



Posey v. Intermountain Rural Electric Association

583 P.2d 303 (1978) | Cited 0 times | Colorado Court of Appeals | April 27, 1978

Plaintiff appeals from the dismissal of his tort claims against defendants. We affirm.

On November 19, 1974, defendant Intermountain Rural Electric Association (IREA) hired Sturgeon Electric Company (Sturgeon) to construct and recondition electrical transmission and distribution lines. Plaintiff was employed by Sturgeon and worked on this project. Defendant C&H Guernsey and Company (Guernsey) provided inspection services pursuant to a January 1975 agreement with IREA. On December 16, 1975, while ascending a pole to repair a supposedly de-energized line, plaintiff sustained an electrical shock, resulting in serious injury. Both IREA and Sturgeon provided workmen's compensation insurance, and plaintiff is currently receiving workmen's compensation benefits.

Plaintiff initiated this common law tort action against defendants on the theory that defendants were not entitled to the immunity afforded employers under the Workmen's Compensation Act. IREA argues, however, that it was deemed to be plaintiff's statutory employer under § 8-48-101(1), C.R.S. 1973, (1976 Cum. Supp.) and was immune from common law suit under § 8-48-101(2), C.R.S. 1973 (1976 Cum. Supp.). Defendant

Guernsey claimed the immunity afforded agents of statutory employers under § 8-48-101(2), C.R.S. 1973 (1976 Cum. Supp.). Defendants moved to dismiss plaintiff's action for failure to state a claim upon which relief could be granted, and supported their motions with affidavits supported by briefs; plaintiff offered no affidavits in response even though he was given an extended time to file his brief in opposition. Treating defendants' motions as motions for summary judgment, the court dismissed plaintiff's claims. In doing so, the court specifically found that IREA was plaintiff's statutory employer, that Guernsey was IREA's agent, and that both defendants were immune from plaintiff's common law suit under § 8-48-101(2), C.R.S. 1973 (1976 Cum. Supp.).

I.

Plaintiff's first contention, that motions to dismiss must be decided solely on the basis of the contents of the complaint, is generally correct; however, a motion to dismiss may be treated as a motion for summary judgment. C.R.C.P. 12(b). In such cases, the court's decision may be based, as it was here, upon the pleadings, depositions, answers to interrogatories, and affidavits submitted. C.R.C.P. 56(c).

II.



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Plaintiff also contends that the immunity afforded statutory employers by § 8-48-101(2), C.R.S. 1973 (1976 Cum. Supp.), does not apply to IREA. Plaintiff urges that IREA does not qualify as a statutory employer because, among other things, it did not exercise any control over his activities on the project. Plaintiff's analysis is in error.

A corporation will be determined to be a statutory employer when it contracts out work which is part of its regular business and which would ordinarily be accomplished with its own employees. *Pioneer Construction Co. v. Davis*, 152 Colo. 121, 381 P.2d 22; *Standard Oil Co. v. Industrial Commission*, 38 Colo. App. 39, 552 P.2d 1029; *San Isabel Electric Ass'n, Inc. v. Bramer*, 31 Colo. App. 134, 500 P.2d 821. IREA's business is selling and distributing electrical power. And, the construction and maintenance of power lines is an essential part of that business. For example, in 1975, IREA spent \$1,598,759 on construction performed by its own personnel, and 95% of that amount went towards new construction. Because IREA established that one of the normal functions performed by its personnel is the construction of new power lines, IREA meets the test of a statutory employer, see *San Isabel Electric Ass'n, Inc.*, *supra*, and is immune from suit. Section 8-48-101(2), C.R.S. 1973 (1976 Cum. Supp.). Therefore, its motion was properly granted.

III.

Plaintiff argues that the court relied upon a deficient affidavit in dismissing his claim against Guernsey. According to plaintiff, Guernsey's allegation in its affidavit that it acted as IREA's agent amounted to a self-serving legal conclusion, without evidentiary value, rather than a

statement of fact. We find no merit to this argument. Even the bare assertion of an agency relationship is admissible as a statement of fact when made by one of the purported parties to the relationship. See *Salters v. Pugmire Lincoln-Mercury, Inc.*, 124 Ga. App. 414, 194 S.E.2d 56 (1971); *Madden v. Simmons*, 39 Ala. App. 24, 92 So.2d 922 (1957); 3 C.J.S. Agency § 514. Cf. *Remmick v. Mills*, 165 N.W.2d 61 (N.D. 1968).

Plaintiff further alleges that Guernsey acted as an independent contractor, rather than IREA's agent, and thus is not immune from suit under § 8-48-101(2), C.R.S. 1973 (1976 Cum. Supp.). His reliance on *Brown v. C.H. Guernsey & Co.*, 533 P.2d 1009 (Okla. App. 1973), in support of his contention, is misplaced. In *Brown*, the court was called upon to determine whether an independent contractor shared the common law immunity granted by the Oklahoma statute to statutory employers and their employees. Our workmen's compensation law, as does Oklahoma's, recognizes the distinction between an independent contractor and an employee. See, e.g., *Faith Realty & Development Co. v. Industrial Commission*, 170 Colo. 215, 460 P.2d 228. However, our statute, § 8-48-101(2), C.R.S. 1973 (1976 Cum. Supp.), extends common law immunity under these circumstances to a statutory employer's agent. An agency relationship exists where one acts on behalf of and under the control of another, with the other's consent. *Pouppirt v. Greenwood*, 48 Colo. 405, 110 P. 195; see Colo. J.I. 7:3.



Posey v. Intermountain Rural Electric Association

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Here, Guernsey's affidavit alleged that it acted as IREA's agent under IREA's control and supervision. Guernsey's assertion is not challenged by affidavit, and we find nothing in the offered depositions that would lead us to doubt that assertion. Therefore, because Guernsey was immune from common law suit, § 8-48-101(2), C.R.S. 1973 (1976 Cum. Supp.), the court properly dismissed plaintiff's claim against Guernsey as well.

We have considered plaintiff's other contentions and find them to be without merit.

Judgment affirmed.

Disposition

Affirmed.

