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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Lois SCAFURI, Plaintiff-Appellant,
v.
SISLEY COSMETICS USA, INC., Barbara Coccetti, Defendants,
and
Neiman Marcus Group, Inc., Carman Ferraioli, Defendants-Respondents.

Argued Nov. 2, 2009.
|
Decided Nov. 25, 2009.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, L-1896-07.

Attorneys and Law Firms

Paul Castronovo argued the cause for appellant (Castronovo & McKinney, L.L.C., attorneys; Mr. Castronovo, on the brief).

Richard C. Mariani argued the cause for respondents (Ogletree, Deakins, Nash, Smoak & Stewart, P.C., attorneys; Mr. Mariani, of counsel and on the brief; Evan J. Shenkman, on the brief).

Before Judges RODRÍGUEZ, REISNER and CHAMBERS.

Opinion

PER CURIAM.

***1** Plaintiff Lois Scafuri appeals from a January 9, 2009 order granting summary judgment in favor of defendants Neiman Marcus, Inc. and Carman Ferraioli, and dismissing plaintiff's complaint against defendants under the Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -49. [1]

Plaintiff, who worked at a Sisley cosmetics counter in a Neiman Marcus department store, claimed that she was terminated from employment after she requested reasonable accommodation of a physical handicap, in violation of the LAD's prohibitions on handicap discrimination and reprisal. *See N.J.S.A.* 10:5-12a and -12d. For purposes of her LAD complaint, she contended that she was a joint employee of Neiman Marcus and Sisley Cosmetics USA, Inc. Without addressing the merits of the LAD claim against Neiman Marcus, the trial court granted summary judgment concluding that plaintiff was not a Neiman Marcus employee.

Our review of the trial court's grant of summary judgment is plenary, employing the same standard used by the trial court. *See Prudential Prop. & Cas. Ins. Co. v. Boylan,* 307 *N.J.Super.* 162, 167, 704 A.2d 597 (App.Div.1998), *certif. denied,* 154 *N.J.* 608, 713 A.2d 499 (1998). We conclude that summary judgment was mistakenly granted because there were disputes as to material facts, and viewing the facts in the light most favorable to plaintiff, she could prevail on the joint employment issue. *See Brill v. Guardian Life Ins. Co. of Am. .,* 142 *N.J.* 520, 540, 666 A.2d 146 (1995); *Agurto v. Guhr,* 381 *N.J.Super.* 519, 525, 887 A.2d 159 (App.Div.2005).

I

We begin by reviewing the law on employee status for purposes of the LAD. The LAD prohibits discrimination by employers against employees, *N.J.S.A.* 10:5-12a, but the statute does not define "employee," other than to indicate that the term does not include domestic servants. *See N.J.S.A.* 10:5-5f. However, in construing the term, we must consider the LAD's fundamental purpose to eradicate workplace discrimination. [2]

> To determine whether plaintiff should be considered an employee of the State under the LAD, we are guided in our analysis by the LAD's purpose. It is remedial legislation, "enacted to protect not only the civil rights of individual aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace."
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> [*Hoag v. Brown,* 397 *N.J.Super.* 34, 47, 935 A.2d 1218 (App.Div.2007) (citation omitted).]

In some circumstances, a person may be deemed to be jointly employed by two entities for purposes of protection under the LAD. *See Hoag v. Brown, supra,* 397 *N.J.Super.* at 53, 935 A.2d 1218; *Hebard v. Basking Ridge Fire Co.,* 164 *N.J.Super.* 77, 82-84, 395 A.2d 870 (App.Div.1978), *appeal dismissed,* 81 *N.J.* 294, 405 A.2d 838 (1979); *Kurdyla v.*

Pinkerton Security, 197 *F.R.D.* 128 (D.N.J.2000). *See also Massarano v. New Jersey Transit,* 400 *N.J.Super.* 474, 493, 948 A.2d 653 (App.Div.2008) (finding joint employment for purposes of the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 to -8). However, because *N.J.S.A.* 10:5-12a prohibits discrimination by employers against employees, it has generally been held that this section does not protect persons who are genuinely functioning as independent contractors. *See Pukowsky v. Caruso,* 312 *N.J.Super.* 171, 180, 711 A.2d 398 (App.Div.1998).

