NATIONWIDE MUTUAL FIRE, INSURANCE COMPANY DISTRICT, Plaintiff,	:IN THE COURT OF COMMON PLEAS :OF THE 26TH JUDICIAL :COLUMBIA COUNTY BRANCH :
vs.	: :
	:CIVIL ACTION-LAW
LEE BENJAMIN, JR., BENJAMIN CONSTRUCTION, LEE BENJAMIN CONSTRUCTION, BENJAMIN ROOFING AND MODULAR HOMES, JAMIE DIETTERICK and MARK DAVENPORT, Defendants.	: : : :NO. 1182-CV-2017 : : :

APPEARANCES:
Franklin E. Kepner, Jr., Esquire, Attorney for Plaintiff
Brian Kane, Esquire, Attorney for Defendant Lee Benjamin, Jr.
Gary L. Weber, Esquire, Attorney for Defendant Jamie Dietterick
Franklin E. Kepner, Jr., Esquire, Attorney for Defendant Mark Davenport

December 26, 2019. James, J.

OPINION

This matter is before this court to consider Nationwide Mutual Fire Insurance Company's Motion for Summary Judgment (hereinafter, "Nationwide") against Defendant Lee Benjamin, Jr. (hereinafter, "Benjamin") arising out of an incident that occurred on July 13, 2016.

A complaint was filed by Mark Davenport (hereinafter, ("Davenport") against defendant Benjamin (Docket No. 2017-cv-21) alleging that while Davenport was working on a porch roof job for

Benjamin, said roof collapsed and Davenport fell to the ground sustaining several injuries. On October 20, 2017, Nationwide filed a Complaint seeking a declaratory judgment that Nationwide has no obligation to defend or indemnify Benjamin for Davenport's personal injury damages.

The facts of the case are as follows:

On July 13, 2016, Jamie Dietterick (hereinafter, "Dietterick") retained the services of Benjamin to repair the roof of his home. Davenport alleges that he was retained by Benjamin to assist on the roof job at Dietterick's home. While Davenport was working on the roof, said roof collapsed and he fell to the ground sustaining several injuries. Ex. B, Davenport's Dep. at 63, 119-125.

Davenport did not file a workers' compensation claim. Benjamin sought coverage for the incident under the Nationwide commercial liability policy. Nationwide contends that it does not have any obligation to provide coverage to Benjamin based upon two separate exclusions contained within the subject insurance policy. The relevant exclusions are as follows:

> **d. Workers' Compensation And Similar Laws**
> Any obligation of the insured under a workers' compensation disability benefits or unemployment law or any similar law.
>
> **c. Employer's liability**
> "Bodily Injury" to:
> (1)An "employee" of the insured arising out and in the course of:

> (a) Employment by the insured; or
> (b) Performing duties related to the conduct of the insured's business; or
> (2)The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.
> This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.
>
> The Policy contains the following relevant definitions:
>
> **Section V-Definitions**
> **5**. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
> **10**. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
> **19**. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short term workload conditions.

Benjamin contends that Nationwide's policy definitions set forth above are ambiguous because it does not define "Employee". It is further contended that Davenport was not an employee of Benjamin since he was volunteering his time for something to do. Defendant Benjamin's Brief at 8.

SUMMARY JUDGMENT STANDARD

The standard for determining whether summary judgment should be granted is set forth in Pa.R.C.P. 1035.2:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

"The essence of the revision set forth in new Rule 1035.2 is that the motion for summary judgment encompasses two concepts: (1) the absence of a dispute as to any material fact and (2) the absence of evidence sufficient to permit a jury to find a fact essential to the cause of action or defense. The former rule was unclear as to whether it encompassed the type of motion which is based upon a record which is insufficient to sustain a prima facie case. New Rule 1035.2(2) is explicit in authorizing such a motion." Pa.R.C.P. 1035.2, Explanatory Comment—1996.

In determining the merit of a motion for summary judgment the court must examine the record in the light most favorable to the non-moving party. Ward v. Rice, 828 A.2d 1118, 1120 (Pa.Super. 2003). All doubts as to the existence of a genuine issue of material fact must be resolved in favor of the non-moving party on motion for summary judgment. Id.

DISCUSSION

The case at bar presents two issues. First, whether Davenport was an employee of Benjamin at the time of the accident. Second, whether the relevant policy exclusions would be applicable under the facts.

In order to determine whether Davenport was an employee at the time of the accident, the Pennsylvania Supreme Court has relied on certain factors to be taken into consideration when doing the analysis. The factors are the following:

> Control of manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one is engaged in a distinct occupation or business; which party supplied the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer, and also the right to terminate the employment at any time.", quoting Stepp v. Renn, 184 Pa. Superior Ct. 634, 637, 135 A. 2d 794 (1957).

Hammermill Paper Co. v. Rust Eng'g Co., 430 Pa. 365, 370, 243 A.2d 389, 392 (1968).

Benjamin testified that he provided instructions to Davenport regarding the work to be performed: "Davenport was to keep the alleyway clean, throw the garbage away, and to clean up the debris." Ex. D, Benjamin's Dep. at 22-23. There was no employment

contract or written agreement between them. Ex. D, Benjamin's Dep. at 51-52.

Davenport never had a place to conduct his own business nor did he have his own liability insurance policy or workers compensation insurance. Ex. D, Benjamin's Dep. at 57, 68.

Regarding the work tools, Benjamin provided all supplies and tools necessary to perform the job except the gloves. Ex. D, Benjamin's Dep. at 54, 61.

Regarding payment, Davenport was compensated by Benjamin in the form of cash and meals for his work after the accident. Ex. D, Benjamin's Dep. at 52. Benjamin bought Davenport a few lunches, and paid him a few hundred dollars in cash. Id. Benjamin further testified that the first job Davenport worked on for him was only three to four weeks before the accident, and that he paid Davenport between $80-$100 cash. Ex. D, Benjamin's Dep. at 51. On the other hand, Davenport testified that he had performed an estimated ten (10) roofing jobs for Benjamin. Davenport's Dep. at 57.

Benjamin further contends that he is a solo proprietor and has no employees. Ex. D, Benjamin's Dep. at 5, 68. Additionally, Davenport's alleged employment was clearly occasional, irregular or incidental, as he was helping out Benjamin for the second time. Defendant Benjamin's Brief at 11.

Davenport testified that he was not paid by the hour or for jobs, but he gets pay here and there. Ex. B, Davenport's Dep. at

10, 54. Further, Benjamin was paying Davenport under the table for helping him, and for the job where the roof collapsed, he was supposed to get paid under the table. Ex. B, Davenport's Dep. at 11. Additionally, Davenport did not work free and he was free to stop working for Benjamin at any time. Ex. B, Davenport's Dep. at 55-56.

In the present case, Benjamin gave Davenport instructions on the jobsite, demonstrating that Benjamin had control over the work and the manner the work was supposed to be done. At Benjamin's deposition he testified:

> I remember telling him that it was right along the alleyway, and the biggest concern was somebody either walking through or a car coming through and the shingle coming off the roof and hitting the car. So that was pretty much his main goal, was just to make sure everything stays out of the alleyway, all the nails stay picked up, run the magnet, stuff like that.

Ex. D, Benjamin's Dep. at 23. Benjamin assumed possession and retained control over the jobsite and his instructions were clearly aimed to keep the surroundings safe for vehicular traffic and passersby who may get injured by the shingles falling off the roof. Also, control was evident since Benjamin supplied all the work tools necessary for the completion of the job, except the gloves brought by Davenport.

While both parties testified that there was no contractual agreement as to the scope of the job duties and Davenport was free to leave the jobsite at any moment, we find that Davenport's

service/assistance was retained with the expectation of remuneration. As the record shows, Davenport worked for Benjamin at least in one occasion and he was paid between $80-$100 dollars. Here, even though he was not immediately paid right after the accident, he was compensated in the form of lunches and cash. This form of payment can be reasonably construed as a payment by the job for the job performed on the day of the accident.

Because the factors in Hammermill weigh in favor of finding the existence of an employer-employee relationship, we find that Benjamin was the employer of Davenport at the time the accident occurred.

Nationwide further contends that Davenport was an employee of Benjamin Construction under the Construction Workplace Misidentification Act (hereinafter, "CWMA") codified as 43 P.S. §933.3. Under the CWMA, an individual who works in the construction industry can be classified as an independent contractor depending on certain factors. The CWMA provides the following:

> **(a) GENERAL RULE.—** For purposes of workers' compensation, unemployment compensation and improper classification of employees provided herein, an individual who performs services in the construction industry for remuneration is an independent contractor only if:
> **(1)** The individual has a written contract to perform such services.
> **(2)** The individual is free from control or direction over performance of such services both under the contract of service and in fact.

> **(3)** As to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.
> **(b) CRITERIA.—** An individual is customarily engaged in an independently established trade, occupation, profession or business with respect to services the individual performs in the commercial or residential building construction industry only if:
> **(1)** The individual possesses the essential tools, equipment and other assets necessary to perform the services independent of the person for whom the services are performed.
> **(2)** The individual's arrangement with the person for whom the services are performed is such that the individual shall realize a profit or suffer a loss as a result of performing the services.
> **(3)** The individual performs the services through a business in which the individual has a proprietary interest.
> **(4)** The individual maintains a business location that is separate from the location of the person for whom the services are being performed.
> **(5)** The individual:
> **(i)** previously performed the same or similar services for another person in accordance with paragraphs (1), (2), (3) and (4) while free from direction or control over performance of the services, both under the contract of service and in fact; or
> **(ii)** holds himself out to other persons as available and able, and in fact is available and able, to perform the same or similar services in accordance with paragraphs (1), (2), (3) and (4) while free from direction or control over performance of the services.
> **(6)** The individual maintains liability insurance during the term of this contract of at least $ 50,000.

43 P.S. §933.3. Applying the CMWA factors to the current facts, the court finds the following:

1- Benjamin Construction is in the business of construction and CMWA would be applicable.

2- Under 43 P.S. §933.3 (a), Davenport did not have a written contract with Benjamin; Davenport was not free from control and direction; and Davenport was not customarily engaged in an independently established, trade, occupation, profession or business.

3- Under 43 P.S. §933.3 (b)(1), Davenport only supplied his own gloves. Davenport did not possess the essential tools, equipment and other assets to perform his service independently. Ex. D, Benjamin's Dep. at 54.

4- Under 43 P.S. §933.3 (b) (2), Benjamin Construction would realize a profit or a loss as a result of Davenport's services. Davenport considered that he was getting paid by the job. Ex. B, Davenport's Dep. at 54-55.

5- Under 43 P.S. §933.3 (b) (3), Davenport did not have any business in which he had a proprietary interest. Ex. D, Benjamin's Dep. at 57.

6- Under 43 P.S. §933.3 (b) (4), Davenport did not have a business location separate and other than the sites which he performed work for Benjamin Construction. Ex. D, Benjamin's Dep. at 57.

7- Under 43 P.S. §933.3 (b) (5), Davenport did not have or maintain liability insurance. Ex. D, Benjamin's Dep. at 68.

Thus, we find that Davenport does not meet the definition of an independent contractor. Therefore, CWMA is not applicable to Davenport.

In regard to the second issue, because we concluded that Davenport under the Hammermill factors was an employee at the time of the accident, it is clear that the Employer's Liability Exclusion precludes coverage under the Nationwide's insurance policy.

First, the Workers' Compensation Exclusion is not applicable in this case since Defendant did not file for a Workers' Compensation claim against Benjamin. Defendant Benjamin's Brief at 8.

Second, the Employer's Liability Exclusion precludes insurance coverage for employee's bodily injuries when performing duties related to the conduct of the insured's business. It is clear from the facts that Davenport was injured, while repairing the roof, and his assistance furthered Benjamin's business interest in Benjamin Construction. Thus, the Employer's Liability Exclusion would be applicable here.

Finally, Benjamin contends that the Motion for Summary Judgment under the Nanty-Glo rule should be dismissed because of Nationwide's sole reliance on the depositions of Davenport and Benjamin. Defendant's Benjamin Brief at 11.

It has been settled that the Nanty-Glo rule prevents a court from granting the Summary Judgment Motion solely on the basis of oral testimony or undocumented affidavits of the moving party's witnesses. <u>Askew v. Zeller</u>, 361 Pa. Super. 35, 43, 521 A.2d 459, 463 (1987.

While it is true that in the current case Plaintiff mainly relied on the depositions of Davenport and Benjamin, an exception has been recognized. The uncontradicted deposition testimony of a co-defendant, who is an adverse party and equally liable to the plaintiff, is a sound basis for summary judgment. <u>Askew</u>, 521 A.2d at 464. Here, the interests of co-defendants, Davenport and Benjamin, are adverse to Nationwide's interest. Therefore, the Nanty-Glo rule is not applicable to the case.

Based on the evidence of record in this case, viewed in the light most favorably to the non-moving party, i.e. Defendants, we find that the Nationwide Employer's Liability Exclusion is applicable, and it precludes coverage for any bodily injury claims brought by Davenport. The summary judgment motion must be granted.

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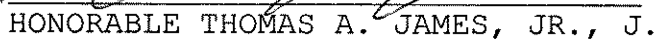
ORDER

AND NOW, this 26th day of December 2019, Plaintiff' motion for summary judgment and declaratory judgment is **GRANTED**. Judgment is entered in favor of Plaintiff against Defendants.

BY THE COURT:



HONORABLE THOMAS A. JAMES, JR., J.