SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

DEPARTMENT 72

BRENDA ELIZABETH GUTIERREZ BAUTISTA, *et al.*, Plaintiffs, v. BEVERLY WORLD INDUSTRIES, INC. dba CALIFORNIA MARKET, *et al.*, Defendants.	Case No.: BC705775 Hearing Date: July 16, 2020

The motion for summary judgment by Beverly World and Gaju Market is GRANTED. The motion for summary judgment by DF Security is GRANTED.

On May 10, 2018, Plaintiffs Brenda Elizabeth Gutierrez Bautista, Katherine Mishell Arriaga Gutierrez, and Brenda Abigail Arriaga Gutierrez a minor by and through her guardian ad litem Brenda Elizabeth Gutierrez Bautista filed suit against Beverly World Industries, Inc. dba California Market ("Beverly World") and Kim Yoo for negligence.

On May 23, 2019, Plaintiff filed an amendment to the Complaint, substituting Gaju Market Corporation ("Gaju Market") for the fictious name Doe 1. On October 18, 2019, Plaintiff again filed to amend the complaint to substitute DF Private Security, Inc. ("DF Security") for Doe 2.

Defendants Beverly World and Gaju Market move for summary judgment of the single negligence cause of action. DF Security also moves for summary judgment on the negligence claim. This Tentative Ruling addresses both motions.

Key Allegations

As alleged and amended, Beverly World and Gaju Market are California businesses that operate at 450 South Western Avenue in Los Angeles. (Compl. ¶ 6.) Defendant Yoo was employed by DF Security as a security guard, and at the time of the incident his assignment had been to provide security services at Beverly World and Gaju Market.

On November 25, 2016, Yoo was involved in a car accident, using his own personal vehicle, which resulted in the death of Adan Asaias Arriaga Miche, Decedent. (Compl. ¶ 11.) The parties do not dispute that Yoo had recently completed a shift at California Market, had been heading home, and was off-duty at the time. The parties also do not dispute that at some point, Yoo made the decision to return to California Market, and that, at some point after that, the accident occurred. As discussed herein, one of the disputed factual issue concerns who, and what, prompted Yoo to return to California Market.

I. DF Security's Motion

a. Objections

DF Security raises four objections to Plaintiff's evidence.

No. 1. SUSTAINED IN PART. While certain statements within Moon's Declaration may be hearsay, the fact that Moon was not employed by California Market at the time he made the declaration does not, without more, render the entire declaration inadmissible hearsay. That said, there are parts of the declaration that are inadmissible. Specifically, Moon references and incorporates an excerpt from a police report for which he gave a statement. This is impermissible as double hearsay: the statement of the officer in the report is hearsay, and the statement of Moon therein is another layer of hearsay. The objection is therefore sustained as to Moon's references to the police report, and is otherwise overruled.

Nos. 2-3. SUSTAINED.

No. 4. OVERRULED.

b. Discussion

A key factual issue in this case is whether Yoo was acting within the scope of his employment when the accident occurred. As a general rule, an employer is not liable for torts committed by an employee acting outside the scope of employment. (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 721.) DF Security asks the Court to apply this rule to these facts and find that DF Security is not liable as a matter of law. (Mot., p. 6.)

i. The going and coming rule applies; the special errand exception does not apply because a regular trip to a regular place of employment at irregular hours is not a special errand.

In the case of vehicle accidents of employees whose jobs do not include driving, the going and coming rule is particularly applicable in determining whether the employee was acting within the scope of employment. The going and coming rule provides that an employee going to or coming home from work is "ordinarily considered outside the scope of employment so that the employer is not liable for his torts." (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 959; *Harris v. Oro-Dam Constructors* (1969) 269 Cal.App.2d 911, 917.) "The 'going and coming' rule is sometimes ascribed to the theory that the employment relationship is 'suspended' from the time the employee leaves until he returns [citation], or that in commuting he is not rendering service to his employer [citation]. Nevertheless, there are exceptions to the rule." (*Hinman, supra,* 2 Cal.3d at p. 961.)

