IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2020-009036-CA-01
SECTION: CA11
JUDGE: Carlos Lopez

Samuel Salmon

Plaintiff(s)

vs.

Sinton Technology Limited et al

Defendant(s)

_____/

ORDER DENYING DEFENDANT, BURKE BRANDS LLC.'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE, came before the Court on December 21, 2022 at 2:00 p.m., upon Defendant, BURKE BRANDS LLC'S Motion for Final Summary Judgment, and the Court having reviewed the written submissions, and having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendant, BURKE BRANDS LLC's (BURKE) Motion for Summary Judgment is DENIED.

A. *Court's may only enter summary judgment when the evidence is so one sided that on party must prevail as a matter of law*.

1. In addressing this factually driven issue pursuant to Florida's new summary judgment standard that went into effect in May of 2021, the Court understands that it must evaluate this case by looking at the evidence to determine if it is "**so one-sided that one party must prevail as a matter of law**," or whether there is a sufficient disagreement to require submission to a jury. *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). Even with the amendments to Fla.R.Civ.Pro. Rule 1.510, trial courts must still look at facts and draw all of the inferences in a light most favorable to the non-moving party. *See, e.g., Mize v. Jefferson City Board of Education*, 93 F.3d 939, 942 (11th Cir. 1996).

B. *This is an unique case of first impression, and while the Third District Court of Appeal may wish to change the law, this Court is bound by existing law that compels the Court to look at whether the Plaintiff "consciously intended" to elect workers' compensation as his remedy.*

2. The Court finds that this is a case of first impression. It involves unique facts, where it appears that for reasons unknown, the Defendant decided to gratuitously authorize the payment of workers' compensation benefits to one of its independent contractors, Mr. SALMON, while he lay unconscious in the hospital. *Compare*, *Lowry v. Logan*, 650 So.2d 653, 655 (Fla. 1st DCA 1995) ("The record below is silent as to why the workers' compensation carrier, who is not a party to these proceedings, accepted compensability of this accident.").

3. Adding to the uniqueness of this case, the Defendant at one point had actually moved for summary judgment on Mr. SALMON's status as its "employee," but then withdrew the motion on that basis, and never refiled it or set it for hearing. To his credit, **Defense counsel candidly admitted at the hearing on this Final Motion for Summary Judgment, that *Defendant could not prove as a matter of law that Mr. SALMON was an employee***, because the record contained evidence to the contrary.

4. The Court notes that there is NO case where issues of fact exist surrounding whether the worker was an "employee" or an "independent contractor," and the court concluded that an election occurred as a matter of law with no adjudication, or formal settlement of the claim.

5. On this record, the Court is unable to conclude that there are ***no*** genuine issues of material fact regarding whether the Plaintiff, Mr. SALMON, **consciously intended to elect workers' compensation as his remedy, and to waive his other rights**, (especially when he began receiving them while he was "unconscious"). It cannot conclude that there are ***no*** genuine issues of material fact regarding whether the Plaintiff, Mr. SALMON "**merely accepted" benefits**.

6. Therefore, the Court must **DENY** Defendant's Motion for Final Summary Judgment.

C. *The record contains a great deal of conflicting evidence that only the jury can weigh.*

7. During the hearing, the Court itself was struck by the many questions it had involving the "**weight**" of the evidence. The Court asked respective counsel about what "**weight**" they both assigned to various facts, *e.g.*, that Mr. SALMON was a W-9 worker and never formally adjudicated or settled his purported workers' compensation claim, or the fact that he had filed multiple petitions seeking benefits after Defendant gratuitously started paying them.

8. These different pieces of evidence necessarily create factual issues on Mr. Salmon's "conscious intent" –a subjective inquiry--and only a jury may assess, evaluate and reach conclusions about whether the evidence supports his "conscious intent" to waive all other rights, or not.

9. In concluding that the issue of election in this case requires the "weighing" of evidence by a jury, the Court has looked to the Florida Standard Jury Instructions, which address how factfinders must assess and weigh evidence in cases like this one, where the issue presented is not merely a legal one, or a "one-sided" one, but rather, one where credibility, believability and common sense inform an ultimate decision on an inherently factual matter like whether Mr. Salmon demonstrated a "**conscious intent**" to select workers' compensation and forego his civil case.

