STATE OF MICHIGAN

COURT OF APPEALS

DENNIS COLE,

Plaintiff-Appellant,

v

BADA BING CLUB and ATLANTIS LOUNGE, INC.,

Defendants-Appellees.

UNPUBLISHED
September 25, 2014

No. 315614
Wayne Circuit Court
LC No. 11-003952-NO

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

In this tort action involving allegations of direct and vicarious liability, plaintiff appeals as of right an order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). Because the trial court correctly concluded that Atlantis Lounge, Inc. may not be held directly or vicariously liable for the torts at issue, we affirm.

On September 8, 2010, plaintiff suffered a beating in the basement of the Bada Bing Club ("the Club") at the hands of four men: Henry Ramirez (the Club's manager), Nathaniel Brewer, Ryan English, and Coty Grifka. Plaintiff was taped to a chair, beaten with a gun, punched and kicked, and drilled through the hand with an electric drill. The men were all convicted of criminal charges for their involvement. The present case involves plaintiff's efforts to obtain tort based damages from the Club's owner, Atlantis Lounge, Inc., based on principles of vicarious liability for Ramirez's conduct and negligence in hiring, retaining, and supervising Ramirez. The trial court determined that Ramirez qualified as an independent contractor, not an employee, and, for this reason, concluded that Atlantis Lounge, Inc. could not be held liable, either directly or vicariously, for Ramirez's wrongdoing.

The trial court granted summary disposition under MCR 2.116(C)(10). Appellate review of a motion for summary disposition is de novo. *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim and should be granted, as a matter of law, where no genuine issue of any material fact exists to warrant a trial. *Id.* The pleadings, affidavits, depositions, admissions and other evidence submitted by the parties must be viewed in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A material question of fact exists when, after viewing the evidence in a light most

favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

On appeal, plaintiff first argues that a material question of fact remained as to whether Ramirez qualified as an employee of Atlantis Lounge, Inc. or an independent contractor. If Ramirez is an employee, Atlantis Lounge, Inc. could potentially be held directly liable for negligently hiring, training, or supervising him. See *Bailey v Schaaf*, __ Mich App __, __: __ NW2d __ (2014); slip op at 12. In contrast, Michigan does not recognize a comparable cause of action for the negligent hiring or retention of an independent contractor. See *Campbell v Kovich*, 273 Mich App 227, 233; 731 NW2d 112 (2006); *Reeves v Kmart Corp*, 229 Mich App 466, 475; 582 NW2d 841 (1998).

Whether an individual may be considered an employee or an independent contractor requires application of the control test.[1] See *Campbell*, 273 Mich App at 234-235. This test involves consideration of "who controlled the work, the hours, the process, and the methods of the work involved." *Kidder*, 455 Mich at 32. Where an individual "contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished," he or she is, by definition, an independent contractor. *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 73; 600 NW2d 348 (1999). In contrast, "[i]f the employer of a person or business is ostensibly labeled an 'independent contractor' retains control over the method of the work, there is in fact no contractee-contractor relationship" and the principles of master and servant apply. *Campbell*, 273 Mich App at 234 (quotation omitted).

In this case, the trial court appropriately determined that reasonable minds could not conclude that Atlantis Lounge, Inc. exercised the necessary control or supervision over Ramirez's specific work activities so as to render him an employee of Atlantis Lounge, Inc. In particular, both Nagy Mickhail (Atlantis Lounge, Inc.'s soles shareholder) and Ramirez testified that Ramirez operated the Club pursuant to a verbal agreement giving Ramirez control over, and responsibility for, the day-to-day operations of the Club,[2] and plaintiff has presented no evidence

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[1] On appeal plaintiff argues for the application of the economic reality test, rather than the control test. However, the economic reality test applies to determinations of employee status in the context of administering social legislation such as the Worker's Disability Compensation Act. See *Kidder v Miller-Davis Co*, 455 Mich 25, 31-35; 564 NW2d 872 (1997). In contrast, the control test applies in tort actions to determine whether a defendant has exercised control over an individual so as to give rise to tort liability for the individual's negligence and wrongdoing. See *Nichol v Billot*, 406 Mich 284, 296; 279 NW2d 761 (1979). Thus, to ascertain whether defendant may be held liable for Ramirez's wrongdoing, either through vicarious liability, or under a theory of negligent hiring, supervision, and retention, the control test applies. See, e.g., *Campbell*, 273 Mich App at 234-235.

[2] Mickhail presented the court with a written agreement specifically identifying Ramirez as an independent contractor. The agreement, however, was unsigned and Ramirez denied knowledge of the written agreement. In any event, a written agreement is not dispositive of Ramirez's role. See *Kidder*, 455 Mich at 46.

to contradict this evidence. On the contrary, Ramirez undisputedly hired and fired the Club's employees. He paid the Club's expenses, including employee salaries. He maintained the Club's financial records and made decisions about the business, including, for example, the decision to employ plaintiff to complete construction in the Club's basement. Ramirez, in fact, paid $12,000 each month in rent to Atlantis Lounge, Inc. for the opportunity to run the Club, drawing his own compensation from the profits remaining after paying his employees, business expenses, and the set rent to Atlantis Lounge, Inc. In essence, Ramirez paid for the opportunity to operate the Club as an independent contractor without interference from Atlantis Lounge, Inc. Cf. *Brown v Standard Oil Co*, 309 Mich 101, 106; 14 NW2d 797 (1944) (holding individual leasing and operating a gas station was an independent contractor, not an employee of gas station's owner).

