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I. EMPLOYMENT LIABILITY

Companies Contracting with Employment Agencies Can Be Held Liable for Temporary Employees' Discrimination Claims

In *Faush v. Tuesday Morning*, 2015 U.S.App.LEXIS 19977 (3d. Cir. Pa. November 18, 2015), Matthew Faush, an African American was an employee of Labor Ready, a staffing company that provides temporary employees to clients, including Tuesday Morning, Inc. Faush was sent by Labor Ready to work at a new Tuesday Morning store.

Faush claimed that he and fellow African-American employees were subject to racial slurs and discriminatory treatment by staff at Tuesday Morning. Faush filed suit against Tuesday Morning in federal court for racial discrimination in violation of Title VII of the Civil Rights Act of 1964, the Pennsylvania Human Relations Act, and 42 U.S.C. § 1981. Tuesday Morning filed a motion for summary judgment on the grounds that it never employed Faush or entered into a contract with him, as is required for his claims. The District Court granted Tuesday Morning's motion for summary judgment, holding that Tuesday Morning was not Faush's employer, and could not be liable under Title VII or the Pennsylvania Human Relations Act. Faush appealed.

The primary dispute was whether Tuesday Morning, as a client of the Labor Ready staffing service, was considered an employer of the temporary workers it used and liable for discrimination claims under Title VII of the Pennsylvania Human Relations Act. The Third Circuit stated that in order to prevail on his Title VII claim, Faush must demonstrate the existence of an employment relationship with Tuesday Morning. The Court provided that *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) governs the definition of employee in the Title VII context. The Court outlined the non-exhaustive factors from Darden used to determine whether a hired party is an employee. The factors are as follows:

> The skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

The court held that a jury applying the *Darden* factors could find that Faush and Tuesday Morning had a common-law employment relationship, and therefore, that Faush was Tuesday Morning's employee for purposes of Title VII and the Human Relations Act. As such, the Third Circuit vacated the District Court's decision with respect to Faush's Title VII and Pennsylvania Human Rights Act claims and remanded for further proceedings.

II. ARBITRATION

Arbitration Agreement is Unenforceable if it Does Not Clearly State that the Signer is Waiving the Right to Pursue Legal

Remedies in Court.

In *Barr v. Bishop Rosen & Co., Inc.*, ___ N.J. Super. ___ (App. Div. October 26, 2015), broker Stephen Barr worked at Bishop Rosen from 1997 to June 2014. During the course of his employment, Mr. Barr executed two Financial Industry Regulatory Authority (FINRA) application forms known as Form U4s and two amendments to the Form U4s. Between November 2009 and April 2014, Mr. Barr and Bishop Rosen defended claims by a customer of Mr. Barr's in a FINRA Arbitration. It ended successfully, but Mr. Barr incurred $214,549.65 in legal defense costs.

Barr brought this lawsuit against Bishop Rosen seeking indemnification for attorneys' fees and costs arising out of the defense. Bishop Rosen moved to dismiss the lawsuit pending an arbitration before FINRA.

The lower court denied Bishop Rosen's motion to compel arbitration and Bishop Rosen appealed. The Appellate Court noted that all contracts require mutual assent. For mutual assent to exist, the parties to an agreement must understand its terms. Where waiver of a jury trial or right to pursue a case is concerned, the law in New Jersey requires that the waiver must be "clearly and unmistakably established." As such, the Court provided that an arbitration provision in a contract must convey that parties are forfeiting their right to pursue a judicial remedy.

Bishop Rosen tried to force arbitration through two avenues, the Form U-4's and a 2000 memorandum based on a regulatory requirement that such firms provide a model arbitration disclosure statement whenever they ask personnel to sign a new or amended Form U-4. While both Forms U-4 contained language regarding arbitration, the court held that neither one contained sufficient language, under the New Jersey case law, to constitute a waiver of plaintiff's right to sue.

