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FILED

JUL 11 2014

LAWRENCE M. MARON, J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

DOCKET NO. HUD-L-6191-11

Civil Action

GONZALO CHIRINO, FELIX D. JAY, ANDREW ANKLE, GARY JOSEPHS, RENE CAMPBELL, ASTON HEMLEY and MARYAN VASYUTA, on behalf of themselves all others similarly situated,

Plaintiffs,

v.

PROUD 2 HAUL, INC., IVANA KOPROWSKI, and "Anonymous Managers 1-5" (names being fictitious),

Defendants.

ORDER GRANTING PLAINTIFFS PARTIAL **SUMMARY JUDGMENT ~~AND A PERMANENT INJUNCTION~~**

This matter, having been opened to the Court by motion of David Tykulsker & Associates, attorneys for plaintiffs, seeking summary judgment awarding damages and a permanent injunction to discontinue certain pay practices, and the Court having considered the moving papers, any opposition and reply papers submitted, the arguments of counsel, and good cause appearing,

IT IS this 11 day of July, 2014, **ORDERED and ADJUDGED** that

1. Plaintiff's Motion be and hereby is granted IN PART.

2. Defendants, jointly and severally, are declared to have violated the Motor Carrier Act, ~~the New Jersey Wage Payment Law, and this State's common law of conversion by~~ making deductions for worker's compensation, other, "E-Log", Parking, Fuel Fee, and Port Pulls

("the Improper Deductions"). ~~Plaintiffs are entitled to damages from defendants, jointly and severally, in the amount of $1,214,264.15 as set forth in Exhibit B to the Certification of Jeffrey Olshansky Concerning Improper Deductions.~~ DENIED

3. ~~Defendants, jointly and severally, are declared to have violated the Motor Carrier Act and this State's common law of fraud with regard to their misrepresentation of the Hub Group delivery price. Plaintiffs are entitled to damages of defendants, jointly and severally, in the amount of $249,656.39 as set forth in Exhibit B to the Certification of Jeffrey Olshansky Concerning Improper Deductions.~~ WITHDRAWN

4. ~~Defendants are permanently enjoining to either state accurately the delivery price on the load tenders or to use the load tender price as the basis to calculate compensation for so long as defendants continue their practice of providing the load tender to the Class as the document setting the price of the delivery.~~ withdrawn

5. Defendants, jointly and severally, are declared to have violated the Motor Carrier Act by their failure to have in place a written lease with the Class during the first quarter of 2014. ~~Plaintiffs are entitled to damages jointly and severally of defendants in the amount of $657,189.58 as set forth in Exhibit A to the Certification of Jeffrey Olshansky concerning 2014 *Brinker* damages.~~

6. Defendants, jointly and severally, are declared to have violated the Motor Carrier Act by defendants' failure to pay the fuel taxes of those Class members who purchased fuel directly during the period in which the Second Lease was effective. ~~Plaintiffs are entitled to damages in the amount of $210,548.22 as set forth in Exhibit B to the Certification of Jeffrey Olshansky Concerning Fuel Taxes.~~ DENIED

7. Defendants jointly and severally, are declared to have violated the New Jersey Worker's

Compensation Law, N.J.S.A. 34:15-57.4, by their knowing and purposeful deductions of the worker's compensation premiums from the pay of the Class through June 4, 2012. Plaintiffs are entitled to damages in the amount of $886,009.61 as set forth in Exhibit B to the Certification of Jeffrey Olshansky Concerning Improper Deductions As this amount is included in the damages set forth in paragraph 2 above, these damages need not be paid separately. DENIED

8. Plaintiffs are awarded prejudgment interest on their proven damages in the amount of $136,201.55. DENIED

9. Class Counsel is allowed a reasonable attorney's fee and costs. Class Counsel shall file and serve a Motion for same after TRIAL within fourteen days of this date. Defendants shall respond within fourteen days of service of the motion, and Class Counsel shall reply within seven days of the response.

10. The matter shall be set down for trial as to the issue of Damages and whether Plaintiffs are whether plaintiffs are entitled to exemplary damages and, if so, how much.

OPPOSED

L. Maron
LAWRENCE M. MARON, J.S.C.

For The Reasons Set Forth In The Attached Findings Of Fact And Conclusions Of Law

TRIAL DATE REMAINS SEPTEMBER 29, 2014.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Chirino v. Proud 2 Haul

Docket: L-6191-11

Motion Returnable: 7/11/14

Relief Requested: Summary Judgment

RELEVANT PROCEDURAL HISTORY AND PARTIES

- This litigation surrounds the relationship between class action Plaintiffs, owner-operators of trucks, and Defendants, Proud 2 Haul (P2H),a federally regulated motor carrier, and its owner, Ms. Ivana Koprowski.
- This Court has previously held that Defendants violated the federal Truth-in-Leasing Regulations (TIL Regulations) by failing to have in place written leases between Plaintiffs and P2H.
- This Court has also previously held that Defendants wrongfully deducted certain money from Plaintiffs' compensation because those deductions were not specified in the written lease, which is required by the TIL Regulations.