In contrast, by all accounts, Mickhail came to the Club no more than once a week, and, according to most witnesses, he did so solely for the purpose of collecting rent payments from Ramirez. Mickhail received the same amount of money each month, regardless of how the Club performed. Plaintiff presents no evidence that Mickhail made any of the Club's business decisions, hired or supervised employees, directed Ramirez's specific work activities, or otherwise exercised control over Ramirez. Indeed, plaintiff—a former Club employee himself—did not know Mickhail and had no dealings with him.

In an effort to establish a material question of fact, plaintiff relies primarily on the untimely affidavit of another employee, Frank Ziola, and testimony from Grifka in which he described Mickhail as the "boss." However, viewed in a light most favorable to plaintiff, this evidence falls short of establishing a material question of fact regarding Ramirez's role. At most, Ziola attests that Mickhail attended a majority of weekly staff meetings on Sundays. But, he does not indicate that those meetings were controlled by Mickhail or that Mickhail somehow usurped Ramirez's role in directing day-to-day operations. Indeed, while broadly ascribing the role of "general" to Mickhail, Ziola, like the other employees, acknowledges that he was hired by Ramirez and paid by Ramirez. Ziola further explained that Ramirez "paid [employees] what he thought they were worth and if you complained you were gonna get it." Ziola described himself as "work[ing] for" Ramirez and he indicated that it was Ramirez, acting as an "enforcer," who "took care" of things that came up. Likewise, Grifka described Mickhail as a "boss," but acknowledged his work related dealings were with Ramirez. Ultimately, both Grifka and Ziola dealt with Ramirez, and it does not appear that either was privy to the specific dynamics of Mickhail's relationship with Ramirez. In short, their evidence does not contradict that offered by Mickhail and Ramirez as to the nature of their arrangement regarding the Club's operation.

Similarly, questions from Mickhail to Ramirez, overheard by Ziola, as to whether Ramirez had "take[n] care of so and so" do not demonstrate an exercise of control which would render Ramirez an employee. Such questions do not suggest that Mickhail directed the method of Ramirez's work in "taking care" of any specific issue, and Mickhail may certainly be interested in the *results* obtained by his independent contractor without transforming Ramirez's role into one of an employee. See *Candelaria*, 236 Mich App at 73. Nor does Ziola's assertion that Ramirez "answered to [Mickhail] when things went wrong or needed to be done differently" indicate the existence of an employee/employer relationship. Ziola's general assertion in this regard, without explication or example, provides no evidence that Mickhail's purported ability to intervene was exercised in any way. Cf. *id.*. Thus, viewing the evidence in a light most

favorable to plaintiff, reasonable minds could not conclude that a question of fact remained as to Ramirez's status as an independent contractor. Accordingly, because Ramirez was an independent contractor and Michigan recognizes no cause of action for the negligent hiring or retention of an independent contractor, the trial court did not err in granting summary disposition regarding plaintiff's allegations involving direct liability. See *Campbell*, 273 Mich App at 233; *Reeves*, 229 Mich App at 475.

Next, plaintiff maintains that the trial court erred in granting defendants' motion for summary disposition regarding his allegations of intentional torts premised on a theory of vicarious liability. In making this argument, plaintiff provides us only with caselaw indicating that an employer may be held vicariously liable for the intentional conduct of an *employee* in certain circumstances. See, e.g., *Hamed v Wayne Co*, 490 Mich 1, 10-12; 803 NW2d 237 (2011). As we have explained, the undisputed facts demonstrate that Ramirez was not an employee, but an independent contractor. Plaintiff does not address this distinction on appeal. His reliance on cases such as *Hamed* is thus misplaced, and we discern no error in the trial court's grant of summary disposition.

Lastly, plaintiff maintains that, even if Ramirez qualifies as an independent contractor, Atlantis Lounge, Inc. remains liable for his conduct because "[o]ne who is personally bound to perform a duty cannot relieve himself from the burden of such obligation by any contract which he may make for its performance by another person." *Van Dam v Doty-Salisbury Co*, 218 Mich 32, 38; 187 NW 285 (1922) (citation omitted). It is true that there are certain nondelegable duties for which an individual remains liable, even where he has sought to delegate performance of the task to an independent contractor. See *Thon v Saginaw Paint Mfg Co*, 120 Mich App 745, 749; 327 NW2d 551 (1982). However, not all duties are nondelegable, and plaintiff fails to identify in his brief, or even make an effort to identify, a nondelegable duty relevant to the present case.[3] Having failed to identify a nondelegable duty, plaintiff has not shown the doctrine has any application to this case and summary disposition was not in error.

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[3] At oral arguments, plaintiff asserted for the first time that the city in which the Club operated had regulations governing the operation of adult cabaret businesses, pursuant to which there is a licensed operator of such a business who is prohibited from assigning the license or otherwise transferring ownership. Because of these provisions, plaintiff maintained at oral arguments that Mickhail could not delegate independent operation of the Club to Ramirez. Plaintiff failed to present this argument to the trial court and it was not raised in his brief on appeal. Consequently, this argument is not properly before us and will not be considered. *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002). See also *Escanaba Timber Land Co v Rusch*, 147 Mich 619, 621; 111 NW 345 (1907) ("We shall therefore confine our attention to the . . . questions determined by the court and raised by counsel in the original brief, and shall not consider questions apparently raised for the first time on oral argument . . . .").

Affirmed.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher