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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CONSTANCE ADLER-GALLOWAY,

Plaintiff and Appellant,

v.

CBS BROADCASTING, INC.,

Defendant and Respondent.

B218163

(Los Angeles County Super. Ct.
No. EC046882)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle Rosenblatt, Judge. Affirmed.

Gary Rand and Suzanne E. Rand-Lewis for Plaintiff and Appellant.

Gary C. Ottoson and Denise M. Serino for Defendant and Respondent.

Plaintiff and appellant Constance Adler-Galloway appeals from a judgment following an order granting summary judgment in favor of defendant and respondent CBS Broadcasting, Inc. in this premises liability action. Adler-Galloway contends the trial court erred in granting the motion for summary judgment, because there is a triable issue of fact as to whether her employer's workers' compensation policy named CBS as an alternate employer and CBS failed to produce a copy of the policy in response to her request for the production of documents. We hold that Adler-Galloway failed to show that facts essential to oppose the motion existed that she could not have obtained sooner and the undisputed evidence established that CBS was named as an alternate employer. Therefore, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On April 4, 2006, Entertainment Partners provided its employee Adler-Galloway to work for CBS as an extra on a television show. The sound stage where the show was filming was leased and operated by CBS. Rain water had accumulated between two doors at the entrance to the sound stage. There were no mats in the area. As she entered the sound stage, she slipped and suffered injuries.

On March 21, 2008, Adler-Galloway filed a personal injury action against several defendants, including CBS, for negligence and premises liability.

In April 2009, CBS filed a motion for summary judgment on the ground that it was a "special employer" of Adler-Galloway, and therefore, the action was barred by the exclusive remedy of workers' compensation. In support of the motion, CBS provided the declaration of Kay Kimmel. Kimmel is the vice-president of labor relations for GEP Entertainment Services, which includes Entertainment Partners. CBS also provided the declaration of one of the show's executive producers, Louis Milito. Both Kimmel and Milito declared that Entertainment Partners maintained a workers' compensation insurance policy that provided coverage to Adler-Galloway and included CBS as an alternate employer insured.

Adler-Galloway opposed the motion on the grounds that CBS failed to comply with discovery requests and triable issues of fact existed. In support of her opposition, Adler-Galloway submitted CBS's response to her request for the production of documents supporting the contention that Entertainment Partners maintained a workers' compensation policy that provided coverage to Adler-Galloway and included CBS as an alternate employer insured. CBS objected on the ground that the documents were equally available, if not more so, to Adler-Galloway than to CBS, because discovery had shown that she made a claim and had been receiving workers' compensation benefits pursuant to the policy. CBS stated that it was searching its records to determine whether it had any writings reflecting CBS as an alternate employer under the policy, and if so, the records would be produced. Adler-Galloway also submitted Milito's deposition testimony and argued that he claimed not to have personal knowledge as to whether CBS had workers' compensation insurance covering Adler-Galloway as her employer. The deposition testimony is not part of the record on appeal.

CBS filed a reply arguing that there was no merit to Adler-Galloway's discovery issue and she had failed to identify a triable issue of fact as to the application of workers' compensation laws.

On July 10, 2009, the trial court found the undisputed facts showed Adler-Galloway was a special employee of CBS and her general employer, Entertainment Partners, had a workers' compensation insurance policy naming CBS as an alternate employer. Therefore, the court granted the motion for summary judgment. On July 31, 2009, the court entered judgment in favor of CBS. Adler-Galloway filed a timely notice of appeal.

DISCUSSION

Standard of Review

“We review summary judgment rulings de novo to determine whether the moving party has met its burden of persuasion that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; Code Civ. Proc., § 437c, subds. (c), (o)(2).)” (*Limited Stores, Inc. v. Franchise Tax Bd.* (2007) 152 Cal.App.4th 1491, 1495-1496.) “However, any determination underlying the order granting summary judgment is reviewed under the standard appropriate to that determination. [Citation.]” (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467.)

Code of Civil Procedure Section 437c, Subdivision (h)

Adler-Galloway contends the trial court was required to deny the summary judgment motion pursuant to Code of Civil Procedure section 437c, subdivision (h), because CBS prevented her from obtaining discovery necessary to her opposition by failing to produce a copy of the insurance policy. We conclude the court did not abuse its discretion.

Code of Civil Procedure section 437c, subdivision (h), provides in pertinent part, “If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.”

The declaration submitted in opposition to the motion for summary judgment must show: “(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed

to obtain these facts. [Citations.]’ [Citation.]” (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.) The opposing party’s lack of diligence in pursuing discovery is a factor that the trial court may consider in denying relief under Code of Civil Procedure section 437c, subdivision (h). (*Id.* at p. 257.)

“The statute mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under [Code of Civil Procedure] section 437c, subdivision (h). [Citations.] Thus, in the absence of an affidavit that requires a continuance under section 437c, subdivision (h), we review the trial court’s denial of appellant’s request for a continuance for abuse of discretion. [Citation.]” (*Cooksey v. Alexakis, supra*, 123 Cal.App.4th at pp. 253-254.)

In this case, Adler-Galloway’s attorney failed to explain her lack of diligence in obtaining the discovery sooner. Adler-Galloway did not pursue any of the procedures available to obtain further discovery responses from CBS. There was no evidence that Adler-Galloway attempted to obtain a copy of the policy from her own employer, Entertainment Partners, or the insurance company that issued the policy. In addition, the declaration provided no reason to believe CBS was not named as an alternate employer insured as CBS claimed. Adler-Galloway also failed to refute CBS’s claim that she was in as good a position to obtain a copy of the policy or better because she had filed a workers’ compensation claim against her employer and received benefits under the policy. The declaration failed to make the necessary showing under Code of Civil Procedure section 437c, subdivision (h), and therefore, it was within the trial court’s discretion whether to grant relief pursuant to that section. We find no abuse of discretion in denying Adler-Galloway’s motion under section 437c, subdivision (h).

Evidence of Coverage

Adler-Galloway contends a triable issue of fact exists as to whether CBS was a named alternate employer under Entertainment Partners' workers' compensation insurance policy, thereby barring her claims under the workers' compensation laws. We disagree.

CBS submitted evidence that it was a named alternate employer on Entertainment Partners' workers' compensation policy. Specifically, CBS submitted the declarations from the vice-president of labor relations of the company operating as Entertainment Partners and the executive producer of the television show for which Adler-Galloway was working on the day of the accident. Both declared that CBS was named as an alternate employer insured under Entertainment Partners' workers' compensation policy.

Adler-Galloway provided no evidence to show that CBS was not named as an alternate employer insured under the policy. She provided a portion of Milito's deposition which is not part of the record on appeal, but which she contends showed he had no personal knowledge of whether the policy named CBS. Even without Milito's declaration, however, Kimmel's declaration as the labor relations executive of the company that procured the policy is sufficient to establish that CBS was a named alternate employer. Adler-Galloway failed to show the existence of a triable issue of fact, and the trial court properly granted summary judgment.

DISPOSITION

The judgment is affirmed. Respondent CBS Broadcasting, Inc. is awarded its costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.