

DIVISION OF ST. THOMAS AND ST. JOHN

Defendants.

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) **CASE NO. ST-15-CV-427**
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² Complaint, ¶¶ 7, 8.

Summary Judgment on March 20, 2018, contending that Campos' claim is barred by the exclusive remedy provision of the Virgin Islands Workers' Compensation Act.^{3 4}

STANDARD

Rule 56 of the Virgin Islands Rules of Civil Procedure provides that summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law." An issue is "genuine" if a reasonable jury could possibly hold in the non-movant's favor with regard to that issue.⁵ "A party asserting that a fact cannot be or is genuinely disputed must...support the assertion by...citing to a particular part of materials in the record...or...showing that the materials cited do not establish the absence or presence of a genuine dispute."⁶ In considering a motion for summary judgment, a court must "draw...all reasonable inferences from the underlying facts in the light most favorable to the non-moving party."⁷

ANALYSIS

ABC claims that it is not subject to suit because Campos' injuries are compensable under the VIWCA, whose exclusive remedy provision states:

When an employer is insured under this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, an employee not entitled to compensation under his chapter, the liability of the employer is, and shall continue to be the same as if this chapter did not exist.

³ 24 V.I.C. §284(a).

⁴ On November 13, 2015, ABC moved to dismiss Campos' Complaint, in part on the same basis. Through a Memorandum Opinion and Order entered March 29, 2016, the Court denied the motion, concluding that it was unable to determine whether the exclusivity provision of the WCA barred Campos' Complaint because the Complaint did not include allegations regarding coverage under the WCA and conversion of the motion to one for summary judgment would have prejudiced both parties since no discovery had been conducted and the parties had not had a reasonable opportunity to respond. *See also, Callendar v. Nichtern*, 1995 V.I. LEXIS 24, *17 (V.I. Terr. Ct. 1995).

⁵ *Andersen v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

⁶ V.I. R. Civ. P. 56(c).

⁷ *Battaglia v. McKendry*, 233 F.3d 720, 722 (3d Cir. 2000).

In order for an injury to be compensable under the WCA, an employee's injury must have "aris[en] out of and in the course of his employment."⁸ There is no dispute that ABC employed Campos and that the incident that forms the basis for the Complaint arose from, and occurred during the course of, Campos' employment.⁹

Additionally, to be covered under the WCA, an employer must "secure the payment of compensation under [the WCA] by insuring with the Government Insurance Fund...[which requires] the employer to pay a premium and file 'the necessary reports' with the Government Insurance Fund annually."¹⁰ As an exhibit to its Motion, ABC presents a Certificate of Government Insurance Coverage for the calendar year 2014 that states, "The risk of this employer is covered By Policy 8431 For the period from January 1, 2014 to December 31, 2014." [sic] ABC also submits the carefully worded affidavit of its president William Koenig indicating that, "It was the practice of ABC Concepts to pay all necessary premiums to maintain its worker's compensation coverage under Virgin Islands law¹¹...[T]he V.I. Department of Finance informed ABC Concepts that it had paid its premiums and had Worker's Compensation coverage in place from January 1, 2014 through December 31, 2014."¹² (emphasis added).

Asserting it was in compliance with its obligations under the WDA, ABC contends it has presented prima facie evidence that ABC was an insured employer, and thus exempt from suit, at the time of Campos' May 16, 2014, injury. Citing authority for the proposition that the Certificate will "sustain a judgment unless contradictory evidence is produced",¹³ ABC then argues that the burden shifted to Campos to come forward with evidence to rebut the presumption of WCA immunity and that ABC is entitled to judgment in the absence of rebutting

⁸ *Robles v. HOVENSA, LLC*, 49 V.I. 491, 494 (VI 2008) (citations and internal quotations omitted).

⁹ Affidavit of William Koenig, ¶¶ 5, 6.

¹⁰ *Bertrand v. Mystic Granite and Marble, Inc.*, 2015 V.I. Supreme LEXIS 36, at *20-21 (V.I. 2015).

¹¹ Affidavit of William Koenig, ¶ 8.

¹² Affidavit of William Koenig, ¶ 9.

¹³ *Island Tile & Marble, LLC, v. Bertrand*, 57 V.I. 596, 612 (V.I. 2012).

evidence. ABC concludes that Campos failed to engage in discovery and consequently cannot produce contradictory evidence, such that ABC should prevail.

In his June 29, 2018, Opposition, Campos claims the WCA does not apply because ABC did not have coverage at the time of Campos' injury. Relying on records obtained from the Department of Labor, Campos presents a receipt that purportedly shows that ABC did not pay for coverage under the WCA until July 25, 2014; unsworn correspondence from Wanda L.C. Morris, the Director of Workers' Compensation Administration indicating "Please note that the employer was uninsured at the time of the injury and although he purchased Workers' Compensation Insurance months later, coverage is not retroactive"; January 20, 2015, correspondence from Morris to Koenig indicting that ABC was in violations of the provisions of the WCA for its "failure to pay the premium as specified by law..."; correspondence on the same date to Campos informing him that "your Employer is in violation of Title 24, V.I.C. Chapter 11 § 272(a) of the Virgin Islands Code pertaining to mandatory workers' Compensation insurance coverage..."; and an undated form signed by Morris indicating that the case was deemed "NOT COMPENSABLE". (emphasis added). Additionally, Campos points out that the Certificate of Government Insurance Coverage offered by ABC is dated July 23, 2014, over two months after the May 16, 2014, incident.

