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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

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GINA GRIFFIN and KNOT TO BE FORGOTTEN,

Plaintiffs,

-against-

DCJ CATERING CORP d/b/a JERICHO TERRACE, ROBERT STEVENSON and CHRISTOPHER LEONE,

Defendants.

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Motion Sequence #2
Submitted November 3, 2008

INDEX NO: 1659/07

The following papers were read on this motion:

Defendants' Notice of Motion.....1
Defendants' Memorandum of Law.....2
Affirmation in Opposition.....3
Reply Affirmation.....4

**Requested Relief**

Counsel for defendants, DCJ CATERING CORP. d/b/a JERICHO TERRACE, ROBERT STEVENSON and CHRISTOPHER LEONE, moves for an order, pursuant to CPLR §3212(b), granting summary judgment dismissing plaintiff's first cause of action. Counsel for plaintiffs, GINA GRIFFIN and KNOT TO BE FORGOTTEN, opposes the motion, which is determined as follows:

## Background

In the first cause of action, the plaintiff, GINA GRIFFIN (hereinafter referred to as "GRIFFIN"), alleges that her employment with DCJ CATERING CORP. d/b/a JERICHO TERRACE (hereinafter referred to as "JERICHO TERRACE"), was terminated because she suffered from panic attacks and that her alleged wrongful termination was "discrimination" pursuant to and in violation of her rights under Executive Law § 296. Defendants move to dismiss the first cause of action on the merits and with prejudice, pursuant to CPLR §3212(b), and the only opposition to the motion is a two (2) page Affirmation in Opposition from the plaintiff's attorney. Therein, he states that, by letter dated October 3, 2008, he offered to withdraw the first cause of action. In response to said letter, the defendants' attorney replied, by letter dated October, 2008, and stated, as follows:

> I have reviewed and discussed your October 3, 2008, letter with my client. My clients will not consent to withdrawal of the First Cause of Action. We will agree to you discontinuing this lawsuit and an exchange of General Releases. This is a frivolous claim. We intend to ask for legal fees for defending this part of this lawsuit.

The plaintiffs' perfunctory request to withdraw the first cause of action, in the affirmation in opposition without the consent of the defendant, is contrary to and in violation of the requirements of CPLR §3217(b) that states as follows:

> After the cause has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action.

It appears to the Court that, at this stage of the proceeding, the plaintiffs may not unilaterally discontinue the first cause of action. Therefore, the Court will treat the CPLR §3212 motion for summary judgment to dismiss the first cause of action to be on the

merits.

In support of the motion, the defendants have submitted the following proof: the summons and complaint; the answer, copies of the deposition transcripts of plaintiff GINA GRIFFIN, defendants CHRISTOPHER LEONE, the principal of JERICHO TERRACE, and ROBERT STEVENSON, general manager of JERICHO TERRACE, affidavits from ROBERT STEVENSON and John Feeney, the principal of one of the vendors, and a memo of notes prepared by the plaintiff for a meeting she had with ROBERT STEVENSON.

The record reflects that plaintiff was hired as the Vendor Coordinator for JERICHO TERRACE, in February, 2002, by defendant, CHRISTOPHER LEONE, the president of JERICHO TERRACE. Vendors are entities such as bands, florists, limo services, photographers, and videographers who, if they meet JERICHO TERRACE standards, are placed on a Preferred Vendor List. JERICHO TERRACE recommends its Preferred Vendors to its clients. The Vendor Coordinator is in charge of the Vendor Program, and meets with JERICHO TERRACE clients in order to help them plan their events, and promotes JERICHO TERRACE's Preferred Vendors by recommending them to clients. The Vendor Coordinator is also in charge of enlisting new vendors, improving the services of current vendors ,and improving the relationship between vendors, clients, and JERICHO TERRACE. Each vendor pays a fee to JERICHO TERRACE to be listed as a Preferred Vendor. The fee is based on the nature of the services provided and varies with each vendor.

At the same time that plaintiff was hired by JERICHO TERRACE, she also had her own wedding planning business from which she sold invitations, party favors and

calligraphy. Plaintiff was free to solicit JERICHO TERRACE clients for her own wedding planning business, to sell them invitations, calligraphy, and favors. The name of plaintiff's business was KNOT TO BE FORGOTTEN, the co-plaintiff in this action. In the area of her business' specialties, invitations, calligraphy and favors, plaintiff eventually became a JERICHO TERRACE Preferred Vendor, paying $300 per month for said listing. Since the plaintiff had a background as a wedding planner and event coordinator, she didn't require any training from the defendants. No specific work schedule was imposed and plaintiff made her own hours and her own appointments. Indeed, she was not required to perform her services at the JERICHO TERRACE location, although she often did. She also had her own office, off the JERICHO TERRACE premises, and had the freedom to meet with JERICHO TERRACE clients at the JERICHO TERRACE location, at her own office, at the client's home, or at a vendor. She was provided with a desk, which she shared with another part time employee, access to the JERICHO TERRACE telephone system, and a file cabinet where she maintained her own files for JERICHO TERRACE clients and her own clients. Plaintiff also used her own business telephone and cell phone, her own car, and paid all her own expenses. If needed, she purchased or obtained her own sales tools and supplies (Schedule C, plaintiff's tax returns for years 2002 to 2006).

