SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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ERIK PEREZ,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 50237/2017

KYLE P. EGGER and GEOTHERMAL ENERGY OPTIONS, LCC,

Defendants.

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PAGONES, J.D., A.J.S.C.

Defendants move for an order, pursuant to CPLR 3212, dismissing the plaintiff's complaint.

The following papers were read:

Notice of Motion-Affirmation-Exhibits A-F-Affidavit of Service	1-9
Affirmation in Opposition-Exhibit A-Affidavit of Service	10-12
Affirmation in Reply	13

Upon the foregoing papers, the motion is decided as follows:

By way of background, this is an action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of a motor vehicle accident which occurred on October 31, 2016. The collision took place on Route 55 in LaGrange, New York. On the day of the accident, plaintiff was a passenger in a vehicle owned by defendant Geothermal Energy Options, LLC

(hereinafter "Geothermal") and driven by defendant Kyle Egger (hereinafter "Egger"), a former fellow employee. It is undisputed that the plaintiff and Egger were traveling from a jobsite to the Geothermal "shop" at the time of the accident. The accident occurred when Mr. Egger fell asleep at the wheel and crossed into oncoming traffic.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movants must set forth a *prima facie* showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movants set forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In support of their motion for summary judgment, defendants allege that the plaintiff, as an "outside employee", was injured in a company vehicle on his way back to the home office; thus, his exclusive remedy is Workers' Compensation benefits. In support of their motion, defendants offer the deposition testimony of the plaintiff, defendant Egger and Maria LaFalce,

Office Manager of Geothermal Energy Options, LLC. The Court will cite the testimony it deems relevant to the disposition of the within motion.

Mr. Perez testified that when he worked at Geothermal, he would arrive at the "house" and travel to different places (*see* Deposition of Perez at pp 19-20 lines 25, lines 2-4). Plaintiff testified that he would be driven from Geothermal to the worksite everyday (*see* Deposition of Perez at p 20 lines 15-23). Plaintiff stated that his hours worked would be measured from the time he got to Geothermal until the time he left the worksite (*see* Deposition of Perez at pp 22-23 lines 4-25, lines 2-7). Mr. Perez stated that he would always be driven back from the jobsite in a Geothermal van (*see* Deposition of Perez at p 23 lines 3-17). Mr. Perez testified that it was part of the job to return to the Geothermal office at the end of the day to drop off the "car" (*see* Deposition of Perez at p 23 lines 18-22). Upon arriving back at Geothermal, plaintiff would wait for his brother for a ride and unload the van (*see* Deposition of Perez at pp 23-24 lines 23-25, lines 2-3). Plaintiff testified that no one told him he had to return to Geothermal from the jobsite (*see* Deposition of Perez at p 26 lines 2-5).

Kyle Egger testified that he got paid from the time he left the Geothermal office through the time he stopped work at the jobsite, with the exception of a lunch break (*see* Deposition of

Egger at p 40 lines 16-21). When they left the jobsite to return to Geothermal, they were not paid for their time in transit (*see* Deposition of Egger at p 41 lines 12-16). Mr. Egger stated that he had multiple conversations with his employer concerning why employees did not get paid for their time in transit (*see* Deposition of Egger at p 41 lines 17-20). He was told in response to these conversations, that Geothermal did not pay for travel time on the way "home" because the employees got paid for their travel time to the jobsite (*see* Deposition of Egger at p 41 lines 21-24). Mr. Egger was asked if at the time of the accident whether they were off the clock, to which he responded in the affirmative (*see* Deposition of Egger at p 46 lines 21-13).

Defendants offer the testimony of Maria LaFalce. Ms. LaFalce testified that plaintiff always returned to the shop at the end of the day (*see* Deposition of LaFalce at p 37 lines 15-24). The time that it took to drive from the jobsite back to the shop was unpaid (*see* Deposition of LaFalce at pp 37-38, line 25 lines 1-4). Ms. LaFalce indicated that the company handbook dictates that employees were paid from the time they arrived until the time they left their last job (*see* Deposition of LaFalce at p 38 lines 5-11). If plaintiff had the ability or desire to return to his home directly from the job site, that would be permissible (*see* Deposition of LaFalce at p 39 lines 1-4). Ms. LaFalce, when asked a hypothetical, agreed that the

employees could get paid for unloading trucks after returning to the shop if they entered the time on their timecards (*see* Deposition of LaFalce at p 42 lines 9-17). Ms. LaFalce testified, over objection, that her understanding was that plaintiff was not "on the job" from the time he left the jobsite in the company van until he came back to the office (*see* Deposition of LaFalce at pp 47-48 lines 23-25, lines 1-19).

Lastly, defendants offer an application for workers' compensation benefits signed by the plaintiff and prepared by attorney Debra J. Reisenman.

Generally, the sole remedy of an employee injured in the course of his or her employment against his or her employer is recovery under the Workers' Compensation Law (*see Constantine v. Premier Cab Corp.*, 295 AD2d 303 [2nd Dept 2002]). The general rule, subject to certain exceptions, is that injuries sustained during travel to and from the place of employment are not compensable under the Workers' Compensation Law (*see Neacosia v. New York Power Authority*, 85 NY2d 471 [1995]). However, an exception to that rule exists where, by reason of contractual agreement, policy or custom, the employer regularly provides a vehicle for the employee's use in commuting to and from work for reasons that benefit the employer (*see Hill v. Speckard*, 209 AD2d 1007 [4th Dept 1994] *leave to appeal dismissed by* 85 NY2d 1032; *Schauder v. Pfeifer*, 173 AD2d 598 [2nd Dept 1991]; *Daugirdas v.*

Jance, 222 NYS2d 60 [Nassau County, Sup Ct 1961]).

Here, the defendants have demonstrated, *prima facie*, that plaintiff's sole remedy is recovery under the Workers' Compensation Law. Notwithstanding the fact that plaintiff was not compensated for his time traveling back from a jobsite, it was the custom and practice of employees of Geothermal to drive company vans to and from the jobsites. Moreover, it was expected of the driving employee to bring the van back to the shop, notwithstanding a lack of compensation. Moreover, it was custom, as evidenced by the testimony of the plaintiff and acknowledged by Geothermal, that Mr. Perez would ride back to the shop with the employee driving the van to wait for his brother. Accordingly, defendants establish, *prima facie*, that the right to compensation under the Worker's Compensation Law is the exclusive remedy of the plaintiff since he was injured by the negligence of a co-employee (*see Daugirdas v. Jance*, 222 NYS2d 60 [Nassau County, Sup Ct 1961]).

Since defendants have made a *prima facie* showing of entitlement to judgment as a matter of law (see Zuckerman v. City of New York, 49 NY2d 557 [1980]), plaintiff must show that genuine triable issues of material fact exist in order to defeat the motion (*id.*).

In opposition, plaintiff maintains that he was not an "outside employee" as: (1) he did perform his work at a fixed

location, even if that fixed location was not the Geothermal office; and, (2) he was required to report to a fixed location at the start of each work day, i.e. the Geothermal office. The distinguishing feature of outside employees is that they do not work at a fixed location and are required to travel between work locations while inside employees work at their employers' premises (*see Egloff v. Ob-Gyn Associates of Northern New York*, 245 AD2d 965 [3rd Dept 1997]). Here, notwithstanding plaintiff's position, the record conclusively establishes that the plaintiff was an "outside employee" as he was not performing work at Geothermal's office but, rather, he was dispatched by the employer to provide "duct work", "scrape and clean" work and "fiberglass" work at various locations (*see Matter of Rodriguez v. Retail Maintenance Serv., Inc.*, 16 AD3d 993 [3rd Dept 2005]; *Matter of Estate of DeRosa v. Evan Plumbing & Heating Co.*, 277 AD2d 619 [3rd Dept 2000]). Plaintiff's remaining argument, i.e. that he was not in the course of his employment at the time of the accident, is without merit in fact as it was the custom of the Geothermal to provide transportation for the plaintiff back to the office at the end of the work day.

Based upon the foregoing, defendants' motion for summary judgment is granted and the plaintiff's complaint is dismissed.

This constitutes the decision and order of this Court. This

decision and order has been electronically filed.

Dated: April 11, 2018
Poughkeepsie, New York

ENTER

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