled to summary judgment as a matter of law. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) “We independently review the parties’ papers supporting and opposing the motion, using the same method of analysis as the trial court. Essentially, we assume the role of the trial court and apply the same rules and standards.” (*Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1373.) We apply the same three-step analysis required of the trial court. First, we identify the issues framed by the operative complaint and answer since it is these allegations to which the motion must respond. Second, we determine whether the moving party’s showing has established facts which negate the opponent’s claim and justify a judgment in the moving party’s favor. When a summary judgment motion *prima facie* justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 503; *Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal.App.4th 544, 548.)

In so doing, we view the evidence in the light most favorable to the party opposing the motion; we liberally construe the opposing party’s evidence, strictly construe the moving party’s evidence, and resolve all doubts in favor of the opposing party. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

II. Summary Judgment Was Properly Granted

Plaintiffs first argue that the trial court erred in granting the motion for summary judgment because, allegedly, defendants did not meet their initial burden of proof as the moving party. We disagree.

“A defendant making the motion for summary adjudication has the initial burden of showing that the cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. [Citation.] If the defendant fails to make this initial showing, it is unnecessary to examine the plaintiff’s opposing evidence and the motion must be denied. However, if the moving papers establish a prima facie showing that justifies a judgment in the defendant’s favor, the burden then shifts to the plaintiff to make a prima facie showing of the existence of a triable material factual issue.’ [Citation.]” (*Kerkeles v. City of San Jose* (2011) 199 Cal.App.4th 1001, 1009.) “A prima facie showing is one that is sufficient to support the position of the party in question.” (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 851.)

Here, as an affirmative defense to the FAC, defendants sought to show that plaintiffs’ claims were barred under the exclusive remedy provisions of workers’ compensation law (see Lab. Code, §§ 3600-3602), by evidence that CRS was not a separate legal entity but was merely a name used by Gray Lift, Inc. in doing business. That is, defendants sought to prove that CRS was one and the same entity as Gray Lift, Inc. and therefore Gray Lift Inc. was decedent’s employer. “[A] fictitious business name does not create a separate legal entity ... but is merely descriptive of a ... corporation who does business under some other name.... The business name is a fiction, and so too is any implication that the business is a legal entity separate from its owner.” [Citations.] (*Pinkerton's, Inc v. Superior Court* (1996) 49 Cal.App.4th 1342, 1348.)

We believe that defendants’ showing was prima facie sufficient to establish their affirmative defense that CRS was the same entity as Gray Lift Inc., and that Gray Lift

was therefore decedent's employer. Not only did defendants' present competent evidence that CRS was not a distinct legal entity but was merely a "dba" or a fictitious name under which Gray Lift Inc. did business, but plaintiffs themselves admitted that CRS was a "division," "department" or "profit center" of Gray Lift, Inc. Based on this evidence, defendants clearly met their initial burden, and thus the burden shifted to plaintiffs to show a triable issue of material fact. (§ 437c, subd. (p)(2).)

Plaintiffs next argue the trial court erred in granting summary judgment because, pursuant to their understanding of *Gigax, supra*, 136 Cal.App.3d 591, there was a triable issue of fact whether CRS, and not Gray Lift, Inc., was actually decedent's employer on the date of the accident. Plaintiffs are mistaken because they misconstrue the meaning of the *Gigax* decision, as we now explain.

In *Gigax*, the plaintiff was employed as a laborer for Van Camp Seafood Company, a corporation, (Van Camp) and was injured while operating a conveyor belt designed by the parent company, Ralston Purina Company (Ralston). Van Camp and Ralston were each distinct corporate entities. (*Gigax, supra*, 136 Cal.App.3d at p. 602, fn. 6.) When the plaintiff sued Ralston, Ralston claimed to be the plaintiff's employer for workers' compensation purposes. Ralston had purchased the assets of Van Camp and was therefore the parent corporation. Ralston argued that Van Camp was merely an "operating division" under the control of Ralston and, therefore, Ralston was in reality the plaintiff's employer for purposes of workers' compensation law. (*Gigax, supra*, at p. 594-602.) The trial court adopted Ralston's position and granted summary judgment in favor of Ralston. On appeal by the plaintiff, the Court of Appeal reversed.

The Court of Appeal defined the nature of the question before it as "a parent corporation's claim of immunity from common law tort liability for injuries to the employees of a kindred corporation." (*Gigax, supra*, 136 Cal.App.3d at p. 598.) In addressing that issue, the Court of Appeal said, "[t]he degree of separation between a parent and subsidiary entity, whether true subsidiary or simply a subdivision of a larger

integrated whole, is ... a factual matter.” (*Id.* at p. 602.) The Court of Appeal held that a triable issue existed whether “Van Camp acts and operates as a separate business entity. It is a proper factual inference from the record below that Van Camp is a corporation totally separate and distinct, in location, function and identity from its corporate parent, Ralston.” (*Id.* at p. 602.) In short, *Gigax* affirmed that a parent corporation may be treated as separate and distinct from a subsidiary corporation, and not be treated as the employer of the subsidiary’s employee, depending upon the facts and circumstances.

The *Gigax* case is clearly distinguishable. As the above synopsis demonstrates, *Gigax* involved two corporate entities and addressed the question of whether a parent and a kindred corporation (or a parent and a subsidiary corporation) could be treated as a single employer for purposes of workers’ compensation law. Here, in contrast, it is undisputed there was but one corporate entity and that CRS was only a fictitious name under which that one entity sometimes operated. As the trial court observed, plaintiff failed to present any evidence to show otherwise, or which would create a trial issue of material fact, and even conceded that CRS was a “division,” “department,” or “profit center” of Gray Lift, Inc.

In other words, contrary to plaintiffs’ arguments, *Gigax* does not stand for the proposition that a single corporate entity having a distinct department with a fictitious business name can, as a result of that fact, be both the employer and a third-party tortfeasor as to the same worker. To the contrary, “the ‘third party tortfeasor’ must be a distinct third person or entity; no action will lie against the employer on the theory that some separate function results in a different entity.” (2 Witkin, Summary of Cal. Law (10th ed. 2005) Workers’ Compensation, § 69, p. 623; accord, *Colombo v. California* (1991) 3 Cal.App.4th 594, 598 [California Highway Patrol officer could not bring action against state on theory that the Department of Transportation—i.e., another state department—was a third-party tortfeasor].)

For these reasons, we agree with the trial court that defendants' motion established that Gray Lift, Inc. was decedent's employer and plaintiffs failed to present evidence showing a triable issue of material fact on that issue.

DISPOSITION

The judgment is affirmed. Costs on appeal awarded to defendants.

Franson, J.

WE CONCUR:

Wiseman, Acting P.J.

Gomes, J.