Here, the relevant exception is the special errand rule. Under this rule, even if an employee is driving from home to work or from work to home, the employee is within the scope of his employment (and the employer is therefore liable) if the employee is "performing an errand either as part of his regular duties or at the specific order or request of his employer." (*Morales-Simental v. Genentech, Inc.* (2017) 16 Cal.App.5th 445, 452.) The special errand rule has created employer liability in situations where the employee:

- is paid by the employer for time spent commuting to and from work (*Hinman, supra,* 2 Cal.3d 956);
- was dropping something off or picking something up for the employer as part of the drive (*Cain v. Marquez* (1939) 31 Cal.App.2d 430);
- was instructed by his employer to use the vehicle for a work-related task and was provided with gas (*Harvey v. D & L Const. Cl.* (1967) 251 Cal.App.2d 48, 59); or
- was heading to a field site or job site that was not the regular place of employment (*Richards v. Metropolitan Life Ins. Co.* (1941) 19 Cal.2d 236, 243).

In each of the foregoing situations there was some aspect of the errand that gave it a quality above and above and beyond an ordinary unpaid commute, in which an employee drives his or her own car from home to the regular place of employment or vice versa.

Contrasting somewhat with these cases are certain workers' compensation cases where merely coming in to work early triggered the special errand exception. The Court of Appeal reached this holding in *Schreifer v. Industrial Acc. Commission* (1954) 61 Cal.2d 289, 295, observing that the employee's "schedule for the day in question had been posted. In reporting to work hours ahead of his regularly scheduled shift he was doing more than merely making his services available at the place where they were

needed. Making the trip at that time was a special service. . . . 'Special' means extraordinary in relation to routine duties . . . ."

At the same time, the *Schreifer* Court cautioned that the workers' compensation cases on the issue of the going and coming rule are not directly applicable in the tort context, in part because "the goal of workers' compensation law is to reimburse the injured worker, whereas the object in tort cases is to determine whether vicarious liability should be extended beyond those who were directly negligent." (*Morales-Simental, supra,* Cal.App.5th at p. 453.) Thus, the workers' compensation cases are not binding.

More apposite is *Sherar v. B & E Convalescent Center* (1975) 49 Cal.App.3d 227. In this case, the employee was driving to her regular place of employment at the regular time when she struck and injured a motorcyclist and his passenger. The plaintiffs argued that even though the accident occurred during a regular commute, the employee was on call 24 hours, and so the employer exercised sufficient control over all of her drives such that the special errand exception should apply. The Court rejected the plaintiffs' attempt to create what the Court termed a "special call" exception. The Court directly stated in dicta, that, had the employee been called in at special hours and the facts otherwise remained the same, the errand still would not have been a special errand. (49 Cal.App.3d at p. 230 ["Plaintiffs . . . make the mistaken assumption that if [the employee] had actually been on a special call at the time of the accident there would have been liability on the part of the employer"].) (Accord *Johnson v. Transit Management of Southeast Louisiana* (La. Ct. App. 2018) 239 So.3d 973 [where employer asked employee to drive from home to regular place of business, mere fact that request was made to start the drive 15 minutes earlier than usual does not convert trip into a special errand]; *Shumway v. Geneva General Hosp.* (N.Y. App. Div. 1996) 233 A.D.2d 868, 868.)

Caldwell v. A.R.B. (1986) 176 Cal.App.3d 1028 is also instructive. In that case, the employee was driving home after the jobsite had been shut down early on account of bad weather. The Court of Appeal found that the mere fact that the drive home was undertaken earlier than normal at the request of the employer was insufficient to convert the drive into a special errand. If an employee heading from the regular job site to home at special hours at the request of the employer is not on a special errand, then an employee heading from home to the regular job site at special hours at the request of the employer is also not on a special errand. The fact that *Caldwell* is a workers' compensation case where the scope of the employer's liability is substantially broader means that this case is especially persuasive here in the tort context.