***2** Courts addressing the employment issue use a twelve-part test adopted in *Pukowsky, supra,* 312 *N.J.Super.* at 182-83, 711 A.2d 398. The twelve factors are:

> (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation-supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties.
>
> [*Ibid.* (citation omitted).]

"[T]he *Pukowsky* test is used to determine who is an employer in cases lacking an actual or customary employer-employee relationship, such as in instances of dual employment, or to ascertain whether the worker is really functioning as an independent contractor." *Thomas v. County of Camden,* 386 *N.J.Super.* 582, 595, 902 A.2d 327 (App.Div.2006) (citations omitted).

The Supreme Court has adopted the *Pukowsky* test in CEPA cases as well. *D'Annunzio v. Prudential Ins. Co. of Am.,* 192 *N.J.* 110, 120-22, 927 A.2d 113 (2007). Because CEPA, like the LAD, is remedial legislation and is to be construed broadly to achieve its purposes, the Court recognized that in some situations CEPA protects persons designated as independent contractors. [3] In determining whether CEPA applies, courts must " 'look to the goals underlying CEPA and focus not on labels but on the reality of plaintiff's relationship with the party against whom the CEPA claim is advanced.' " *Id.* at 121, 927 A.2d 113 (quoting *Feldman v. Hunterdon Radiological Assocs.,* 187 *N.J.* 228, 241, 901 A.2d 322 (2006)).

In endorsing and refining the *Pukowsky* test, the Court in *D'Annunzio* emphasized the need to look beyond labels to the substance of the relationship between the individual and the organization:

> Taken out of context, labels can be illusory as opposed to illuminating. [ ] When CEPA or other social legislation must be applied in the setting of a professional person or an individual otherwise providing specialized services allegedly as an independent contractor, we must look beyond the label attached to the relationship. *The considerations that must come into play are three: (1) employer control; (2) the worker's economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue.*
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> [192 *N.J.* at 122 (footnote omitted; emphasis added).]

While *D'Annunzio* addressed the situation of a doctor who worked for an insurance company, the Court's language is pertinent here:

> [T]he [*Pukowsky*] test further allows for examination of the extent to which there has been a functional integration of the employer's business with that of the person doing the work. Several questions elicit the type of facts that would demonstrate a functional integration: Has the worker become one of the "cogs" in the employer's enterprise? Is the work continuous and directly required for the employer's business to be carried out, as opposed to intermittent and peripheral? Is the professional routinely or regularly at the disposal of the employer to perform a portion of the employer's work, as opposed to being available to the public for professional services on his or her own terms? Do the "professional" services include a duty to perform routine or administrative activities? If so, an employer-employee relationship more likely has been established.

***3** Finally, the test includes consideration of the worker's economic dependence on the employer's work, but does not insist on the same financial indicia one might expect to be present in the case of a traditional employee, such as the payment of wages, income tax deductions, or provision of benefits and leave time. Workers who perform their duties independently may nevertheless require CEPA's protection against retaliatory action when they speak against or refuse to participate in illegal or otherwise wrongful actions by their employer.

[*Id.* at 123-24, 927 A.2d 113.]

II

Having addressed the applicable case law, on which the parties substantially agree, we next address the facts as they pertain to the summary judgment issue. In their briefs, and at oral argument, both counsel did a masterful job of highlighting the facts most favorable to their clients. However, like the trial court, our role is not to decide which party would prevail at a plenary trial. Rather, we must determine whether, accepting as true all of the evidence which supports plaintiff's position and viewing that evidence in the light most favorable to her, she *could* prevail. *Brill v. Guardian Life Ins. Co. of Am.,* 142 *N.J.* 520, 540, 666 A.2d 146 (1995).

