

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WALTER PREBLE, et al.,)	
)	
<i>Plaintiffs</i>)	
)	
v.)	Docket No. 97-212-P-H
)	
SANDRA THOMS, et al.,)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON DEFENDANTS’ MOTION
FOR SUMMARY JUDGMENT**

Defendant Sandra Thoms moves for summary judgment on all counts of the complaint in this action arising out of an injury to plaintiff Walter Preble which he alleges occurred in the course of his employment. In the same motion, defendant William Thoms, husband of Sandra Thoms, moves for summary judgment on Count III of the complaint. I recommend that the court deny the motion.

I. Summary Judgment Standards

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point

in favor of the nonmoving party” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

Walter Preble worked with or for William Thoms from May 20, 1997 at least through May 30, 1997. Affidavit of William Thoms (“W. Thoms Aff.”) (Docket No. 12) ¶ 2; Affidavit of Walter Preble (“Preble Aff.”) (Docket No. 3) ¶ [2]. He was injured on June 2, 1997 at the premises at which he did this work. Preble Aff. ¶ [3]. The parties dispute whether Walter Preble was an employee of Sandra Thoms or William Thoms or an independent contractor working under the supervision of William Thoms at this time, and whether Walter Preble was working in either capacity at the time of the injury. Walter Preble was injured when a forklift operated by William Thoms ran over his foot. W. Thoms Aff. ¶ 8; Preble Aff. ¶ [3]. Three payments of \$400 each were made to Walter Preble, of which one was entirely in cash, one was by check of Brownfield Equipment, Inc. and one was half in cash and half by

check. Preble Aff. ¶ [7]. No amounts were deducted from these payments for any purpose. W. Thoms Aff. ¶ 4. Other individuals had been employed by Brownfield Equipment, Inc. during 1997, and deductions for taxes and other purposes had been taken from their paychecks. Deposition of Sandra Thoms, Exh. 4 to Opposition to Summary Judgment Motion (“Plaintiffs’ Opp.”) (Docket No. 26), at 7-9.

Neither defendant has any ownership interest in Brownfield Equipment, Inc. W. Thoms Aff. ¶ 5; Affidavit of Sandra Thoms (“S. Thoms Aff.”) (Docket No. 13) ¶ 4. Defendant Sandra Thoms is employed as office manager of Brownfield Equipment, Inc. S. Thoms Aff. ¶ 3. At the time of his injury, Walter Preble was planning to do some work that was independent of Brownfield Equipment, Inc., or either of the defendants, involving heavy equipment that he owned. Preble Aff. ¶ [15]. Defendant William Thoms was a party to several lawsuits at the time Walter Preble worked with or for him. Deposition of William F. Thoms, Exh. 3 to Plaintiffs’ Opp., at 21-24. Brownfield Equipment, Inc. had no workers’ compensation insurance. S. Thoms Dep. at 10.

III. Procedural History

The plaintiffs filed this action on June 12, 1997. Docket No. 1. The defendants filed a suggestion of bankruptcy on July 25, 1997 advising that defendant William Thoms had filed bankruptcy in New Hampshire. Docket No. 11. A corrected suggestion of bankruptcy was filed on November 12, 1997 (Docket No. 18) noting that William Thoms had dismissed the earlier bankruptcy filing but that he refiled on October 7, 1997 in the United States Bankruptcy Court in Manchester, New Hampshire. As a result of each of these filings, this action was stayed automatically as to William Thoms by operation of 11 U.S.C. § 362. The plaintiffs moved in the bankruptcy court for relief from the stay on November 12, 1997. Motion for Relief from Stay, *In re William Thoms*, United States Bankruptcy

Court, District of New Hampshire, Docket No. 97-13885 MWV (“Motion for Relief”) (attached to Docket No. 22). The defendants filed the instant motion in this action on December 8, 1997. Docket No. 23. The bankruptcy court entered an order granting the plaintiffs relief from the stay in accordance with their request on January 21, 1998. Order Granting Motion for Relief, *In re William F. Thoms III*, Docket No. 97-13885 MWV, United States Bankruptcy Court, District of New Hampshire (attached to Docket No. 28). The plaintiffs’ motion for relief from the stay asserted that an insurance policy exists which may provide coverage for the claims in Counts I and II of their complaint in this action, that no other creditors had potential claims upon the proceeds of that policy, and that they sought relief in order to pursue the proceeds of that policy. Motion for Relief. Because the claim asserted in Count III was not presented to the bankruptcy court as one for which the insurance policy might provide coverage, the relief granted by the bankruptcy court does not extend to that count.

IV. Analysis

The complaint is set forth in three counts. Count I alleges direct negligence by William Thoms in the operation of the forklift and *respondeat superior* liability of Sandra Thoms for that negligence. Complaint (Docket No. 1) ¶¶ 5-9. Count II alleges Gail Preble’s loss of consortium. *Id.* ¶¶ 10-12. Count III is styled a “civil action based on employment,” alleging that the defendants are the “employer[s] and owner[s]” of Brownfield Equipment, Inc. and that they breached a duty to the plaintiffs to secure workers’ compensation insurance that would cover Walter Preble’s injury. *Id.* ¶¶ 13-18.

Sandra Thoms’ motion is based solely on her assertions that she is not an owner or officer of Brownfield Equipment, Inc., that she did not employ Walter Preble, and that she did not owe Walter Preble any duty. Motion for Summary Judgment at [2]-[3]. The plaintiffs respond that Walter Preble

understood, based on conversations with both defendants, that Sandra Thoms was the owner of the business for which he was working, and that his oral employment contract required her express approval. Preble Aff. ¶¶ [4], [5]. Therefore, the plaintiffs conclude, Sandra Thoms was at least the apparent principal of William Thoms, making her vicariously liable for his negligence as her agent. Plaintiffs' Opp. at 3-5. The plaintiffs cite no authority for this conclusion, directing the court's attention only to a case involving actual agency and another involving fraudulent misrepresentation, a cause of action that is not alleged here.

The Maine Law Court has addressed the concept of apparent agency, and the resulting liability of the principal, on several occasions. Most recently, in *Williams v. Inverness Corp.*, 664 A.2d 1244 (Me. 1995), the Law Court quoted with approval from the *Restatement (Second) of the Law of Agency* § 267 (1958), which provides:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care and skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Williams, 664 A.2d at 1246. The Law Court also emphasized that apparent authority exists only when the conduct of the principal leads a third person to believe that a given party is his agent. *Id.* The principal is liable for torts committed by an agent in cases in which a tort may be based upon the apparent authority of the agent to act for his principal. *Id.* The plaintiffs have provided evidence that, while minimal, when interpreted in the light most favorable to them would allow a jury to reasonably conclude that Sandra Thoms negligently or intentionally held William Thoms out to Walter Preble as her agent for the purpose of the work for which Preble was paid. Accordingly, I conclude that Sandra Thoms is not entitled to summary judgment.

As noted above, Count III as to William Thoms is still subject to the automatic stay imposed

by 11 U.S.C. § 362. Therefore, this court may not act on William Thoms' motion for summary judgment on that count at this time.

V. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **DENIED** as to Counts I and II. If my recommendation is accepted, the motion will be held in abeyance as to Count III until such time as the automatic bankruptcy stay is lifted.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of February, 1998.

*David M. Cohen
United States Magistrate Judge*