Here, the undisputed facts and evidence indicate that (1) Yoo was driving home from a regular shift; (2) after a phone call with Moon, Yoo made a left turn, as opposed to going straight, indicating that he was returning to California Market rather than continuing his trip home; and (3) during that turn, the accident occurred.

Thus, strictly speaking, the accident occurred when Yoo was driving back to work. For the purpose of application of the going and coming rule, the Court sees no difference between a drive back to work that originated at home and a drive back to work that originated at some midpoint between home and work. The latter is the case here, but for the purpose of this analysis, it suffices to simply say that Yoo was on a drive to work from a non-work location at the time of the accident.

With this framework in mind, there is nothing about Yoo's drive back to work that created any special benefit for any employer other than that it helped Yoo turn back around and get to his regular place of employment. No employer expanded the reach of its operations beyond the market premises merely because one of its presumed managers may have asked Yoo to turn back around and come to work. Yoo's drive back to his regular place of employment was not a special errand, and therefore, as a matter of law, DF Security cannot be liable. Summary judgment is granted on this basis.

ii. The special errand exception to the going and coming rule does not apply because the evidence shows that Moon did not have the authority or agency to call Yoo on a special errand for DF Security.

There is a second independent reason why Yoo's drive back to his regular place of employment was not a special errand. When the special errand exception does apply, an underlying assumption is that the errand was undertaken at the employer's request. (See *Morales-Simental v. Genentech, Inc.* (2017) 16 Cal.App.5th 445, 452 [special errand rule applies when employee is "performing an errand either as part of his regular duties or at the specific order or request of his employer"].) Thus, the special errand rule does not apply when the employee's errand is outside of his regular duties and was not specifically ordered or requested by his employer. This argument – that these two elements are satisfied and the special errand rule therefore does not apply – is a basis on which summary judgment could be granted, provided DF Security meets its burden and there are no triable issues thereto.

The parties do not dispute that, whatever the nature of Yoo's return to California Market, the trip was made outside of his regular duties, in that it was a drive to the workplace that was not connected to any scheduled shift of Yoo's. DF Security argues that Paul Moon, the individual who spoke to Yoo on the phone and whose call precipitated Yoo's return to California Market, did not have the authority or agency to order or request that Yoo perform a special errand for DF Security. DF Security submits the deposition testimony of Moon himself, which indicates that Moon was a construction contractor who worked at California Market. (Declaration of Matthew Evans, Exh. 3 (Yi Depo.), at pp. at 69:10-70:6 [suggesting that Moon contracted with either California Market or its individual tenants for their construction needs].) The parties do not dispute that Moon was available to California Market's tenants to build out their tenancies on a

contract basis. (Separate Statement ("SS") ¶ 25.) Thus, DF Security's evidence shows that Moon's contract was with either California Market or its individual tenants, but not with DF Security. By showing that no contractual or other type of relationship existed between Moon and DF Security, DF Security has met its burden of showing that Moon did not have the agency or authority to call Yoo on a special errand for DF Security's benefit.

Plaintiffs attempt to raise a triable issue with the following inferential chain: (1) contractually, DF Security allows California Market to control its security guards' activities; (2) Moon was acting as a manager of California Market in calling Yoo to return; and therefore (3) Moon was acting with the authority of DF Security in calling Yoo to return. (See, e.g., Separate Statement ¶ 14, Plaintiffs' response.)

The problem with Plaintiffs' argument is that it is not supported by the evidence. What Moon declares is that he (1) "was given authority by the California Market to coordinate construction and projects," and (2) "was working for the California Market as a construction project manager." (Moon Decl. ¶¶ 2-3.) These declarations do not raise a triable issue, in that they do not present any evidence that tends to show that Moon was a manager *of California Market*. The mere fact that a contractor supervises work projects for a hiring entity does not, without more, grant that contractor legal authority to act as a manager of the hiring entity. Here, Plaintiffs have presented no evidence[1] that Moon was a manager of California Market for the purpose of the question whether he possessed authority to act on California Market's behalf. If anything, Moon's admission that his relationship to California Market was that of independent contractor militates against the finding that Moon was a manager of California Market.