10. FSJI 401.3 (general negligence) and 403.3 (product liability) both define greater weight of the evidence as "the **more persuasive and convincing force and effect of the entire evidence** in the case" (emphasis added). FSJI 601.1 advises jurors when weighing the evidence to "**think about and weigh the testimony** and any documents, photographs, or other material that has been received in evidence." The instruction also tells them "your job is to determine what the facts are. **You may use reason and common sense to reach conclusions**. **You may draw reasonable inferences from the evidence**." FSJI 601.2, on the believability of witnesses, instructs jurors (among other things) to consider the "demeanor of the witness," the "frankness or lack of frankness of the witness," and the **reasonableness of the testimony of the witness**, considered in light of all the evidence in the case and in the light [of the juror's] own experience and common sense."

11. The Court finds that the question of whether there was an election presented by this motion for summary judgment necessarily requires the participation of jurors, who when armed with the instructions set forth above, will be able to weigh the various evidence and render a decision. As this Court is not in the business of weighing evidence or fact finding, it concludes that only the jury can

answer the factual questions of "*conscious intent*" to "*elect*" and "*waive*," before reaching the ultimate conclusion about whether there was an "election" which would bar the Plaintiff from being able to pursue his civil lawsuit at all.

12. The Court rejects Defendant's oversimplified argument, urging the court to grant summary judgment simply because the carrier paid benefits that the injured worker accepted.

13. Importantly, Defendant's argument contravenes well-established Third District law that governs this Court's ruling. The Third District has held that the "**mere acceptance of some compensation benefits…is not enough to constitute an election**. *See*, *Hernandez v. United Contractors Corp*, 766 So.2d 1249, 1252 (Fla. 3d DCA 2000) (*citing Lowry v. Logan*, 650 So. 2d 653, 657 (Fla. 1st DCA 1995), *Velez v. Oxford Dev. Co*, 457 So. 2d 1388 (Fla. 3d DCA 1984) and 2A A. Larson, *Workmen's Compensation* § 67.22 (1976)).

14. *Hernandez* also held that there cannot be an election unless there is "**evidence of a conscious intent by the claimant to elect the compensation remedy and to waive his other rights**." *Id*. at 1252 (emphasis in original).

15. While *Hernandez* is not on all fours with this case of first impression, the Court finds that the Third District's articulation of the test in *Hernandez* is the one that this Court must use to assess whether there are genuine issues of material fact on election,(*i.e*. did Mr. SALMON's consciously intend to elect workers' compensation as his remedy and waive this civil claim).

16. Not only does a jury have to determine whether there was a "**conscious intent**" to "**elect**" comp and "**waive**" his other rights, it must also decide whether there was more than a "***mere acceptance*** of compensation benefits."

17. Both parties have introduced admissible evidence into this record to support their respective positions.

18. The Plaintiff submitted (a) the Plaintiff's affidavit; (b) record evidence that Plaintiff was a W-9/independent contractor; (c) evidence that Defendant starting paying Mr. SALMON's workers' compensation benefits while he was unconscious in the hospital, and before Mr. SALMON himself

ever sought them; (d) that Mr. SALMON sought and hired a civil attorney long before seeking and hiring a workers' compensation attorney; and (e) the fact that Mr. SALMON **never adjudicated his claim in front of a JCC, settled a workers' compensation claim, or signed a release of any kind**. All of this evidence supports Mr. SALMON's position that he **did *not*** "**consciously intend**" to "elect" workers' compensation as his remedy and **waive his right to his civil claim**.

19. Conversely, the Defendant submitted evidence that the (a) Plaintiff subsequently filed multiple petitions seeking workers' compensation benefits after Defendant began paying those benefits, and (b) accepted workers' compensation benefits. This evidence provides support for Defendant's positon that Mr. SALMON may have consciously intended to elect workers compensation as his remedy, and to waive his other rights.

20. However, in assessing this record and Defendant's motion, this Court also notes that the civil claim Defendant asserts Mr. SALMON waived, has significant value far in excess of the workers' compensation benefits he has received. Additionally, in the event that the jury finds that Mr. SALMON did not consciously intend to "elect" workers' compensation as his remedy, the workers' compensation carrier possesses a lien where it will be reimbursed for the benefits it paid Mr. SALMON from any recovery made in the civil claim.