It appears that plaintiff set her own schedule, made her own hours and made her own appointments. She did not have a specific work schedule and decided when, where, and how she was to work. The only requirement was that she would give JERICHO TERRACE approximately eighteen (18) hours per week, or at least enough time to complete her assigned task. It was also understood that plaintiff was free to promote and would be promoting her own business and selling her own services at the same time she

was promoting the JERICHO TERRACE Vendor Program. There is no indication that plaintiff was supervised by the defendants or required to attend regular staff meetings or submit written reports to defendants. Based upon the nature of her relationship with JERICHO TERRACE, and at her request, plaintiff was paid on a 1099 basis for the years 2002-2006, and paid her own taxes and social security. Schedule C of her tax returns show that plaintiff reported all of her income from JERICHO TERRACE as business income and took deductions for all of her expenses, including her office, travel, sales and entertainment expenses. These returns also show that the plaintiff had a substantial income from her own business, in addition to her income from JERICHO TERRACE.

Defendants assert, and plaintiff does not refute, that because plaintiff was an independent contractor, they had little or no control over how plaintiff performed her duties. Defendants contend that, when they attempted to assert some authority over plaintiff, they were unable to do so. At her deposition (pages 33-38), plaintiff testified that in preparation for a meeting with defendant STEVENSON, she prepared a memo (Exhibit "F") outlining why she was an independent contractor, and why her work and hours could not be controlled. Again, plaintiff does not refute that the defendants were unable to exert any control over her hours or how she did her job. The record reflects that plaintiff was the only employee of JERICHO TERRACE who was paid on a 1099 basis. She received $725.00 per week plus 10% of the gross income from the Vendor Program when receipts exceeded $10,000.00 per month. Within a short time of joining JERICHO TERRACE, she was able to increase income from the Vendor Program to over $10,000.00 per month.

Defendants also assert, and it is not refuted by plaintiff, that, in or about January, 2006, defendant STEVENSON, the General Manager of JERICHO TERRACE, was

approached by Daphna Gavita of Party Sensations, a Preferred Vendor, who complained that plaintiff was favoring certain vendors over others. Ms. Gavita reported that, when she complained to the plaintiff about this, plaintiff asked her for money. Defendants have submitted a letter from Ms. Gavita setting forth her complaint. At about the same time, another vendor, Earl Friedman, of Sherwood-Triart Photography, contacted the defendants by letter with a similar complaint about the plaintiff. Defendants submitted a letter from Mr. Friedman. Further, defendants learned that plaintiff had asked John Feeney of Flower Michele for money for a party referral scheduled for Mother's Day, 2006. It is alleged that plaintiff waited until after the event and then approached Feeney, who confirmed that he had given plaintiff $2,000.00 for this referral. When defendant confronted the plaintiff, she denied receiving the money. However, at her deposition, plaintiff admitted receiving $1,000.00 from Feeney (deposition of plaintiff, pg. 96, lines 4-10) and said it was a "gratuity." Defendants contend that whether one categorizes the payment as a kickback or gratuity, acceptance of the payment violated company policy and was a justifiable ground for termination.

The Court notes that there is no evidence whatsoever to support the plaintiff's claim that she was terminated because she suffered from "panic attacks." On the contrary, plaintiff was on notice and given every opportunity to refute defendants assertions that she was terminated for taking "kickbacks," for insisting on payments for referrals which is against company policy, and due to the complaints of clients of the defendants, but plaintiff has failed to refute same.

## The Law

In order to prevail under the New York State Human Rights Law, Executive Law § 296, plaintiff must establish that she was a member of the class protected by the statute. Executive Law § 296(1)(a) governs discrimination only in the traditional employer-employee relationship and not in the employment of an independent contractor. The determination of whether an employer-employee relationship exists rests upon evidence that the employer exercises either control over the results produced or over the means used to achieve the results. *See, Murphy v ERA United Realty*, 251 AD2d 469, 674 NYS2d 415 (2nd Dept. 1998).