Because the return to California Market was not made at the request of DF Security, the special errand exception does not apply. Summary judgment can also be independently granted on this basis.

II. Beverly World and Gaju Market's Motion

For the purpose of this motion, Defendants Beverly World and Gaju Market are hereinafter referred to as the Premises Defendants.

a. Objections

i. Plaintiffs' objections

[1] The police report is inadmissible. (See section I.a, *supra*.) The deposition testimony of Mr. Young (Plfs.' Exh. 3, 73:19-23) is hearsay. The remaining evidence does not address whether Moon was a manager or otherwise had authority.

The Court rules on Plaintiffs' objections to Premises Defendants' evidence as follows:

Sustained: Nos. 9, 10, 13, 15, 19, 21, 24, 29, 30, 31, 32, 37, and 38.

Overruled: All remaining objections are overruled.

The police report remains hearsay for the reasons discussed in connection with DF Security's motion, above.

ii. Premises Defendants' objections

Premises Defendants' objections are irregularly numbered, beginning with No. 2, followed by No. 6, and proceeding ordinally from there. The Court's evidentiary objections rulings below correspond to the number listed on the moving papers.

Sustained: Nos. 23, 24, 27, 28, 33, 34, 41, 42, 43, 44, 45, 48, 52, and 55.

Overruled: Nos. 2, 6, 7, 8, 9, 10, 12, 14, 15, 16,17, 18, 19, 20, 22, 26, 32, 35, 36, 37, 38, 39, 40, 41, 46, 47, 49, 50, 53, and 56.

iii. Premises Defendants' objections

Premises Defendants have filed a document entitled "Evidentiary Objections to Plaintiffs' Additional Facts re: Separate Statement." The body of the document contains three columns with the following headings: (1) Additional Facts Objected To; (2) Plaintiffs' Evidence; and (3) Grounds for Objection. These headings make clear that Premises Defendants seek to object not to Plaintiffs' evidence itself, but to Plaintiffs' statements of fact that are based on the evidence. However, evidentiary objections must be directed toward evidence, not factual assertions. The proper vehicle for responses to such factual assertions is a responsive separate statement. Accordingly, all of Premises Defendants' objections are OVERRULED, and the document is instead taken as a responsive separate statement.

b. Discussion

The Court first considers the parties arguments as they pertain to Gaju Market and concludes with an analysis of Beverly World's liability.

i. Gaju Market

Gaju Market's motion is successful for the same two essential reasons as DF Security's, as well as for a third independent reason.

1. The going and coming rule applies; the special errand exception does not apply because a regular trip to a regular place of employment at irregular hours is not a special errand.

Like DF Security, Premises Defendants also argue that the going and coming rule applies to this situation and releases them from liability. The reasoning in section I.b.i, *supra*, applies as much to Premises Defendants' motion as it does to DF Security's. Setting aside considerations of who asked Yoo to return to work and whether that individual acted with the authority of either Beverly World or Gaju Market, Yoo, whose job does not embrace driving, was driving to work in his own vehicle at the time of the accident. Thus, the going and coming rule applies (see *Harris, supra,* 269 Cal.App.2d at p. 917); the special errand exception does not apply because a regular trip to a regular place of employment at irregular hours is not a special errand.

Premises Defendants have presented an additional piece of evidence that buttresses the conclusion that the going and coming rule does not apply. The following is an excerpt from Yoo's deposition:

> "Q Why did you return to California Market?
>
> A Well, I am familiar with Alex, so I wanted to go and tell Alex that Mr. Moon is asking you to call him."

(Defs.' Appx., Exh. 3, Declaration of Jeffrey K. Klein, Exh. 1 thereto (Yoo Depo.) pp. 20:18-24.)

This testimony suggests that the task that Yoo was returning to California Market to accomplish was part of the usual work that Yoo would have performed at California Market. This strengthens the finding that the trip back to California Market was not a special errand.

2. The special errand exception to the going and coming rule does not apply because the evidence shows that Moon did not have the authority or agency to call Yoo on a special errand for Gaju Market.

The special errand exception does not apply for a second independent reason: the evidence shows that Moon did not have the authority to call Yoo on a special errand for Gaju Market's benefit. This question requires a slightly different analysis than the same question as to DF Security. Premises Defendants present evidence showing that Yoo was hired by DF Security, and that DF Security, in turn, provided security services at the property where Gaju Market is a tenant. (Declaration of Joshua Park[2] ("Park Decl.") ¶ 4 ["Gaju is not in the business of providing security services. It does not, and did not, control how DF or DF's employees/contractors perform their security duties"].) Yoo testified, and Park confirmed, that Yoo was not an employee or contractor of Gaju Market. (Park Decl. ¶ 5; Klein Decl., Exh 1 (Yoo Depo.), pp. 11:13-17, 13:3-10, 54:7-17.) Additional testimony from Yoo indicates that Premises Defendants did not oversee, supervise, or direct Yoo's activities at the premises, and that DF Security was solely responsible for coordinating his schedule, providing him with any necessary equipment, and paying him. (Yoo Depo., pp. 11:13-17, 12:3-12:23, 54:7-16.)

Premises Defendants also present evidence regarding Paul Moon. The evidence indicates that Moon worked for an entity that provided construction services to tenants at the premises:

> "Paul Moon is an engineering contractor who worked for ML Design & Construction, Inc. ("ML"). ML was hired by another third-party, Square Mixx, LA, Inc., a former tenant at the Property, to assist with its tenant improvements. Mr. Moon was not at the time of the subject accident, nor has he ever been, an employee of Gaju or BWI." (Park Decl. ¶ 10.)

In the original moving papers, Premises Defendants framed the issue as whether Yoo was an employee or an independent contractor of either of the Premises Defendants. However, even if the Court were to find that, as a matter of law, Yoo was an independent contractor of one entity or another, this would not fully answer the question; the theoretical possibility could remain that both (1) Gaju Market was Yoo's special employer and (2) Moon had the authority to call Yoo on a special errand for Gaju Market in a way that would invoke the special errand exception. For the purpose of Gaju Market's burden, it suffices for the Court to conclude, and the Court does conclude, that Premises Defendants' evidence shows that (1) Yoo was not an employee of Gaju Market, meaning that he could not possibly have undertaken the special errand on his own, without the prompting of one who had the authority to send Yoo on a special errand for Gaju Market; and (2) Moon was a construction contractor for the premises and did not possess the authority to direct anyone to do any work for Gaju Market's benefit.

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[2] Plaintiffs argue that Park has since "completely repudiated" his declaration. (Supp Opp'n, p. 8.) The Court disagrees with this characterization. Park indicated that he did not possess specific knowledge of the level of control that Gaju Market exerts over DF Security. This does not mean he repudiated the entirety of his declaration, including basic statements about who was hired by whom for what.

Plaintiff attempts to raise a triable issue by establishing that a special employment relationship existed between Yoo and the Premises Defendants. The argument is based primarily on an unsigned contract between DF Security and Premises Defendants that indicates that Gaju Market is authorized in various ways to direct DF Security's security guards to accomplish certain tasks. (Supp. Opp'n, pp. 5-7.)

While an unsigned contract can, in proper circumstances, provide evidence of the nature of the relationship between parties, the Court need not delve too deeply into this area of inquiry. The reason is because, even if Plaintiffs were to establish a triable issue with respect to Gaju Market's ability to control security guards, Plaintiffs have failed to address the second aspect of their attempt to create a triable issue: showing that Moon possessed the authority to direct anyone to do any work for Gaju Market's benefit.