MOVANT'S ARGUMENT

- Plaintiffs seek summary judgment on the following issues:
    - Defendants violated the federal TIL Regulations, the New Jersey Wage Payment Law and committed common law conversion with regard to compensation for jobs performed for the HUB Group.
    - A permanent injunction should issue requiring Defendants to accurately state the delivery price on load tenders or to use load tender price as the basis to calculate compensation.
    - Defendants violated the TIL Regulations by not having written leases in place with Plaintiffs during the first quarter of 2014.
    - Defendants violated the TIL Regulations by failing to pay fuel taxes for those individuals who purchased fuel directly (rather than on a WEX credit card) during the effective period of the second lease.
    - Defendants violated the Workers' compensation law by deducting workers compensation premiums from Plaintiffs pay.
        - Defendants are employees under the workers Compensation Law, not independent contractors
- Various government agencies have declared P2H to be the employer of Defendants.

OPPOSITION ARGUMENT

- Plaintiffs should be estopped from asserting that they are employees, because they have previously succeeded in having this Court determine that they are independent contractors.
- Plaintiffs were properly paid for work performed for the HUB Group.
    - The leases specifically say that the payment is made based on gross revenue, not the load tender, which is consistent with the TIL Regulations.
    - Defendants were overpaying Plaintiffs.
- There is no evidence of fraud.
- Plaintiffs have not proved the amount of damages attributable to each Plaintiff and, therefore, have not borne their burden.
- No government agency has ever adjudicated that Plaintiffs are employees of P2H. Any determination that has been made was not adversarial.
- Plaintiffs are independent contractors.
- Plaintiffs conversion claim is pre-empted.
- Defendants have not committed workers compensation fraud.

REPLY

- Plaintiffs withdraw their request for judgment surrounding the HUB Group compensation.
- Defendants committed workers compensation fraud.
- Plaintiffs are not estopped from arguing they are employees.
- Plaintiffs have appropriately calculated damages given the inability of Defendants to provide discovery.
- Plaintiffs common law claims are not preempted.

FINDINGS OF FACT AND LEGAL ANALYSIS

The standard for summary judgment is set forth in R. 4:46-2, and has been clarified by the New Jersey Supreme Court in Brill v. The Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). An order for summary judgment "shall be rendered if the pleadings...show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In Brill, the New Jersey Supreme Court held that:

> Whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are

> sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party.

Brill, 142 N.J. at 540. On a motion for summary judgment, the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. Id.

It is well settled that "a trial court should not grant summary judgment when the matter is not ripe for such consideration, such as when discovery has not yet been completed. See, Salomon v. Eli Lilly & Co., 98 N.J. 58 (1984). The Court should afford "every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case." Oslacky v. Borough of River Edge, 319 N.J.Super. 79, 87 (App.Div.1999) (quoting Velantzas v. Colgate–Palmolive Co. Inc., 109 N.J. 189, 193 (1988)).

Summary judgment should not be granted where adjudication of such motion would constitute what essentially results in a trial by affidavits on issue of fact. Shanley & Fischer, P.C. v. Sissleman, 251 N.J. Super. 200 (App. Div. 1987).

If a party fails to comply procedurally when opposing such a motion, failure to comply with the rule will not justify a grant of the motion based on the assumption that the movant's statement of material facts is true when the record as a whole clearly shows a material dispute. Legan v. Jersey City Bd. Of Education., 399 N.J. Super. 329, 367 (App. Div. 2008) aff'd in part and rev'd in part on other grds 198 N.J. 557 (2009).

This is Plaintiffs' motion for summary judgment. Plaintiffs must, therefore, establish that they are entitled to judgment as a matter of law and that there are no issues of fact which the Court could resolve in favor of Plaintiffs such that judgment would be inappropriate. The Court will address each of Plaintiffs' claims in turn.

I. FAILURE TO HAVE WRITTEN LEASES FOR 1Q 2014.

It is uncontested that P2H did not have written leases in effect with Plaintiffs whom they continued to engage for the first quarter of 2014. This issue was addressed in Plaintiffs' April 11, 2014 motion, which made it apparent that Defendants had not entered into leases until, at the earliest, after the February 28, 2014 motion for reconsideration was decided.[1] The parties

[1] Plaintiffs' counsel asserts that while two leases were signed on March 19, 2014 the remainder of the leases were not signed until, at the earliest, March 31, 2014.

ultimately entered into leases, which this Court determined were not entirely in conformity with the TIL Regulations.

This Court has previously held that Brinker v. Namcheck, 577 F. Supp. 2d 1052 (W.D. Wisc. 2008), articulates the appropriate methodology for quantifying damages.

Brinker held that when quantifying the damages owed by a federally regulated motor-carrier for violating the TIL Regulations, the motor carrier is responsible for any expenses not specified in the lease to be paid by the owner-operator. Defendants have not objected to the use of the Brinker formula.

Thus, as there were no leases, Defendants are obligated to bear all costs they charged to Plaintiffs.

Plaintiffs have calculated Brinker damages as $657,189.58, exclusive of prejudgment interest totaling $4,337.45.

While Defendants' brief does not directly address the issue of first quarter leases, they argue that Plaintiffs' valuation of damages should be disregarded because Plaintiffs have not appropriately demonstrated actual damages attributable to each Plaintiff. See Brinker 577 F. Supp. 2d at 1055 (calculating damages as the "exact amount" of the overcharge).