21. As Defense Counsel candidly admitted at the hearing, while workers' compensation affords an injured worker quick payment of medical benefits without the need to prove fault, **a civil claim entitles an injured victim to a much greater panoply of damages**. These damages include compensation for the pain and suffering Mr. SALMON has experienced and will continue to experience as a result of the catastrophic explosion that occurred at the Defendant's coffee making facility.

22. Independent contractors possess a valuable right to bring a civil claim against the entity for which he/she is working.

23. Here, the Court can see a version of the record evidence, where this Defendant tried to **unilaterally deprive Mr. SALMON of those rights**, by authorizing the payment of benefits as he **lay unconscious in a hospital bed**, even though **he was not actually eligible** for those benefits. It is

almost as if ***this*** **Defendant** ***attempted to "elect"*** workers' compensation as the remedy for Mr. SALMON – an independent contractor – even though the law does not allow it to make such a decision.

24. As described below, this record demonstrates that at the very least, **there is a genuine issue of material fact regarding whether an election of benefits has been made.** When juxtaposing this evidence against governing Third District law, the record confirms the existence of genuine issues of material fact, thereby forcing the Court to conclude that it **must leave it to a jury to weigh the evidence, and determine whether Mr. SALMON did or did not consciously intend** to elect workers compensation as his remedy, and **waive all of his rights** to bring this civil case.

D. *The cases upon which the Defendant relies are materially distinguishable from this case of first impression, and therefore unpersuasive to the Court.*

25. The Court wishes to address *Vallejos v. Lan Cargo*, 116 So.3d 545 (Fla. 3rd DCA 2013), relied upon heavily by the Defendant, and argued by both parties. Despite the Defendant's assertion that the case is on "all fours," it is not.

26. *Vallejos* involved a man working for a company (Professional Aviation Management) that supplied temporary help to a warehouse. At the warehouse, a *different worker* working for a *different entity* (Lan Cargo) that also supplied help to the warehouse, instructed Mr. Vallejos to perform a task he was not authorized to do.

27. Mr. Vallejos **sought and collected workers' compensation benefits *from his own employer***. He then negotiated a settlement with the carrier and **signed a broad release**. *Id*. at 547.

28. Two years after the settlement, Mr. Vallejos **sued the other company** that had employed the negligent worker, Lan Cargo, for negligence. That company defended by asserting that Mr. Vallejos had "elected his remedy by filing a petition for benefits, receiving payments, and **negotiating a settlement**." *Id*. at 548.

29. The *Vallejos* court explained why it was ruling there was an election in that case:

> **There was no question that Vallejos was injured during the scope of his employment**. **The signed release** states that Vallejos 'represents and affirms that all accidents, injuries, and occupation diseases known to have occurred or have been sustained while employed by the Employer have been revealed." Vallejos **admits that his entitlement to workers' compensation benefits was not a contested issue**. Unlike many of the aforementioned cases, Professional and its carrier never denied Vallejos' claim. Id. at 549. (Emphasis added).

30. *Vallejos* is materially distinguishable from this case. Here there **IS** a **question about whether the Plaintiff "was injured during the scope of his employment**." Here **there is no signed release**. Here while Defendant has not "contested" entitlement, Defendant did try—and the Court does not attribute good or bad motives to the Defendant's actions—to usurp the Plaintiff's right to bring a civil action by paying the benefits while he was unconscious in the hosptial, notwithstanding that Defendant's **personnel file on Mr. SALMON showed that he was actually an independent contractor/ W-9 worker**.

31. The Court finds that while Defense counsel opined that Defendant was being "punished" for doing the right thing and paying an injured worker benefits, its assessment of what the "right thing" was falls into a "gray" area requiring juror resolution. The Court finds that a jury will also have to evaluate the converse of Defendant's argument: *i.e,* whether the Court would be punishing Mr. SALMON by precluding him from pursuing the panoply of the benefits afforded by his civil remedy, simply because the Defendant **decided that it would gratuitously extend benefits to its independent contractor while he was unconscious in the hospital**

