IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010HCV01444

BETWEEN	**ORVILLE HOUSEN**	**CLAIMANT**
AND	**ZDA CONSTRUCTION LIMITED**	**DEFENDANT**

IN OPEN COURT

Mr. Anthony Pearson appeared for the Claimant

Mr. Leonard Green and Mr. Adley Duncan instructed by Chen, Green & Company appeared for the Defendant

Heard: 2nd and 3rd November 2015 and 24th May 2016

Tort – Negligence – Vicarious Liability – Injury on worksite – Employee Contract – Is the claimant an independent contractor – Occupier's Liability – Effect of Settlement Agreement – Misrepresentation – Occupier's Liability Act, section 3

PUSEY, J

[1] Mr. Orville Housen ("Mr. Housen") while carrying out his duties as a Construction Liaison Officer on the work site of the Couples Hotel in the parish of Saint Mary was the victim of an unfortunate event. The Defendant was involved in this project at The Couples Hotel.

[2] On April 2nd 2008, while a worker was operating an excavator machine in the demolition of a section of a laundry roof, a concrete block column fell on a part of the roof that was laying on the ground, whereby a piece of concrete snapped, hitting Mr. Housen on the head and falling on top of him. He received injuries to the head, neck and shoulders as a result.

[3] After suffering this injury, Mr. Housen was taken to the Saint Ann's Bay Hospital where he was diagnosed with an acute spinal injury with C6/7 subluxation. He was subsequently seen at the Kingston Public Hospital where he received treatment

through a period of hospitalization, and later as an outpatient. Treatment included being placed on skull traction and undergoing two surgeries as outlined in the June 25th 2009 Medical Report of Dr. Dean Wright.

CLAIM

[4] Mr. Housen filed an action in negligence for General Damages and Special Damages in the sum of One Million Five Hundred and Sixty-Three Thousand Seven Hundred and Ninety-Seven Jamaican Dollars and Fifty Cents (JM $1,563,797.50) and has outlined the following Particulars of Negligence:

> The Defendant company was negligent in that it:
>
> *i. Failed to warn or adequately warn the Claimant of the presence of the danger in order to enable the Claimant to be reasonably safe.*
>
> *ii. Failed to take reasonable care to employ competent staff.*
>
> *iii. Failed to institute and/or maintain a safe system of working.*
>
> *iv. Failed to instruct and/or supervise employees in the method of operation of dangerous machinery.*
>
> *v. In all the circumstances, did not take any sufficient steps to ensure an adequately safe environment and conditions for the Claimant so as to avoid the accident and resultant injuries*
>
> *vi. Failed in all circumstances to discharge the common duty of care in breach of section 3 of the Occupiers' Liability Act.*

DEFENDANT'S CASE

[5] The Defendant's arguments are fairly straightforward. Firstly, the Defendant argues that Mr. Housen was not an employee and that instead he was a subcontractor employed to work on the demolition project. The Defendant further alleges that they in no way acted negligently and that if there were any negligence it would be a matter between Mr. Housen and the contractor doing the demolition work. The piece of evidence that the Defendant places most reliance, however, is a document signed by Mr. Housen where he received the sum of Three Hundred and Eighteen Thousand Seven Hundred and Ninety-Two Jamaican Dollars and Fifty Cents (JM $318,792.50) from the Defendant company. He agreed therein that the monies he received would be the full settlement and that he would not claim against the Defendant. The

Defendant argues that they provided this money out of good will because Mr. Housen was desperate and that they are not liable for his injuries.

ISSUES

[6] The Court has assessed four main issues to be considered in the determination of this matter. They are as follows:

i. Is Mr. Housen an employee or an independent contractor?
ii. Was the defendant negligent in their acts and/or omissions causing injury to Mr. Housen?
iii. is the Defendant liable under the Occupiers Liability Act?
iv. Finally, what is the effect of the settlement agreement signed by the parties?

NATURE OF EMPLOYEMENT

[7] The classification of worker as an employee or an independent contractor has always been important in law as it has direct bearing on the liability of the employer. There is generally no liability for the action of an independent contractor unless there is a non-delegable duty. The Court has developed a number of tests to make this distinction. The classic on has to do with control.

[8] In **Narich Pty. Limited v The Commissioner of Pay-roll Tax** [1984] ICR 286, the Appellant, Narich Pty. Limited owned franchises throughout Australia of Weight Watchers International Inc. Under the terms of the franchises Narich organized weight watching classes. It chose and trained the lecturers for those classes and remunerated them for the lectures given. The lecturers had formal written contracts with Narich. The lecturer's contract and other documentation was comprehensive and the effect of the contract was to impose a number of obligations on every lecturer as to the manner in which the lecture was to be conducted.

[9] The Court found that Narich was able to control not only the allotted task but also the manner in which it was performed. The conclusion reached by the Privy Council was

that lecturers were tied hand and foot by the contract with regard to the manner in which work is performed and, consequently, the lecturers were employees. The crux of the decision is that, though the lecturers may appear as independent contractors, the substance of the arrangement defines them as employees.

[10] Later in **Stevens v Brodribb Sawmilling Co Pty Ltd** (1960) 160 CLR 16, at pages 36-37, Wilson and Dawson JJ asserted that:

> *In many, if not most cases, it is still appropriate to apply the control test in the first instance because it remains the surest guide to whether a person is contracting independently or serving as an employee. That is not now a sufficient or even an appropriate test in its traditional form in all cases because in modern conditions a person may exercise personal skills so as to prevent control over the manner of doing his work and nevertheless be a servant.*
>
> *…*
>
> *… any attempt to list the relevant matters [which will establish an employer/employee relationship], however, incompletely, may mislead because they can be no more than a guide to the existence of the relationship of master and servant. The ultimate question will always be whether a person is acting as the servant of another or on his own behalf and the answer to that question may be indicated in ways which are not always the same and which do not always have the same significance.*

[11] In the instant case, the evidence before the Court as to the nature of the employment is not particularly clear. Mr. Housen said he was employed to the Defendant and that he signed a document or contract but there is no such document before the Court. On the other hand, the Defendant said that Mr. Housen was a subcontractor. It was admitted in cross-examination that Mr. Housen did take instructions from the Defendant in the execution of his duties.

[12] Though parts of the picture are indeed missing, it is the Court's responsibility to assess the evidence and rule on a balance of probabilities. Firstly, the Court accepts that the Defendant did in fact give instructions to Mr. Housen where his job was concerned. The Court also accepts that the Defendant instructed Mr. Housen as to the manner in which his job should be carried out. All indications are that the Defendant was generally in charge of the job site. The job of Mr. Housen was integral to the renovation work that the Defendant company did. The implication being that Mr. Housen and the

operator of the machine used in the demolition were employees, hired to carry out this site preparation work.

NEGLIGENCE

[13] Negligence is a tort that may arise in different forms. For the purposes of this section of the judgment, negligence may arise generally, through vicarious liability or the presence or a non-delegable duty. When an employee claims against an employer for the tort of another employee that caused him injury, this falls under vicarious liability.

[14] It has been the cases that an employer will be liable for the torts of an employee under his command. This was highlighted by the “Salmond Test” and a string of cases for more than a century. Sir John William Salmond asserted that an employer would be liable for (a) wrongful acts authorized by him and (b) acts which are considered unauthorized ways of doing authorized acts, even if these acts were expressly forbidden (see: Heuston and Buckley, **Salmond and Heuston on the Law of Torts**, (London: Sweet and Maxwell, 1996) p. 443).

[15] In **Limpus v London General Omnibus Company** [1862] 1 H&C 526, a driver pulled in front of another rival omnibus in order to obstruct it. Though there were express rules against this sort of conduct, the employer was still found liable as this was an authorized mode of the employee carrying out his duty as it was found that the employee was acting in the course of his employment.