The characteristics of whether an employee-employer relationship exists are set forth in *12 Cornelia Street, Inc. v Ross*, 56 NY2d 895, 453 NYS2d 402, 438 NE2d 1117 (C.A. 1982), where the Court of Appeals reversed the Appellate Division, Third Department, and found that the nature of the real estate agent's relationship with the real estate agency was one of independent contractor, not employment. The Court is persuaded by attorneys for defendants' excellent analysis of *12 Cornelia Street, Inc. v Ross, supra*, setting forth the similarities to the facts therein to those of the within action, and concludes that said case is controlling in the case at bar. In *Cornelia*, the salespersons were not permitted to draw against commissions. The plaintiff herein was not permitted to draw against commissions. In *Cornelia*, the salespersons were permitted to work whatever hours they chose (although a voluntary time schedule had been established). The plaintiff herein set her own hours and appointments and was permitted to work whatever hours she chose, within a general time frame of 18 hours per week. In

*Cornelia*, the salespersons had the flexibility to fix their own work schedule. Plaintiff herein had the flexibility to fix her own schedule. In *Cornelia*, the salespersons paid their own expenses. Plaintiff herein paid her own expenses. In *Cornelia*, the salespersons were not required to attend regular sales or any type of meeting and training was not mandatory. In the case at bar, JERICHO TERRACE did not require any training. In *Cornelia*, the salesperson had to pay their own health insurance premiums, if they wanted that coverage. No such plan was offered to the plaintiff herein. In *Cornelia*, while the salespersons were assigned leads, the majority of their sales contracts came form their own efforts. While plaintiff was provided a list of JERICHO TERRACE clients, her commissions were based on new vendors, which she solicited and contacted on her own, without leads from JERICHO TERRACE. In *Cornelia*, taxes were not withheld from the salespersons' pay. In the case at bar, taxes were not withheld from plaintiff's pay. Herein, plaintiff continued to run her own business, while working for JERICHO TERRACE. Herein, plaintiff reported her income from JERICHO TERRACE as business income, along with the income from her other endeavors, on Schedule C of her tax returns. It is not refuted that, since beginning her employment with JERICHO TERRACE, plaintiff has always fought to maintain her status as an independent contractor. She took advantage of that position. She avoided control by management, set her own hours and paid taxes as an independent contractor. Based on almost identical facts as in *Cornelia*, this Court concludes that an employee/ employer relationship did not exist between plaintiff and JERICHO TERRACE (*12 Cornelia Street, Inc. v Ross, supra*), and that plaintiff's status was that of an independent contractor. *See also, Hertz Corp. v Comm'r of Labor*, 2 NY3d 733, 778 NYS2d 743, 811

NE2d 5 [C.A. 2004]; *Bynog v Cipriani Group, Inc.*, 1 NY3d 193, 770 NYS2d 692, 802 NE2d 1090 [C.A. 2003]; *Scott v Massachusetts Mut. Life Ins. Co.*, 86 NY2d 429, 633 NYS2d 754, 657 NE2d 769 [C.A. 1995]). Based on the credible evidence submitted by the defendants, the Court finds that GRIFFIN was an independent contractor and not an employee.

In support of their motion for summary judgment, defendants have demonstrated, with probative evidence, that the plaintiff was not wrongfully discharged and that plaintiff was an independent contractor. It then became incumbent upon the plaintiff to demonstrate by affidavit, or other available proof, the existence of a triable issue of fact as to whether she was wrongfully discharged and/or an independent contractor. "Facts appearing in the movant's papers which the opposing party does not controvert may be deemed to be admitted." *SportsChannel Associates v Sterling Mets, L.P.*, 25 AD3d 314, 807 NYS2d 61 (1st Dept. 2006), quoting from *Kuehne & Nagel v Baiden*, 36 NY2d 539, 369 NYS2d 667, 330 NE2d 624 (C.A. 1975). Having failed to raise any issues of fact in opposition to the within motion, the plaintiffs must suffer the consequences of summary judgment. Accordingly, defendants request for summary judgment dismissing he first cause of action is granted.

To the extent that the plaintiff seeks to recover under the second cause of action for wage claims by an employee against an employer and for alleged violations of Labor Law § 198, the determination that the plaintiff, GINA GRIFFIN, was an independent contractor and not an employee is the law of the case, subject to the doctrine of collateral estoppel and *res judicata*. *See, Ryan v New York Telephone*, 62 NY2d 494, 478 NYS2d 823, 467 NE2d 489 (C.A. 1984); *Weiner v Greyhound Bus Lines Inc.*, 55 AD2d 189, 389

NYS2d 884 (2nd Dept. 1976). Accordingly, the second cause of action must be dismissed as well. CPLR §3212(e).

The silence of the plaintiff in failing to dispute any of the facts set forth in the moving papers is deafening and rife with implication. Based on the foregoing, it is hereby

**ORDERED,** that the first cause of action is dismissed with prejudice; and it is further

**ORDERED**, that the second cause of action is dismissed with prejudice; and it is further

**ORDERED,** that the remaining causes of action are severed and continued, and the parties shall appear for trial in Central Control Part on February 18, 2009, as previously scheduled.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: January 22, 2009

WILLIAM R. LaMARCA, J.S.C.

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