Defendants cite to Owner-Operator Independent Drivers Association v. Landstar Systems, 622 F.3d 1307, 1326 (11th Cir. 2010), for the proposition that federal courts have previously determined classes, such as the one in this case, must be de-certified so that exact damages can be calculated. Notably, no application to de-certify is presently before this Court.

Nevertheless, Defendants have provided the Court with the certification of a Certified Public Accountant who opined that the calculations provided by Plaintiffs' counsel did not reflect actual damages sustained.

This Court has previously allowed Plaintiffs to use formulae and extrapolations to calculate damages where those damages were sufficiently precise to serve as a tabulation of actual damages, as is permissible under precedent. See Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 128-29 (App. Div. 2002), certif. den. 176 N.J. 279 (2003); Caldwell v. Haynes, 136

N.J. 422, 442 (1994), Borough of Fort Lee v. Banque National de Paris, 311 N.J. Super. 280, 291 (App. Div. 1998); Kozlowski v. Kozlowski, 80 N.J. 378, 377 (1979). On a previous motion, returnable February 28, 2014, Defendants opposed Plaintiffs' application for attorney's fees, but there was no substantive opposition to the use of such methodologies to quantify damages. Thus, since the quantification of damages was unopposed in the prior application by Plaintiffs, the Court found no impediment to entering judgment in the amount claimed by Plaintiffs.

Here, however, Defendants have challenged Plaintiffs' damage figure and so there is a dispute as to whether the calculation of damages is sufficiently precise to permit this Court to grant summary judgment or whether the proofs provided would lead to speculative damages.

Plaintiffs' argue that $886,009.61 for workers compensation deductions is derived from a 4% deduction from the Class' pay and is precise. All other sums are derived from various methodologies in an attempt to create a reasonable estimate of the amount owed. Plaintiffs' assert that this endeavor is necessary because Defendants were unable to produce adequate records in discovery that Plaintiffs could use to tabulate damages.

The cases Plaintiffs cite demonstrate that the issue of damages is not ripe for summary judgment. Plaintiffs rely on cases such as V.A.L. Floors, Inc. v. Westminster Communities, Inc., 355 N.J. Super. 416 (App. Div. 2002) for the proposition that a "reasonably accurate and fair" method of quantifying damages is not impermissibly speculative. While supportive of the proposition Plaintiffs advance, V.A.L. Floors also states: "it is certain that plaintiffs are entitled to some damages, although it is uncertain how much. That is a question that must ultimately be decided by the jury, acting, as in other cases, 'upon reasonable inferences and estimates.'" Id. at 427.

Stated differently, the issue of damages, when calculated through the application of formulae and extrapolations, when challenged, must be presented to the trier of fact. The Court does not act as a trier of fact on a motion for summary judgment, but rather a gatekeeper to determine if there are any issues for the trier of fact to resolve. Here, as recognized by the Appellate Division in V.A.L. Floors, the use of a "reasonably accurate and fair" methodology to calculate damages gives rise to a jury question, making summary judgment inappropriate and requiring a trial.

Therefore, this Court can grant summary judgment on the issue of liability only since that issue was uncontested in the motion papers and at oral argument.

II. HUB GROUP JOBS, INJUNCTIVE RELIEF AND COMMON LAW FRAUD

In their reply brief, Plaintiffs recognized that there was an issue of fact concerning the compensation for HUB Group jobs and withdrew their request for damages and an injunction.

Therefore, Plaintiffs' motion for summary judgment, with regard to underpayment for services rendered to HUB Group shall be deemed as withdrawn.

Plaintiffs also sought summary judgment on a claim for common law fraud stemming from the alleged HUB Group underpayments. However, Plaintiffs' reply brief does not purport to seek judgment on this claim and, instead, withdraws the other claims related to HUB Group compensation. Therefore, the Court finds that the request for summary judgment on the claim for common law fraud has also been withdrawn.

III. EMPLOYEE STATUS UNDER THE WAGE PAYMENT LAW AND WORKERS COMPENSATION LAW

Plaintiffs seek summary judgment on their claims under the Wage Payment Law and the Workers Compensation Law.

Plaintiffs, to prevail, must demonstrate that they are employees, rather than independent contractors, because N.J.S.A. 34:11-4.1(b) specifically provides that the statutory scheme does not apply to independent contractors or subcontractors. Plaintiffs also must demonstrate they are employees to prevail on a claim for Workers' Compensation Fraud.

Defendants' arguments that Plaintiffs are estopped from asserting they are employees are unfounded. This Court has not determined that Plaintiffs are independent contractors in any of the previous motions that have been filed in connection with this matter and such a finding has not been integral to any of this Court's prior holdings. Defendants misread this Court's determination that they violated the TIL Regulations by failing to have a lease in place with each owner operator as a statement that the owner-operators are, necessarily, independent contractors. However, the Court has never made such a finding. Defendants assert that a party can be estopped from taking a position contrary to a prior position upon which it succeeded. See Def's

Br. at 26 (citing Bray v. Cape May City Zoning, 378 N.J. Super. 160 (App. Div. 2005)). Because the Court finds that there has been no prior inconsistent position, Plaintiffs are not estopped from raising that issue in this motion.

The definition of employee provided by the Wage Payment Law is:

> any person suffered or permitted to work by an employer, except that independent contractors and subcontractors shall not be considered employees.

Plaintiffs rely on the first clause of the definition "suffered or permitted to work by an employer" and assert that because Defendants permitted Plaintiffs to work for them, they are "employees."[2]

While it is uncontested that Plaintiffs were "suffered to work" by Defendants, the question becomes whether they fall under the exception to the statute. Namely, whether they are independent contractors.

Plaintiffs assert that they are employees by virtue of the "hundreds if not thousands of admissions by defendants that Class members are employees, together with the findings of both state and federal agencies that the relationship between the class and the defendants is one of employee/employer. . . ." Pla's Br. at 51.

Defendants contend that the "admissions" cited by Plaintiffs are federally mandated forms which they are required to complete. Defendants maintain that, pursuant to North American Van Lines v. NLRB, 869 F. 2d 596, 599 (D.C. Cir. 1989); Fedex Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009) and Ruiz v. Affinity Logistics Corp., 697 F. Supp. 2d 1199, 1206-07 (S.D. Cal 2010), the use of federally required forms that nominally present an employee-employer relationship is insufficient to conclude that such a relationship actually exists. See Def's Sup. Br. at 3-5.

To utilize the language of forms required by federal regulations would elevate form over substance. The use of an employer-employee dichotomy in a pre-printed, mandatory, form is not

[2] For reasons that shall be elucidated, infra, the Court need not recite or address Plaintiffs arguments regarding the history of the use of the phrase "suffer or permit to work" or any of the allegedly analogous contexts in which that phrase has been interpreted.

a voluntary admission by Defendants that they employ Plaintiffs. Moreover, the fact that Defendants have Plaintiffs fill out a federal I-9 Form, which is not required for independent contractors, cannot be the source of a determination that Plaintiffs are actually employees. Moreover, as Plaintiffs' brief states, the terms used in a written agreement between the parties is "play no part whatsoever in the determination of whether a worker is an employee or an independent contractor." Pla's Reply Br. at 40 (citing Caicco v. Toto Bros., Inc., 62 N.J. 305, 310 (1974)).

Plaintiffs point to decisions of the NLRB, US Department of Labor, New Jersey Department of Labor and New Jersey Division of Workers Compensation that found Plaintiffs to be employees.

Defendants maintain that these "decisions" were not the product of adversarial proceedings where P2H was given a right to respond.

There is no evidence in the motion record that P2H had the opportunity to contest any agency decision upon which Plaintiffs rely or that any constituted an adjudication through the adversarial process. Viewing the record in the light most favorable to Defendants, because P2H did not have an opportunity to respond to any agency that might have "decided" it was Plaintiffs' employer, they have not litigated the issue such that they are now estopped from arguing Plaintiffs are not employees.

Thus, the Court is required to address whether the facts, when viewed in the light most favorable to Defendants, demonstrate that Plaintiffs are employees under the applicable test for determining the existence of an employment relationship.

The question of what test the Court should utilize to make the determination has not been resolved. The same question was recently presented to the Third Circuit Court of Appeals, which certified the question to the Supreme Court of New Jersey. See Hargrove v. Sleepy's, Docket No. 072742. Although the Supreme Court heard oral argument on this issue in March, 2014, no decision has been rendered as of the time of this motion.

The potential tests cited by the parties for the Court to utilize are the "relative nature of the work test" the "right to control test," the "exemption test for truck drivers under the New Jersey

Unemployment Compensation Law," the Third Circuit test for the Fair Labor Standards Act" and the "IRS 20 Factor Control Test."

As a preliminary matter, the Court notes that the standard for summary judgment provides guidance on the inquiry that must be made. Under that standard, the Court must determine whether Plaintiffs have borne their burden by demonstrating that, as a matter of law, they are employees. The Court need not reach, and shall not reach, the issue of whether Plaintiffs are, in fact, independent contractors. The only inquiry required on this motion is whether Plaintiffs have proved, beyond factual and legal dispute, that they are employees of P2H.

Plaintiffs contend that "suffer or permit to work" indicates an intent to have a broad, inclusive test of employee status. In that vein, Plaintiffs assert that the common law right of control test has been abandoned by our courts in favor of the relative nature of the work test. See Marcus v. Eastern Agricultural Ass'n, Inc., 58 N.J. Super. 584, 602 (App. Div. 1959), rev'd adopting Judge Conford's dissent, 32 N.J. 460 (1960).

Under that test, the Court would be asked to determine "the extent of the economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business." 58 N.J. Super. at 603. See Also Tofani v. Lo Biondo Bros. Motor Express, Inc., 83 N.J. Super. 480, 493 (App. Div.), aff'd o.b., 43 N.J. 494 (1964) (finding that an individual who became a "cog" in the regular business of a trucking company became its employee for purposes of workers compensation).

Plaintiffs look to the State's Alcoholic Beverage and Control regulations to support the conclusion that "suffer or permit to work" should be interpreted broadly to encompass them as employees. See Kravis v. Hock, 137 N.J.L. 252 (E & A 1949); Freud v. Davis, 65 N.J. Super. 242 (App. Div. 1960).

Plaintiffs also cite precedent interpreting the Fair Labor Standards Act for the proposition that the term "suffer or permit to work" may cause certain relationships to be employment relationships even though they may have previously been otherwise classified. See Walling v. Portland Terminal Co., 330 U.S. 148 (1947).

Defendants argue that the Unemployment Compensation Law for independent contractor truck drivers should govern the application of the Wage Payment Law to this context. Specifically, Defendants assert that N.J.S.A. 43:21-19(i)(6)(X) provides that unemployment benefits are not required to be paid for:

> Services performed by operators of motor vehicles weighing 18,000 pounds or more, licensed for commercial use and used for the highway movement of motor freight, who own their equipment or who lease or finance the purchase of their equipment through an entity which is not owned or controlled directly or indirectly by the entity for which the services were performed and who were compensated by receiving a percentage of the gross revenue generated by the transportation move or by a schedule of payment based on the distance and weight of the transportation move;

Defendants assert that it would be incongruous to have an individual be an employee under one statutory scheme and an independent contractor under another. Defendants also note that a bill has been introduced which would amend this test (but not affect the applicability of the statute to P2H, leaving Plaintiffs as exempt). However, the Court cannot glean the intent of the Legislature from proposed legislation.

Alternatively, Defendants rely on a test developed by the IRS in 1987 called the "20 factor control test." This "test" provides a list of factors that courts could consider to determine whether an employer-employee relationship existed. Those factors are:

> 1. Instructions: If the person for whom the services are performed has the right to require compliance with instructions, this indicates employee status.
>
> 2. Training: Worker training (e.g., by requiring attendance at training sessions) indicates that the person for whom services are performed wants the services performed in a particular manner (which indicates employee status).
>
> 3. Integration: Integration of the worker's services into the business operations of the person for whom services are performed is an indication of employee status.
>
> 4. Services rendered personally: If the services are required to be performed personally, this is an indication that the person for

whom services are performed is interested in the methods used to accomplish the work (which indicates employee status).

5. Hiring, supervision, and paying assistants: If the person for whom services are performed hires, supervises or pays assistants, this generally indicates employee status. However, if the worker hires and supervises others under a contract pursuant to which the worker agrees to provide material and labor and is only responsible for the result, this indicates independent contractor status.

6. Continuing relationship: A continuing relationship between the worker and the person for whom the services are performed indicates employee status.

7. Set hours of work: The establishment of set hours for the worker indicates employee status.

8. Full time required: If the worker must devote substantially full time to the business of the person for whom services are performed, this indicates employee status. An independent contractor is free to work when and for whom he or she chooses.

9. Doing work on employer's premises: If the work is performed on the premises of the person for whom the services are performed, this indicates employee status, especially if the work could be done elsewhere.

10. Order or sequence test: If a worker must perform services in the order or sequence set by the person for whom services are performed, that shows the worker is not free to follow his or her own pattern of work, and indicates employee status.

11. Oral or written reports: A requirement that the worker submit regular reports indicates employee status.

12. Payment by the hour, week, or month: Payment by the hour, week, or month generally points to employment status; payment by the job or a commission indicates independent contractor status.

13. Payment of business and/or traveling expenses. If the person for whom the services are performed pays expenses, this indicates employee status. An employer, to control expenses, generally retains the right to direct the worker.

14. Furnishing tools and materials: The provision of significant tools and materials to the worker indicates employee status.

15. Significant investment: Investment in facilities used by the worker indicates independent contractor status.

> 16. Realization of profit or loss: A worker who can realize a profit or suffer a loss as a result of the services (in addition to profit or loss ordinarily realized by employees) is generally an independent contractor.
>
> 17. Working for more than one firm at a time: If a worker performs more than de minimis services for multiple firms at the same time, that generally indicates independent contractor status.
>
> 18. Making service available to the general public: If a worker makes his or her services available to the public on a regular and consistent basis, that indicates independent contractor status.
>
> 19. Right to discharge: The right to discharge a worker is a factor indicating that the worker is an employee.
>
> 20. Right to terminate: If a worker has the right to terminate the relationship with the person for whom services are performed at any time he or she wishes without incurring liability, that indicates employee status.

Defendants also cite Luxama v. Ironbound Express Inc., 2012 U.S. Dist. LEXIS 99292 (June 28, 2012) and the Third Circuit test for employment under the Fair Labor Standards Act. That test has six factors:

> 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; [and] 6) whether the service rendered is an integral part of the alleged employer's business.
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> [Martin v. Selker Bros., Inc., 949 F.2d 1286, 1293 (3d Cir. 1991)).]

Importation of the IRS 20 Factor control test is unwarranted in this case. Plaintiffs do not attempt to demonstrate that they are employees under such a test and, therefore, have not claimed that this test would make them employees as a matter of law. Furthermore, Defendants have not demonstrated why this Court should adopt that test to determine the status of Plaintiffs on State law claims.

Although this is a case involving interstate trucking, which is federally regulated, the claims advanced are under State statutes, not federal statutes such as the Fair Labor Standards Act. Defendants have not provided adequate support for the proposition that this Court should adopt a test designed to apply to a federal analogue when our Courts have articulated tests under the State statutes.

Defendants' claim that the Court should apply the Unemployment Law exemption to the Workers Compensation statute to provide uniformity across statutory schemes, while attractive at first glance, is not supported by any legal authority advanced to this Court. Defendants have not provided the Court with any authority for the proposition that an entity could be an employer under the Workers' Compensation Law and the Wage Payment Law, but not under the Unemployment Compensation Law.

The Appellate Division has detailed the scheme for determining whether an individual is an employee or an independent contractor. In Auletta v. Bergen Center for Child Development, 338 N.J. Super. 464 (App. Div.), certif. den. 169 N.J. 611 (2001), the Court wrote:

> Under the Workers' Compensation Act, the term "employee" is "synonymous with servant, and includes all natural persons . . . who perform services for an employer for financial consideration, exclusive of . . . casual employment." N.J.S.A. 34:15-36. Our courts interpret "employee" broadly and include "relationships not ordinarily considered to constitute employment." Hannigan v. Goldfarb, 53 N.J. Super. 190, 195, 147 A.2d 56 (App.Div.1958). However, the Act does not include "independent contractors." Independent contractors are defined as:
>
> one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is accomplished, but only as to the result of work.
>
> [Lesniewski v. W.B. Furze Corp., 308 N.J. Super. 270, 280, 705 A.2d 1243 (App.Div.1998)(quoting Cappadonna v. Passaic Motors, Inc., 137 N.J.L. 661, 61 A.2d 282 (E. & A.1948))].
>
> Two tests have developed to determine whether a person is an employee or an independent contractor: (1) the "right to control test" and (2) the "relative nature of the work" test. Pollack v. Pino's Formal Wear & Tailoring, 253 N.J. Super. 397, 407, 601 A.2d 1190 certif. denied, 130 N.J. 6, 611 A.2d 646 (1992). These tests

> have developed to assist in drawing a line "between those occupations which are properly characterized as separate enterprises and those which are in fact an integral part of the employer's regular business." Ibid. In recent years "[t]he courts have placed a greater reliance upon the relative nature of the work test," than upon the control test. Ibid. See Conley v. Oliver and Co., 317 N.J. Super. 250, 254, 721 A.2d 1007 (App.Div.1998).
>
> "Under the control test the actual exercise of control is not as determinative as the right of control itself . . . because, in many instances, the expertise of an employee precludes an employer from giving him any effective direction concerning the method he selects in carrying out his duties." Smith v. E.T.L. Enterprises, 155 N.J. Super. 343, 350, 382 A.2d 939 (App.Div.1978); Conley, supra, 317 N.J. Super. at 255, 721 A.2d 1007. The determination depends upon whether the employer had "the right to direct the manner in which the business or work shall be done, as well as the results accomplished." Kertesz v. Korsh, 296 N.J. Super. 146, 152-53, 686 A.2d 368 (App.Div.1996).
>
> [Id. at 470-72.]

The Appellate Division went on to describe the application of these tests:

> "Where the control test is not accepted as the dispositive factor, the focus then turns to the relative nature of the work test in deciding whether plaintiff is an employee or independent contractor." Kertesz, supra, 296 N.J. Super. at 154, 686 A.2d 368. Under the "relative nature of the work test" a court must determine (1) whether the work performed by petitioner was an integral part of the regular business of defendant; and (2) whether petitioner demonstrated "substantial economic dependence" upon the employer. Sloan v. Luyando, 305 N.J. Super. 140, 148, 701 A.2d 1275 (App.Div.1997) (citing Caicco v. Toto Brothers, Inc., 62 N.J. 305, 310, 301 A.2d 143 (1973)).
>
> [Id. at 472.]

The satisfaction of either the "control test" or the "relative nature of the work test" suffices to establish an employer-employee relationship. Id. at 473.

Defendants assert, at page 57 of their Brief, that the nature of trucking delivery services is such that [P2H] has the potential right to control many aspects of the services performed by the drivers but does not do so, so that the "right to control test" is properly applied here . . . " (emphasis in original).

Thus, Defendants, in essence, admit that they have the right to control Plaintiffs operations, but elect not to do so. As the cases cited by Defendants state, it is the right rather than the exercise of control that is dispositive. See Def's Br. at 58-59 (quoting Aetna Insurance v. Trans American, 261 N.J. Super. 316 (App. Div. 1993)). Defendants then implore the Court to utilize the IRS 20 factor test, which, as noted supra, this Court determined to be unnecessary.

Notably, Defendants do not cite any cases that adopt the IRS test. Instead, Defendants cite Carpet Remnant Warehouse v. Dep't of Labor, 125 N.J. 567, 584 (1991), which addresses factors encompassed in the IRS test and Stevens v. Board of Trustees, 294 N.J. Super. 643, 653 n.1 (App. Div. 1996), in which the Appellate Division declined to determine whether rejection of the IRS test was appropriate.

The primary factors to consider, according to the precedent of the Courts of this State, as cited by Defendants, are "evidence of the right of control, right of termination, furnishing of equipment, and method of payment." Aetna, supra, 261 N.J. Super. at 327.

P2H admits that it has the right to control, but that it does not exercise that right. In essence, Defendants argue that they could tell the drivers how to get from the pick-up location to the drop-off, but they do not. Defendants note that the right to terminate is governed by the contract. The record reflects that all equipment, save for a few individuals who lease equipment from P2H then lease their services and equipment back to P2H, is provided by Plaintiffs. The method of payment, as evidenced by the contracts, is a percentage of gross revenue (or, perhaps, load ticket) and not an hourly wage or salary.

Thus, under the right of control test, there are some factors that weigh in favor of finding an employment relationship and some factors that weigh in favor of finding an independent contractor relationship. On the record presented, when viewing the facts in the light most favorable to Defendants, the Court finds that the issue of whether Plaintiffs are employees or independent contractors cannot be determined as a matter of law by using the right to control test.

However, the Court may also employ the relative nature of the work test to determine if Plaintiffs are employees.

Under that test, as noted supra, the Court "must determine (1) whether the work performed by petitioner was an integral part of the regular business of defendant; and (2) whether petitioner demonstrated "substantial economic dependence" upon the employer." Aluetta, supra, 338 N.J. Super. at 472.

Here, there can be no dispute that Plaintiffs work in driving the truck routes and transporting goods is an integral part of P2H's regular business.

Plaintiffs' brief states "[f]irst, it is abundantly clear that Class members depend on PH for significant parts, if not the entirety, of their income during the periods in which plaintiffs render services to PH." Pla's Br. at 34. The only citation in the motion record that would support this contention is ¶ 12 of Plaintiffs' statement of facts: "When providing services to PH, Class members worked exclusively for defendants and cannot provide services to any other company." Defendants' statement of facts clarifies this statement by responding: "Admit that while in the course of making a delivery on Proud 2 Haul's behalf the drivers cannot provide services to any other company."

It is Plaintiffs' burden to demonstrate that they are entitled to judgment as a matter of law and that no genuine issue of material fact exists in the motion record that would preclude such a judgment. Here, the Court finds that Plaintiffs have not borne that burden.

The Court cannot determine, under the "relative nature of the work test" the extent of the economic reliance of Plaintiffs on contracts from Defendants. Defendants assert that the drivers are not permitted to drive for others while on P2H business, but might have gainful employment elsewhere at times when they are not driving for P2H. Thus, viewing the facts in the light most favorable to Defendants, Plaintiffs would be permitted to seek work with other companies so long as they were not actively driving a P2H route. Thus, the motion record does not support the conclusion that Defendants precluded Plaintiffs from working elsewhere, intended to be Plaintiffs' primary source of compensation, or were, in fact, "substantially" reliant on P2H economically.

Because the Court is not presented with evidence that demonstrates what percentage of Plaintiffs' actual compensation is paid by P2H, and the Court must view the facts presented in the light most favorable to the non-moving party, this Court finds that an issue of material fact

exists which prevents the Court from determining that Plaintiffs are employees as a matter of law when applying the "relative nature of the work test."

Thus, when applying the standards that are applicable on a motion for summary judgment, the Court cannot determine, as a matter of law, whether Plaintiffs are employees or independent contractors under either of the two tests advanced by Plaintiffs.

IV. WORKERS COMPENSATION FRAUD AND WAGE PAYMENT LAW VIOLATIONS

Fraud, as it pertains to Workers' Compensation, is prohibited by N.J.S.A. 34:15-57.4(a)(2). Specifically, the statute prohibits an employer from

> Mak[ing] a false or misleading statement, representation or submission, including a misclassification of employees, or engages in a deceptive leasing practice, for the purpose of evading the full payment of benefits or premiums pursuant to R.S.34:15-1 et seq.

A determination that Plaintiffs are employees under the Workers' Compensation Statute is a requisite element of a claim for fraud. Thus, because the Court cannot determine whether Plaintiffs are employees or independent contractors as a matter of law, this Court cannot grant summary judgment on Plaintiffs' claims for Workers' Compensation Fraud.[3]

Similarly, this Court cannot find that Plaintiffs are employees under the Wage Payment Law. Therefore, summary judgment cannot be granted on Plaintiffs' claims under the Wage Payment Law.

V. DEFENDANTS' LIABILITY FOR DEDUCTIONS FOR WORKERS COMPENSATION, OTHER (WORKER'S COMPENSATION PREMIUMS), E-LOG, PORT PULLS, FUEL FEES AND PARKING

Plaintiffs contend that the operative leases between them and Defendants did not contain specific recitations of how Workers Compensation, Workers Compensation Premiums, E-Log, Port Pulls, Fuel Fees and Parking will be charged back to Plaintiffs. Therefore, Plaintiffs argue that the leases are in violation of 49 C.F.R. §376.12(h), which requires that the lease "clearly

[3] The Court takes no position on the propriety of the information provided to various insurers which was cited by Plaintiffs in their moving papers. Because the Court cannot resolve the question of whether Plaintiffs are employees, the Court cannot make findings regarding the applicability of the statute to the facts of this case.

specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation . . . ."