Plaintiffs' argument in this regard is based on a decontextualization of the word "manager" as it is used in Paul Moon's declaration. The declaration specifically states that Moon "work[ed] for the California Market as a construction project manager." (Exh. 8 (Moon Decl.) ¶ 3.) However, this piece of evidence does not contradict Premises Defendants' showing that Moon was not a manager of or for Gaju Market, and that he did not otherwise possess the authority to direct security guards on Gaju Market's behalf. No other evidence of Plaintiffs' suggests that Moon possessed such authority. Thus, there is no triable issue with respect to whether Moon had the authority to direct security guards on special errands for Gaju Market's benefit. That being the case, Gaju Market is entitled to summary judgment in its favor.

3. The special errand exception to the going and coming rule does not apply because the undisputed evidence shows that Yoo was not asked by anyone to make a special errand, but instead made the decision to return on his own.

Premises Defendants have provided a third independent basis for why Yoo was acting outside the scope of his employment when the accident occurred. Namely, they argue that the evidence shows that Yoo was not asked by anyone to make a special errand, but instead made the decision to return on his own:

> "Q You got the call from Mr. Moon and you diverted yourself from going home to go back to California Market?
>
> A Yes. Well, if the distance was too far, then I could have told him that I could not go. But I was close-by.
>
> Q Okay. And he asked you to return to California Market?

A He did not.

Q Why did you return to California Market?

A Well, I am familiar with Alex, so I wanted to go and tell Alex that Mr. Moon is asking you to call him.

. . . [¶] . . .

Q And did you tell Mr. Moon you were going to return to the market?

MR. CAMACHO: Objection. Asked and answered.

THE WITNESS: I did not." (Yoo Depo, pp. 20:6-21:12.)

Other than the police report, which is inadmissible, Plaintiffs present no evidence showing that Moon asked Yoo to return to the premises; Plaintiffs' evidence only suggests that Moon returned to the premises after having a conversation on the phone with Moon. Thus, Plaintiffs' evidence does not logically contradict Premises Defendants' showing that Yoo returned to the premises of his own volition. That being the case, the special errand exception to the going and coming rule cannot apply. (See *Morales-Simental, supra,* 16 Cal.App.5th at p. 452 [special errand is one performed either as part of regular duties or "at the *specific order or request* of [the] employer"] (emphasis added). Summary judgment is granted in Gaju Market's favor on this basis.

ii. Beverly World

Beverly World is the second of the Premises Defendants, and it too seeks summary judgment in its favor. At the initial hearing on this motion, the Court indicated that there did not appear to be a basis for liability as to Beverly World. This was based on Premises Defendants' showing that (a) Beverly World was an independent corporation that never operated at the California Marketplace, (b) Beverly World never engaged the services of Yoo or DF Security and (c) Beverly World was no longer in operation at the time of the subject accident. (Declaration of Hyun Soon Rhee ¶ 3.) Plaintiffs have failed to address this showing in either the Opposition or the Supplemental Opposition, other than to point out that Premises Defendants have failed to produce Rhee for deposition. However, Plaintiffs do not argue why it is necessary to produce Rhee for deposition, nor do they suggest the type of testimony that they might elicit were they to depose Rhee. Thus, the lack of a deposition does not render Rhee's testimony inadmissible or otherwise invalid. Beverly World has shown that it is not liable, and Plaintiffs have failed to raise a triable issue thereto. Summary judgment is granted on this basis as well with respect to Beverly World.

The bases for summary judgment as to Gaju Market are also bases for summary judgment as to Beverly World. Namely, Premises Defendants have shown that the going and coming rule applies and have presented three independent reasons why the special errand exception does not apply. Plaintiffs have failed to raise a triable issue with respect to any of these reasons.

Premises Defendants' motion for summary judgment is granted.

It is so ordered.

Dated: July 20, 2020

Hon. Ruth A. Kwan
Judge of the Superior Court