32. As the Defendant's carrier started to pay benefits while Mr. SALMON was in the hospital lying unconscious, the Court finds that a jury could view this timeline, and how it dovetails with Mr. SALMON's pursuit of additional benefits, in at least one of two different ways: either (a) the jury could find that because Defendant was paying Mr. SALMON's benefits ***before he sought them***, that Mr. SALMON could have believed he had a right to keep collecting benefits, while he pursued his civil lawsuit, as his Affidavit indicates, as long as he did not formally resolve his workers' compensation claim or sign a release,[1] (a position supported by both *Hernandez,* and *Lowry);* or (b) the jury could find that while Mr. SALMON ***did not actually seek*** workers' compensation

benefits at the outset, Defendant's carrier did start paying them while he was unconscious, but at some point between the time he received those first benefits and the time he filed his final petition for benefits, his actions **did** amount to a conscious intent to elect his remedy and waive his civil remedy.

33. Again, because this evidence could point to different conclusions, the Court finds that it cannot rule as a matter of law on summary judgment, and needs the help of the jury as fact finder to resolve these issues.

34. At the hearing, the Defendant also referred to the ***cases cited by Vallejos***, *supra*., for the proposition that "there are numerous cases which hold that when an employee is injured on the job and then applies for and receives workers' compensation benefits, a subsequent negligence claim is barred." *Id.* at 549. In reading those cases, the Court **also finds them to be materially distinguishable**.

35. Both *Yero v. Miami-Dade Cnty*, 838 So.2d 686, 687 (Fla. 3d DCA 2003) and *Delta Air Lines v. Cunningham*, 659 So.2d 556, 557 (Fla. 3d DCA 1995), involved situations where workers had collected workers' compensation benefits from their employers. ***Neither side in either case had disputed that the worker was in the course and scope of his employment***. However, **after they received and settled their workers' compensation claims with their own employers, *they then sought to sue one of the other subcontractors* on the project**.

36. The courts in both of those cases concluded that because the other subcontractors were considered "statutory employers" of the workers, those workers were restricted to workers' compensation as their remedy, and barred from bringing a civil suit against any of their "employers," be they actual employers or statutory employers.

37. In *Townsend v. Conshor, Inc*., 832 So.2d 166 (Fla. 2d DCA 2002), also cited by *Vallejos*, the worker sued his own employer and a manufacturer for a defective railing that gave way causing the worker to fall and get injured. There, the worker had sued his employer for simple negligence and pursued a workers' compensation claim at the same time. There was no evidence that the worker was not in the course and scope of his employment. After the worker **formally settled his workers' compensation claim and executed a general release**, the court found he had elected his remedy.

38. Again, the Court rejects Defendant's primary argument that the issue for the Court to decide is simply

whether the Defendant paid workers' compensation benefits that were accepted by the Plaintiff. Merely accepting benefits by itself is not enough to show an election as *Hernandez* teaches us. **The threshold for whether Mr. SALMON consciously elected workers' compensation as his remedy and intended to waive his other rights, is far higher than that**.

39. This record is replete with factual questions about (a) why Defendant paid benefits to one who certainly appeared to be an independent contractor; (b) whether the Defendant's potentially gratuitous payment of benefits, can now be used as a sword against the Plaintiff to prevent him from bringing a civil lawsuit he would have been entitled to bring as a W-9/ independent contractor of the Defendant; (c) whether a person who has never settled or adjudicated a workers' compensation claim, and never signed a release of any kind, can be held under the law to have consciously "elected" workers' compensation as his remedy; and (d) whether an injured worker who accepts benefits and files additional petitions thereafter, has "consciously elected" his remedy in workers' compensation.

40. In light of these clear genuine issues of material fact presented by this record, this Court cannot find that the evidence is so one-sided as to permit entry of summary judgment as a matter of law.

41. WHEREFORE, it is hereby ORDERED AND ADJUDGED that Defendant, BURKE BRANDS LLC's Motion for Final Summary Judgment is **DENIED**.

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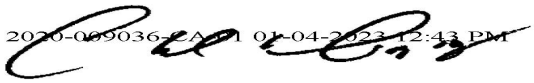
[1] Plaintiff outlined the cases in both his Response and in counsel's Power Point presented at the hearing, describing what kinds of actions amount to an "election" for these purposes. These cases all suggest there must be an adjudication on the merits, a final settlement, a release, or some indication that the issue was resolved in some formal way.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 4th day of January, 2023.



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Hon. Carlos Lopez

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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