[16] It is trite that employers are not found responsible for employee gone on a frolic of their own in a manner that is unrelated to their employment.

[17] In this matter, the Defendant’s employee operated the equipment in such a way that caused injury to Mr. Housen. While it is not clear whether the Defendant’s employee was demolishing the roof in an authorized or an unauthorized way, this distinction is not important to the Court’s finding. The important elements are that the employee who caused the injury was under the command of the Defendant and doing work that was authorized by the Defendant and for this reason the Defendant cannot escape

liability. The Court finds that the Defendant is vicariously liable for the act of his employee within the course of his regular duty that caused injury to Mr. Housen.

OCCUPIER'S LIABILITY

[18] In **Wheat v E. Lacon & Co Ltd** [1966] 1 All ER 582, the term occupier was defined in law by Lord Denning as a person who has sufficient control over the premises to the extent that he ought to realize that lack of care on his part can cause damage to his lawful visitors.

[19] In the instance case, there is no evidence before the Court as to how much control the Defendant had over the premises. The evidence is that the Defendant company was present on the premises to renovate the hotel and as such hired workers to effect this job. The Court assesses, on a balance of probabilities, that the Defendant company had sufficient control over the premises, or at least over the section of the premises that work would have been taking place, in order for them to carry out their job of renovation.

[20] Mr. Housen in his pleadings and submissions asserts that the Defendant has breached the **Occupier's Liability Act**, particularly section 3, which states:

> *(1) An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.*
>
> *(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*
>
> *(3) The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor and so, in proper cases, and without prejudice to the generality of the foregoing –*
>
> *(a) an occupier must be prepared for children to be less careful than adults;*
>
> *(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.*

> *(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances.*
>
> *(5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe*
>
> *(6) Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps, if any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.*
>
> *(7) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).*
>
> *(8) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.*

There is, however, no evidence before the Court that the incident occurred because the premises were not reasonably safe. In essence, Mr. Housen has not put forward any evidence that the premises were not safe. Instead, there is an intimation that the incident arose out of some action of the machine operator. Moreover, where section 3(3)(b) of the **Occupier's Liability Act** is concerned, the evidence is that the Defendant hired this employee to carry out specialized work and allowed them to do it. It is clear that the Defendant had entrusted Mr. Housen to guard against any special risks inherent to the job. The Court finds that the Defendant was not in breach of the **Occupier's Liability Act**.

SETTLEMENT AGREEMENT

[21] The final question is whether the document outlined below is a valid and enforceable agreement which this Court can and ought to rely on. An answer in the affirmative

would end Mr. Housen's chances at success. The document signed by the parties is quite simple:

> ***ZHONGDA CHINA CONSTRUCTION JAMAICA LIMITED***
>
> *ZDA*
>
> *Statement*
>
> *Mr. Orville Housen who was once working for the above company in Couple Ocho Rios project (sic), and got some injury on neck (sic) accidentally on the date of March 1st 2008.*
>
> *Now both the (sic) Mr. Orville Housen and ZDA (Zhongda China construction Jamaica limited) agree that ZDA pays the (sic) Mr. Orville Housen three hundred eighteen thousand seven hundred and ninety-seven Jamaican dollars and fifty cents (318,792.50) (sic). After the payment ZDA does not owe anything to Mr. Orville Housen and Mr. Orville Housen will not ask for anything from ZDA anymore.*
>
> *Both agree and sign:*
> *…*

[22] An agreement, undoubtedly, depends on the presence of certain element. These include offer, acceptance, consideration (payment or benefit), an intention to create legal relation and the presence of contracting parties. There is really no doubt that the document is a simple and classic agreement. The Defendant company offered Mr. Housen the sum of Three Hundred and Eighteen Thousand Seven Hundred and Ninety-Two Jamaican Dollars and Fifty Cents (JM $318,792.50) to deal with his injuries whereby Mr. Housen agreed that he would not request anything further of the Defendant company. In essence, there was an offer, acceptance, good consideration and a clear intention to enter into legal relations.

[23] The evidence is that Mr. Housen, being in financial need, accepted the money from the Defendant company to deal with his injuries. In the witness box, Mr. Housen said he accepted and signed the agreement freely understanding the implications. He said, however, that he felt compelled to sign because of his financial situation and his need for the funds. He also said he signed because the Defendant company told him that they were not liable for his injuries but that their insurers were the ones who would be liable.

[24] Mr. Gary Zhong, who gave evidence for the Defendants, was not able to speak from his own knowledge about what took place at the time, as he was not employed to the company then. His information came from conversations he had with former employees who had returned to China. His limited knowledge is that the company generally has insurances for its work sites, but he has no details about the insurance for the site where Mr. Housen was injured.

[25] As it is clear that the document is valid agreement, the only question be answered at this point is whether the contract can be found to be voidable due to misrepresentation. A representation is a statement made by one party to another particularly because the party making the representation wants to induce the other party to enter into an agreement. A misrepresentation is therefore a representation that is not true.

[26] In **Beattie v Lord Ebury** (1872) 7 Ch App 777 at 804 Mellish LJ asserted that a representation relates to some existing fact or some past event that must be distinguished from a statement of intention that contains and element of futurity.

[27] In **Edginton v Fitzmaurice** (1885) 29 ChD 459 at 483, the state of one's mind was at issue. Bowen LJ asserted:

> *"The state of man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact."*

In essence for one to misrepresent the state of their own mind as to a future intention, it must have been through dishonesty and in the absence of fraud there will be no relief granted.

[28] In the instant case, Mr. Housen said he felt compelled to sign the agreement because of his need for the funds. He also asserts that he was induced to do because he was told that he could claim from the Defendant company's insurers. Mr. Gary Zhong, giving evidence on behalf of the Defendant, could not speak to what Mr. Housen was

told, but he did testify that the Defendant would generally be insured although he does not know about the insurance for that particular construction site.

[29] The Court accepts that Mr. Housen was told that he should approach the company's insurers to seek redress. The question is, whether this is a misrepresentation in law because as it turns out the Defendant's insurers say the company was not insured at that time.

[30] There is no evidence before the Court that the Defendant knew that their company was not insured and only made this statement to induce Mr. Housen knowing it was false. This is so because there is no evidence as to why the Defendant was not insured and whether the person making the statement would have known this fact. The totality of the evidence suggests that the person making the statement was of the opinion that these sorts of matters were to be properly dealt with by the insurer and was in essence suggesting that Mr. Housen approach the insurer in this regard.

[31] It is the nature of a settlement agreement, such as this, that a party will try to do what is in their best interest. In other words, a party will try to pay a sum now to avoid court action later. All the evidence suggests that this is precisely what was at paly here. This was a company trying to the secure their interests in the way they saw fit. The Court does not find, on the evidence that the person making the statement knew that Defendant company was not insured and knowingly made a false statement.

[32] The sparsity of evidence about the absence of the insurance is a difficulty for the Court. If this was caused by the default of the Defendant company, then that default could have been actionable. However, there is no such claim or evidence before the Court.

CONCLUSION

[33] The unfortunate result of this matter is that Mr. Housen cannot recover against the Defendant company. He has contracted to waive any further recovery from the Defendant company based on the hope of insurance compensation. He did this

without legal representation or advice. The Defendant company apparently had no legal representation at that time either. So the agreement was made on even terms and in my view is binding on the parties.

[34] Should this Court be mistaken in that view, Mr. Housen received sums which would cover most of his medical needs. His evidence of loss of earnings were insufficient as he indicated that he did farming which certainly would replace any lost earnings.

[35] It is my view, however, that the Courts should grant Judgment to the Defendant with costs to the Defendant to be taxed if not agreed.

[36] Further, I would implore the Defendant to consider an ex gratia payment to Mr. Housen.

ORDERS

[37] The Orders of the Court are as follows:

1. Judgement is granted to the Defendant
2. Costs to the Defendant to be taxed if not agreed.