As this Court has previously determined, failure to clearly specify the existence of a charge-back or the value of a charge back is a violation of the TIL Regulations that necessitates a conclusion that the Motor Carrier, P2H, must bear the cost and no deduction will be permitted from Plaintiffs' compensation.

Plaintiffs value the wrongful deductions at $1,214,264.14. Plaintiffs reach this number by fashioning a methodology, based on documents produced by Defendants, which allowed an estimation of damages.

Again, Defendants contest the calculation of damages, but do not directly address liability. When the Court addressed at oral argument that there appeared to be no argument on the issue of liability, Defendants did not object.

The Court notes that damages stemming from the deductions for workers compensation and "other" do not depend on the classification of Plaintiffs' as employees under the Workers' Compensation Law. It is sufficient that a deduction was made from Plaintiffs' compensation without any provision for the deduction in a written lease.

As stated, supra, this Court has previously allowed Plaintiffs to use formulae and extrapolations to calculate damages where those damages were sufficiently precise to serve as a tabulation of actual damages and Defendants offered no objection.

However, in this motion, Defendants do object to the tabulation of damages. The cases cited Plaintiffs indicate that the use of a formula or methodology to approximate damages, when challenged, creates a jury question. V.A.L. Floors, Inc. v. Westminster Communities, Inc., 355 N.J. Super. 416, 427 (App. Div. 2002)

Thus, since the liability issue was not contested, the Court finds that Plaintiffs are liable for the wrongful deductions as a matter of law because the operative leases did not specify that the deductions would be taken and, therefore, will grant summary judgment on the issue of liability only. The issue of the quantification of damages must be presented to a jury.

VI. COMMON LAW CONVERSION

The elements of a conversion claim are the "'intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.'" Chicago Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 454 (App. Div.) certif. den. 200 N.J. 506 (2009)(quoting Restatement (Second) of Torts § 222A(1)(1965)).

Plaintiffs claim that Defendants intentionally exercised dominion over the sums they wrongfully withheld from their compensation. Plaintiffs assert two reasons for this claim: 1) the TIL Regulations make the money theirs unless the lease specifies otherwise and 2) Defendants reported these funds as income to Plaintiffs, which amounts to an admission that Plaintiffs are the rightful owners of the money. Pla's Br. at 48. Defendants seek to impute liability for conversion on Ms. Koprowski as an officer of the corporation pursuant to Charles Bloom & Co. v. Echo Jewelers, 279 N.J. Super. 372, 382 (App. Div. 1995).

Defendants argue that there is nothing "improper" in the context of a conversion claim simply because the deductions may be "improper" under the TIL Regulations. Moreover, Defendants assert that Plaintiffs claimed these damages under their claims for violations of the TIL Regulations, giving rise to pre-emption.

The Court finds that the "improper" deduction of workers compensation premiums, e-log, port pulls, fuel fees and parking were addressed in the context of a violation of the TIL Regulations. The only impropriety in withholding those funds was under the TIL Regulations. There has been no independent tort for which they should be held liable.

With respect to Workers Compensation, Defendants contend that the amount is properly withheld because Plaintiffs are independent contractors.

The Court finds that the issue is not one of pre-emption, though the issue could be phrased that way. Instead, the issue is one of prohibiting a double recovery. In this motion this Court has granted judgment as to liability against Defendants for the same deductions. To grant another judgment is unnecessary and unwarranted.

VII. FUEL PURCHASERS WHO DID NOT USE A WEX CREDIT CARD

This Court has previously granted summary judgment regarding the failure to specify, pursuant to 49 C.F.R. 376.12(e), who would be responsible for payment of fuel taxes. However, that judgment only pertained to those members of the class who utilized the WEX fuel credit card. Plaintiffs now seek judgment regarding the previously unaddressed class members.

The Court fully addressed the issue of liability in its August 30, 2014 Findings of Fact and Conclusions of Law and shall not fully restate the reasons for its holding at this time. The parties have been presented with the Court's reasoning for that decision, which is incorporated herein by reference.

Defendants did not express opposition to the issue of liability in their moving papers or at oral argument.

However, Defendants do, generally, assert that the calculation of damages is flawed. As with other issues presented, supra, the Court finds that this creates a jury question and that the matter of damages must be reserved for trial. Nevertheless, the Court finds that no issue of material fact exists and shall grant summary judgment as to liability at this time.

VII. ATTORNEY'S FEES

Plaintiffs' seek attorney's fees pursuant to 49 U.S.C. § 14704 (e), which provides that a district court shall award attorney's fees for a party that is injured due to a violation of the Truth-in-Leasing Regulations.

In accordance with the statute, the Court GRANTS the award of attorney's fees.

Because the issue of damages must be reserved for trial, Plaintiffs' counsel shall file a motion after trial to quantify attorney's fees.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment is GRANTED, on the issue of liability only, with regard to failure to have a lease in place for the first quarter of 2014, deductions not specified in prior written leases in violation of the TIL Regulations and fuel cost deductions not specified in prior written leases.

Plaintiffs' motion is DENIED with regard to liability under the Workers' Compensation Law, Wage Payment Law and common law conversion.

Plaintiffs withdrew their request for judgment on issues surrounding compensation derived from jobs performed for the HUB Group.

Trial shall proceed accordingly.