Unlike the Forms U-4, the 2000 memorandum stated that arbitration includes a waiver of a judicial remedy. Defendant furnished that memorandum pursuant to a rule that required it "to provide a model arbitration disclosure statement whenever asking an associated person, such as plaintiff, to sign a new or amended Form U-4." The model disclosure was required to be provided before seeking a new or amended Form U-4. But defendant did not provided the memorandum when or before plaintiff signed amended Forms U-4 in 2003 and 2005, or in connection with the 2009 Form U-4. Instead, the 2000 memorandum was a "stand-alone" document that was not provided to plaintiff "until three years after execution of the first 1997 arbitration agreement and nine years before the second in 2009." The court noted that the memorandum "would likely have been adequate had Bishop Rosen simultaneously sought plaintiff's execution of a new Form U-4." The court found that the 2000 memorandum was too disconnected in time from the Forms U-4 to permit the memorandum to be viewed as part and parcel of any of those Forms. As such, the court affirmed the decision denying the motion to compel arbitration.

III. INSURANCE LAW

Upon Rescission for Material Misrepresentation, Insurers Need Not Defend or Indemnify Insured

In *Thomas DeMarco v. Sean Robert Stoddard, D.P.M.*, 2015 N.J. LEXIS 1237 (N.J. December 1, 2015), Defendant Sean Robert Stoddard, D.P.M. practiced podiatry in New Jersey. In 2007, he applied to the RIJUA for medical malpractice liability insurance. Among other representations, the application indicated that at least fifty-one percent of Dr. Stoddard's practice was generated in Rhode Island. That answer was false. Dr. Stoddard submitted renewal applications from 2008 through 2011, each of which stated that at least fifty-one percent of Dr. Stoddard's practice was generated in Rhode Island.

Dr. Stoddard performed three surgeries on plaintiff Thomas DeMarco, a New Jersey resident. In 2011, DeMarco and his wife filed a medical malpractice complaint in New Jersey alleging that Dr. Stoddard negligently performed the surgery. Dr. Stoddard

forwarded the complaint to the RIJUA, which responded with a reservation of rights letter stating that the RIJUA only provides coverage for physicians who maintain fifty-one percent of their "professional time and efforts" in Rhode Island, and that the RIJUA was "in the process of securing facts concerning whether [Dr. Stoddard] . . . met the fifty-one percent (51%) requirement for the provision of insurance coverage from the [RI]JUA."

In January 2012, the RIJUA filed declaratory judgment action in Rhode Island, naming both Dr. Stoddard and the DeMarcos as defendants. The RIJUA sought a declaration that Dr. Stoddard misrepresented material information in his insurance applications and a judgment permitting rescission of the policy. In March 2012, the DeMarcos named the RIJUA as a defendant in their medical malpractice action, and sought a declaratory judgment that the RIJUA was required to defend Dr. Stoddard and indemnify him up to $1 million. The Rhode Island court entered a default judgment against Dr. Stoddard, declaring his 2010-2011 renewal policy void and holding that the RIJUA had no duty to defend or indemnify him for the DeMarcos' claims. Thereafter, the RIJUA and the DeMarcos filed cross-motions for summary judgment in the New Jersey malpractice case. The court determined that New Jersey law should apply, and held that the Rhode Island judgment could not be enforced in the New Jersey action because it was entered without jurisdiction over the DeMarcos. The trial court went on to grant the DeMarcos' motion for summary judgment and deny the RIJUA's motion.

The Appellate Division granted the RIJUA's motion for leave to appeal, and affirmed the trial court order. The panel determined that New Jersey law should apply and concluded that innocent third parties should be protected for a claim arising before rescission. The panel concluded that the RIJUA owed a duty to indemnify Dr. Stoddard. RIJUA appealed.

The Supreme Court held that the RIJUA owed neither a duty to defend nor a duty to indemnify Dr. Stoddard based on his misrepresentation on the insurance application. The Court looked to the law on legal malpractice insurance, under which a legal malpractice insurance policy may be declared void from its inception due to a misrepresentation of material fact by the insured in an application for insurance. Applying the same rules, the Court held that the RIJUA owed neither a duty to defend nor a duty to indemnify its insured.

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