While we intimate no view as to what a jury would decide, the following evidence convinces us that plaintiff could prevail on the issue of whether she was a joint employee of Neiman Marcus and Sisley for purposes of the LAD. Scafuri was a high school drop-out whose primary job skill was in make-up artistry and selling cosmetics. She held a series of jobs that involved selling cosmetics at high-end department stores. In May 2004, she was hired by Sisley to work at a cosmetics counter or "bay" which was part of a Neiman Marcus store in Short Hills. [4] This was her sole source of employment. Until she had spinal surgery in 2006, Scafuri worked thirty to thirty-five hours a week, on a four-day per week schedule at the Neiman Marcus store. In July 2006 she returned on a part-time basis, until her termination in January 2007.

The evidence would support a conclusion that, in her capacity as a counter manager, Scafuri functioned as part of the Neiman Marcus sales staff. According to Scafuri, she was required to meet sales goals set by Sisley and separate sales goals set by Neiman Marcus. In performing her job, she worked side by side with Neiman Marcus sales associates, who co-staffed the cosmetics counter with her. The Sisley job description for counter manager provided, among other things, that a counter manager was to "[w]ork as a team with the Sisley-Paris counter, Sisley cosmetics employees and store sales associates, store management and Sisley Cosmetics regional." Although Scafuri was responsible for selling cosmetics and meeting her sales goals, only Neiman Marcus employees could actually ring up the sales on the cash registers. Therefore, she depended on the store's employees to enable her to complete her sales work.

***4** Scafuri testified that her monthly work schedules had to be submitted to and approved by both a Sisley manager and Carman Ferraioli, Neiman Marcus's director of the store's cosmetics department. Ferraioli testified that he enforced the store's policies in his department. He recalled a number of occasions on which he had corrected or reprimanded Sisley or other vendor-employed counter managers in his department for violating Neiman Marcus policies while working on the sales floor.

According to Scafuri, Neiman Marcus required her to meet its "very high standards for customer eservice." She testified that she was regularly required to attend in-store meetings that Neiman Marcus held for both its sales employees and the Sisley employees who were counter managers. Scafuri was encouraged to help create an "inter-sell environment" by trying to get employees from other departments to direct their customers to the Sisley counter to buy cosmetics. Significantly, Scafuri also testified that it was part of her job to sell non-Sisley products at Neiman Marcus:

> I was directed by Neiman Marcus to assist all customers so that may have taken me to other counters. So I sold La Mer, I sold La Parie, I sold Lauren, Prada.... Clinique, YSL, that's [Yves St.] Laurent, [Chanel], fragrance Jo Malone. Wherever a customer needed me to go with them if they needed my assistance or asked for my assistance.

She testified that "Neiman's expected me to sell the other [cosmetic] lines as well and cover their counters when there [were] no sales associates around." She testified that she also sold "men's ties." Based on Scafuri's description of her job, it can fairly be inferred that she was fully integrated into Neiman Marcus's core business of selling luxury products. According to Scafuri, her paycheck came from Sisley but "[e]verything else I did in the store was controlled by Neiman Marcus."

After Scafuri returned to work part-time in July 2006, following her recovery from back surgery, she submitted a doctor's note indicating that she needed to sit down or lie down from time to time. However, according to Scafuri, when

Ferraioli saw her sitting down at the cosmetics counter, he told her there was "no sitting in his department." Scafuri testified that she complained to a supervisor at Sisley headquarters, but was told that Neiman Marcus would not accommodate her. She also testified that Neiman Marcus employees were unwilling to help with other accommodations she needed, such as opening boxes and carrying merchandise from the storeroom to the cosmetics counter; that Ferraioli did not provide her with a cart to transport the merchandise to the counter; and he did not accommodate her scheduling needs.

In January 2007, to assist her in selling Sisley products at an upcoming major in-store promotional event, Ferraioli gave Scafuri a copy of the store's confidential list of customers who had previously purchased large amounts of Sisley products. According to Scafuri's deposition testimony, she was terminated from her employment after another Sisley employee, Barbara Coccetti, told Ferraioli that Scafuri had taken home some of that confidential customer information. Ferraioli interviewed Scafuri, who admitted that she took the information home in order to write a thank-you note to a customer and told Ferraioli that the card was at her home. However, she quickly corrected her statement when she realized that she had the customer card in her handbag. Later that day, Ferraioli told Scafuri that he had spoken with her supervisor at Sisley and with "executive management and that [Scafuri] was banned from Neiman Marcus and ... was to leave the store."

***5** That same day, Angela Corry, a Sisley supervisor who worked in Long Island, told Scafuri that "Neiman Marcus was terminating me because I violated a policy and that then Sisley was terminating me because I violated the policy." [5] At her deposition, Corry was asked "Who made the decision that [Scafuri's] employment had to be terminated?" She responded "Neiman Marcus." Corry also testified that she asked Ferraioli if he would "reinstate Lois [Scafuri] for me if I asked you," and he replied "no." In completing the employer's portion of a COBRA form for Scafuri, a Sisley human resources manager indicated that Scafuri had been "[t]erminated by Dept. Store" on January 12, 2007.

Viewing this evidence in the light most favorable to Scafuri, as we must, we conclude that she could satisfy the three critical elements which both parties agree the Court emphasized in *D'Annunzio:* "(1) employer control; (2) the worker's economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue." 192 *N.J.* at 122, 927 A.2d 113.

There is sufficient evidence of Scafuri's economic dependence on the relationship; it was her entire livelihood for three years. Further, a reasonable jury could conclude that she was functionally integrated into the Neiman Marcus cosmetics department, or, as the Court put it, she was a "cog" in the Neiman Marcus operation. *Id.* at 123-24, 927 A.2d 113. She worked in physical proximity to Neiman Marcus employees and teamed with them to sell Sisley cosmetics. She also sold other Neiman Marcus merchandise when necessary to accomplish the store's overall goal of keeping the customers satisfied and maximizing sales. *See Hoag v. Brown, supra,* 397 *N.J.Super.* at 48-53, 935 A.2d 1218.

Finally, for summary judgment purposes, there is enough evidence that Neiman Marcus, and Ferraioli in particular, had the right to control the way Scafuri performed her work. According to Scafuri's testimony, this included deciding whether the cosmetics department would accommodate her handicap. And, according to Neiman Marcus, her alleged violation of a Neiman Marcus policy played a central role in her termination.

Consequently, we conclude that summary judgment should not have been granted on the joint employment issue. Therefore, we reverse the order dismissing the complaint and remand this matter to the trial court for further proceedings consistent with this opinion. Those proceedings will include ruling on defendants' summary judgment motion as it pertains to the merits of the LAD claims.

Reversed and remanded.

All Citations

Not Reported in A.2d, 2009 WL 4251861

Footnotes

1 After the court denied their summary judgment motion on the merits of plaintiff's LAD claim, co-defendants Sisley Cosmetics USA, Inc. and Barbara Coccetti reached a settlement with plaintiff, and they are not parties to this appeal.

2 The breadth of the Legislature's intent to eradicate discrimination may be gleaned from the fact that the LAD not only prohibits discrimination in employment but also prohibits discriminatory refusals to enter into contracts. *N.J.S.A.* 10:5-12(l) makes it illegal "[f]or any person to refuse to ... contract with, ... or otherwise do business with any other person on [a prohibited discriminatory] basis." We have previously held that, at least in some situations, this section provides protection to independent contractors. *Rubin v. Forest S. Chilton, 3rd, Memorial Hospital, Inc.,* 359 *N.J.Super.* 105, 109-10, 819 A.2d 22 (App.Div.2003). *See Nini v. Mercer County Community College,* 406 *N.J.Super.* 547, 557, 968 A.2d 739 (App.Div.), *certif. granted,* 200 *N.J.* 206 (2009). However, Scafuri did not premise her LAD claim on section 12(l), and we need not consider whether it could possibly apply here.

3 Unlike the LAD, CEPA defines "employee" as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." *N.J.S.A.* 34:19-2b.

4 According to Scafuri, as well as other witnesses, the "bay" would include counters at which employees sold other cosmetics as well, such as YSL or Laura Mercier.

5 In brief, Scafuri contended that other employees had taken customer information home and were not fired. She alleged that Ferraioli used this incident as a pretext to terminate her because she needed accommodations for her spinal condition. Ferraioli contended that Scafuri not only violated an important Neiman Marcus policy but alleged she lied to him about whether she took the information home.