Instead of filing a reply, ABC moved to strike Campos' Opposition, contending that, without filing a motion under V.I. R. Civ. P. 56(d), Campos "engaged in third party discovery 18 months after the factual discovery cutoff had passed". Reiterating its assertion that Campos did not engage in discovery during the period provided in the Scheduling Order, ABC argues that the Court "should not reward Plaintiff's 'egregious inaction' by permitting him to conduct unauthorized discovery.

Because Campos has not responded to the Motion to Strike, the Court is without definitive information regarding how and when Campos obtained the records of which ABC

complains. In his May 2, 2018, Motion for Extension of Time, Campos' counsel indicated, "The undersigned has been trying to contact Wanda Morris at the Department of Labor to review documents in this matter."¹⁴ and "The undersigned would like to review said Motion with Wanda Morris in this matter before submitting a response to the Court."¹⁵ But, Campos' June 22, 2018, second Motion for Extension of Time made no mention of the need to contact Ms. Morris. While it would perhaps be reasonable to assume that Campos obtained the record sometime after May 2, 2018, and sometime before June 22, 2018, the Court so conclude because it is required to draw all reasonable inferences in favor of the non-moving party, Campos.

The Scheduling Order does not address third party subpoenas, and ABC presents no authority indicating that a late subpoena of third party records violates the discovery deadlines contained in a scheduling order regulating discovery between the parties. Thus, the question is not whether Campos obtained the information after the discovery deadline, it is when Campos was required to disclose the information to ABC. In the absence of evidence on that issue, the Court cannot determine whether Campos' disclosure was "late".

But, even assuming Campos did make a late disclosure of the Department of Labor records, what is clear is that ABC filed a Notice of Intent to Serve Subpoena Duces Tecum on July 15, 2016, to which was attached a subpoena duces tecum directed to the Custodian of Records, Virgin Islands Department of Labor, Workers' Compensation Division, that contained requests for:

1. All documents relating to any claim for workers compensation benefits made by or on behalf of Louis Campo a/k/a Louis Campos, relating to an on-the-job injury allegedly sustained on or about May 16, 2014, on St. Thomas, Virgin Islands, while employed by ABC Concepts, Inc.; and
2. All documents relating to any payment or compensation of any kind, made by the Virgin Islands Workers Compensation program to Louis Campo a/ka [sic] Louis Campos,

¹⁴ ¶ 5.

¹⁵ ¶ 6.

relating to an on-the-job injury allegedly sustained on or about May 16, 2014, on St. Thomas, Virgin Islands, while employed by ABC Concepts, Inc.

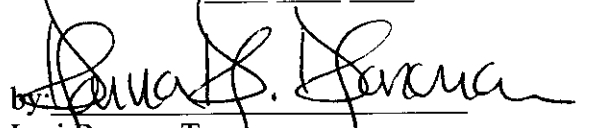
It is certainly a reasonable inference that the records subpoenaed by ABC in July, 2016, included the documents presented by Campos in support of his Opposition to ABC's Motion for Summary Judgment. The documents upon which Campos relies clearly fall into the categories detailed on ABC's subpoena and predate ABC's subpoena. Thus, even assuming Campos had an obligation to produce the documents to ABC after obtaining them from Director Morris, and even assuming that Campos violated that duty, the Court concludes that ABC suffered no prejudice from any discovery violation because ABC was already in possession of the documents. In fact, the Court must question why the documents were not disclosed by ABC in its November 18, 2016, Rule 26(a) Disclosure.

Nowhere in Koenig's affidavit does he state that ABC in fact had coverage under the WCA at the time of Campos' injury or that ABC paid the 2014 premium for that coverage before the injury occurred. It appears to the Court that, rather than "reward" Campos for his alleged unauthorized discovery, ABC would instead have the Court approve its failure to disclose correspondence directed to its president by Ms. Morris on January 20, 2015, indicating that ABC was in violation of the provisions of the WCA for its "failure to pay the premium as specified by law", in apparent direct contradiction of the allegations of Koenig's affidavit. Nowhere in the affidavit does Koenig state that ABC obtained insurance consistent with its "practice" for 2014, or say when the V.I. Department of Finance "informed" ABC Concepts that it had paid its premiums and had Worker's Compensation coverage in place from January 1, 2014 through December 31, 2014. Because even the Certificate presented by ABC in support of its Motion suggests on its face that it was issued on July 23, 2014, over two months after Campos suffered his injury on May 16, 2014, the Court must decline ABC's invitation.

At a minimum, there is a genuine issue of material fact regarding whether ABC is entitled to judgment as a matter of law. As a consequence, the Court will deny summary judgment and deny the Motion to Strike. An Order consistent with this Opinion shall follow.

Dated: October 2, 2018.

ATTEST: Estrella H. George
Clerk of Court


by: Lori Boynes-Tyson
Court Clerk Supervisor 10/3/2018


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS