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Superior Court of California, County of San Francisco
Case No. CGC 05 446984
Rafael Gonzalez Et Al v. S.p. Carpet Pros, Inc. Et Al

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ORDER

RAFAEL GONZALEZ et al VS. S.P. CARPET PROS, INC. et al

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Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

12 RAFAEL GONZALEZ; and MANUEL)
13 ZAMUDIO, Themselves and On Behalf of)
14 All Others Similarly Situated Employees)

Plaintiffs,

vs.

18 S.P. CARPET PROS, INC. and HOME)
19 DEPOT USA, INC. and DOES 1 to 100)

Defendant.

No. CGC-05-446984

dn
~~Proposed~~ ORDER DENYING
DEFENDANT HOME DEPOT'S
MOTION FOR SUMMARY
JUDGMENT, OR IN THE
ALTERNATIVE FOR SUMMARY
ADJUDICATION

DATE: January 29, 2008
TIME: 2:00 PM
DEPT: 220

Action Filed: November 22, 2005

TRIAL DATE: NONE SET

1 Defendant to this action, Home Depot, filed a motion for summary judgment or
2 in the alternative for summary adjudication based on the claim that defendant HOME
3 DEPOT USA, INC. ("HOME DEPOT") is not the employer of the named class
4 representatives, nor the putative class members. At the hearing of the matter, Morgan
5 C. Smith of THE ARNS LAW FIRM, Jonathan E. Davis of THE ARNS LAW FIRM,
6 and Nathan C. Zipperian of SHEPHERD FINKELMAN MILLER & SHAH appeared
7 on behalf of plaintiffs. Thomas Duckworth of DUCKWORTH & PETERS LLP
8 appeared on behalf of defendant CARPET PROS. Joel M. Cohn of AKIN, GUMP,
9 STRAUSS HAUER & FELD appeared on behalf of HOME DEPOT.

10 Having reviewed the papers submitted, the comments at oral argument, and good
11 cause appearing, the court orders as follows: Defendant HOME DEPOT'S Motion for
12 Summary Judgment is DENIED. The court finds there are triable issues of material fact
13 regarding the extent of the control over the means, manner and method of the work
14 done by the Carpet Pros installers.

15 As the Supreme Court has stated in *Ramirez v. Yosemite Water Co.* (1999) 20
16 Cal.4th 785, 794 "past decisions ... teach that in light of the remedial nature of the
17 legislative enactments authorizing the regulation of wages, hours and working
18 conditions for the protection and benefit of employees, the statutory provisions are to be
19 liberally construed with an eye to promoting such protection."

20 As stated by the Supreme Court in *S. G. Borello & Sons, Inc. v. Department of*
21 *Industrial Relations* (1989) 48 Cal.3d 341, 350 the primary factor of importance in
22 determining the issue of an employee status is "whether the person to whom service is
23 rendered has the right to control the manner and means of accomplishing the result
24 desired" Additionally, it is generally it is a question of fact whether a person is an
25 employee or independent contractor. (*see id* at 367.)

26 The parties agrees that California courts "principally analyze 'the right of control
27 over the manner or means of accomplishing the result desired'" when determining whether an
28 entity is a joint employer. (Def's Mot. at 7; see also *Industrial Ind. Exch. v. Ind. Acc. Com.*

1 (1945) 26 Cal.2d 130, 135) Defendant HOME DEPOT asserted, among other
2 arguments, that it does not hire employees of Carpet Pros, it does not train them, does
3 not pay them directly and does not fire them. Defendant also states that it does not
4 dictate what employees go to any particular job that is assigned by HOME DEPOT.
5 Based on this analysis, defendant HOME DEPOT claims there is no triable issue of
6 material fact and is therefore entitled to Summary Judgment. Defendant HOME
7 DEPOT asserts in its moving papers that it is not an employer as a matter of law, since
8 no triable issues of material fact exist to show that defendant controlled the “conditions
9 of employment of the plaintiffs.” Defendant HOME DEPOT asserted that it does not
10 hire employees of Carpet Pros, it does not train them, does not pay them directly and
11 does not fire them. Defendant also states that it does not dictate what employees go to
12 any particular job that is assigned by HOME DEPOT. Based on this analysis,
13 defendant HOME DEPOT claims there is no triable issue of material fact and is
14 therefore entitled to Summary Judgment.

15 However, in contradiction to the position of defendant HOME DEPOT, plaintiffs
16 assert that the primary test of employee status in California as dictated by the Supreme
17 Court in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48
18 Cal.3d 341, is not “control over the conditions of employment”, but rather “right to
19 control the manner and means of accomplishing the result desired.” (p. 350.) The
20 Supreme Court indicated that that the right to discharge at will without cause is strong
21 evidence of an employee-employer relationship.

22 In support of the right to discharge at will, plaintiffs presented undisputed
23 evidence of the contract between Home Depot and Carpet Pros (Exhibit E §7.1) that
24 read as follows: “The Home Depot shall have the right to request that any employee or
25 subcontractor not perform work pursuant to this agreement. If such employee or
26 subcontractor **is for any reason objectionable** to the Home Depot then Contractor
27 agrees that any such person shall not perform work pursuant to this agreement.”
28 Additionally, plaintiff established as an undisputed material fact that all work

1 performed by Carpet Pros is done for Home Depot. (Plaintiffs' Undisputed Material
2 Fact "PUMF" #15) Taken, together, these facts establish a triable issue as to whether
3 defendant HOME DEPOT had the right to terminate any employee, without or without
4 cause.

5 As to the hiring process, defendant HOME DEPOT asserted that it had no
6 control over the hiring process of CARPET PROS other than a background check.
7 Plaintiff also submitted evidence that the background check included convictions for
8 many offenses objectionable to HOME DEPOT like misdemeanor gambling offenses;
9 misdemeanor possession of drugs and misdemeanor forgery. (See Exhibit L) The only
10 evidence of any hiring criteria presented in any of the moving or opposing papers was
11 the hiring criteria of HOME DEPOT. It is also a HOME DEPOT requirement that any
12 employee of Carpet Pros be subject to this background screening every 24 months and
13 subject to removal from any HOME DEPOT job if not in compliance with the HOME
14 DEPOT criteria. (see Exhibit M) However, plaintiff submitted the deposition testimony
15 of Mr. Paymozd, CEO of Carpet Pros who testified that "if an installer does not pass
16 The Home Depot background check, I wouldn't have work to provide for him . . ."
17 (PUMF # 20.) The court finds there is a triable issue of material fact of whether the
18 foregoing evidence constitutes control over the hiring process of Carpet Pros.

19 Defendant HOME DEPOT also asserts there is no triable issue of material fact as
20 to whether it controls the means manner and methods of the Carpet Pros work.
21 Defendant points to the evidence that it does not control which employees are assigned
22 to any particular job, and does not control the amount the employees are paid for their
23 work. Plaintiffs, on the other hand, point to extensive evidence of control. The
24 following is a summary of the evidence.

25 Home Depot requires the Service Providers to contact the customer within 24
26 hours of receipt of an Installation Purchase Order "PO" from Home Depot to set
27 installation time, and provide the customer with a four hour window of arrival (§3.3.5
28

1 ex. V) Home Depot dictates the time period within which the install must be completed
2 for "In Stock" installation to occur within 72 hours. (PUMF # 33.)

3 Home Depot then has an agent measure the job site to determine how much
4 carpeting is needed, and if any extra charges apply to a specific job. (PUMF # 25) The
5 agent draws a picture to tell the CARPET PROS employees how and where to install
6 the carpet. (Deposition of Saeed Paymozd p. 175)

7 HOME DEPOT determines all the following: what the price paid to Carpet Pros
8 will be for any job (PUMF #25); what carpeting and how much to be installed (PUMF
9 #25 and 26); how carpeting to be installed (i.e. pad, floor or floor, area rug. (PUMF
10 #27); what rooms to be installed. (PUMF #29); what additional work will be necessary.
11 (PUMF #30); method of gluing or tacking (PUMF # 31); how to clean up the area after
12 work (PUMF # 32); the hours of operation and the days off for CARPET PROS.
13 (PUMF #34); How to the treat the customer (PUMF #36); that the employees cannot
14 smoke around the customer and cannot accept gifts or tips from customer (PUMF #41);
15 the Service Provider must speak English (PUMF #42); how the Service Providers must
16 keep their hair (PUMF #46); how the Service Providers must keep their facial hair
17 (PUMF #47); the Service Providers must keep their shirts tucked in (PUMF #48); the
18 Service Providers pants must be free of holes (PUMF #49); the Service Providers keep
19 must have no visible body jewelry (PUMF #50); the Service Providers must have
20 appropriate foot ware (PUMF #51); the Service Providers should use no abusive
21 language (PUMF #52); how the Service Providers must be polite (PUMF #53); the
22 Service Providers must consuming no food. (PUMF #54); the Service Providers must
23 not listen to radio or TV during work. (PUMF #55); the Service Providers must not
24 park in the customers' drive ways. (PUMF #56); the Service Providers must assure Job
25 site is clean and organized. (PUMF #57); the Service Providers must not wear the
26 HOME DEPOT apparel to bars (PUMF #66); the Service Providers cannot have
27 bumper stickers of any kind on their vehicles (PUMF #70); the Service Providers must
28 not wear hats with logos other than HOME DEPOT (PUMF #71); the Service Providers

1 must not wear flip flops or open toed shoes (PUMF #72); the Service Providers must
2 not have disheveled or unkempt hair (PUMF #73).

3 In light of the evidence presented by plaintiff, the court finds there is a triable
4 issue of material fact as to whether HOME DEPOT controlled the means, manner and
5 methods of the work of the Carpet Pros employees.

6 Defendant HOME DEPOT also asserted that it did not evaluate the work of the
7 CARPET PROS employees in any manner. However, plaintiffs presented evidence (see
8 Exhibit O) that showed HOME DEPOT visiting Carpet Pros installations 21 times in a
9 week period. Additionally, plaintiffs presented evidence that they would not get paid
10 without the customer signing off on the work. (PUMF #13 and 75)

11 In light of the foregoing evidence, the court finds that there are numerous triable
12 issues of material fact as to the control of defendant HOME DEPOT over the work of
13 the Carpet Pros employees to prevent Summary Judgment. On this basis, the Motion
14 for Summary Judgment or in the Alternative for Summary Adjudication is DENIED.

15 IT IS SO ORDERED.

16 DATED: *Feb 20, 2008*

A. James Robertson II
17
18 HON. A. JAMES ROBERTSON II

19
20 *Defendant Home Depot U.S.A.*
21 *Inc's Objections To Proposed*
22 *Order Denying Defendant*
23 *Home Depot's motion For*
24 *Summary Judgment were*
25 *considered and rejected*

A. James Robertson II

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Approved as to form:

DATED:

AKIN, GUMP, STRAUSS HAUER & FELD

Joshua B. Waxman
Attorney for Defendant The Home Depot

DATED:

DUCKWORTH & PETERS, LLP

Thomas E. Duckworth
Attorney for Defendant Carpet Pros