

NOT FOR PUBLICATION WITHOUT THE
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4431-09T3

SPARK SOFTWARE SOLUTIONS,
L.L.C.,

Plaintiff-Appellant,

v.

Z & A INFOTEK CORPORATION,

Defendant-Respondent/
Third-Party Plaintiff,

v.

MEERA KIYASUDEEN, YASMINE
KIYASUDEEN AND KYIA ALIYAR,

Third-Party Defendants.

Submitted May 17, 2011 - Decided July 11, 2011

Before Judges Carchman and Messano.

On appeal from the Superior Court of New
Jersey, Law Division, Middlesex County,
Docket No. L-2469-09.

J.C. Neu & Associates, attorneys for
appellant (Jeffrey C. Neu, on the brief).

Rajan & Rajan, attorneys for respondent
(Mahesh Rajan, on the brief).

PER CURIAM

Plaintiff, Spark Software Solutions, LLC, (Spark), appeals the grant of summary judgment in favor of defendant, Z&A Infotek Corporation (Z&A). Plaintiff claimed that defendant owed plaintiff wages of \$51,060 representing four months of work. Defendant argued, and the motion judge concluded, that plaintiff could not bring an action for wages because plaintiff is a temporary help service agency or consulting firm, and not registered with the state, as required by the Private Employment Agency Act, N.J.S.A. 34:8-43 to -66. (PEAA or the Act).¹ We reverse and remand.

The facts are not in dispute.

Plaintiff, Spark Software Solutions, LLC, was formed by Meera Kiyasudeen² in 2005. Meera describes himself as a "business analyst" with extensive experience in "Oracle Applications." Meera is the sole employee of Spark, and the sole owner of Spark is Meera's wife, Yasmin Kiyasudeen. According to Meera, he formed the LLC "to protect himself and for tax purposes."

In October 2006, Meera was looking for work and posted his resume on various job portals. The postings were in his name as

¹ The Act is no longer titled, but we retain the source act title for simplicity of discussion.

² For ease of reference, we refer to these individuals by their first names.

an individual and did not mention Spark. Meera was then contacted by Jay Shuckla, from Z&A Infotek, an employment agency, who informed him that Ricoh Corporation (Rico) had an opening for an IT professional. Meera sent his resume to Shuckla.

Defendant coordinated two interviews between Meera and Ricoh, and also negotiated Meera's pay, schedule and start date. Spark was never mentioned in the negotiations. After a start date was established, defendant asked Meera for his LLC information, which Meera provided. Defendant then sent Meera two documents to sign – a "Professional Services Agreement,"³ and a "Purchase Order."

³ In relevant part, the Professional Services Agreement provides:

II. STAFFING

a) "Vendor" agrees to furnish to Client, and "ZNA" hereby agrees to engage from "Vendor," the services of one or more Consultants as needed by Client in accordance with the written Purchase Order(s) approved by "ZNA," for the assignment(s) described in such Purchase Order(s).

. . . .

III. PAYMENT FOR SERVICES

Payment for services will be made in the corporate or business name of "Vendor" on the periodic basis set forth in the Purchase Order. . . .

IV. ADMINISTRATION

a) It is understood and agreed that "Vendor" is an independent contractor and all Consultants are either employees of "Vendor," or are independent contractors/consultants of "Vendor."

Meera began working for Ricoh in November 2006. According to plaintiff, "the relationship with the defendant was rocky at times, because the defendant was continually late in paying [him]," but Meera continued to perform work for Ricoh until the agreement between Ricoh and defendant was terminated in September 2008. At this point, the contract between Meera and defendant was also terminated because defendant could no longer provide Meera with work.

Defendant did not pay plaintiff for work performed on the Ricoh contract between June 30, 2008, and September 30, 2008. According to plaintiff, during this time period, Meera performed 520 hours of work at \$115 per hour.⁴ Meera sent invoices to defendant, and defendant paid only \$8,740. According to plaintiff, he is still owed \$51,060 plus interest. Defendant responded that plaintiff was not entitled to his wages because he was not registered with the State of New Jersey as a temporary help service.

Hoping to receive payment, plaintiff then registered with the State as a temporary help service. He decided to register without consulting an attorney.

⁴ The Purchase Order states that Meera's billing rate was \$108 per hour.

In granting defendant's motion for summary judgment, the motion judge concluded that plaintiff was a temporary help service firm,⁵ and explained:

I understand that this is a very harsh result. But it's a result that is compelled by the law. And there is nothing that has been presented to me, within the time that you had an opportunity to present to me, that gives rise to any dispute about any material fact as to whether or not Spark Software was registered, as required under the law. The evidence is pretty clear that it was not.

It's also clear that the plaintiff testified that it was temporary employment, so it brought it under the law – the obligation to register. It was not. The company subsequently registered in August 2009. The case law seems to be clear. . . .

On appeal, plaintiff alleges that Spark is not a temporary help service firm, an employment agency or a consulting firm, and is not governed by the Act.

The thrust of defendant's argument is that plaintiff is a temporary help services agency because plaintiff is "involved with recruitment, hiring, and job placement of its candidates in New Jersey." Defendant argues that because Meera's wife,

⁵ The motion judge did not make any findings as to whether Spark qualified as a "consulting firm" or "employment agency" under the Act. Defendant argues only that Spark is a "temporary help service firm" or a "consulting firm." Plaintiff denies that Spark is a "temporary help service firm," "consulting firm," or "employment agency." In the interest of completeness, we address each provision.

Yasmin, is the legal owner of Spark, Spark is a company that "provided a consultant, Meera Kiyasudeen, to work on a temporary project for Defendant's end client, Ricoh" and that plaintiff "conceded that it was not registered under the Act."

We apply the same standard as the trial court in reviewing the granting of motions for summary judgment. EMC Mortg. Corp. v. Chaudhri, 400 N.J. Super. 126, 136 (App. Div. 2008) (citing Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A. 189 N.J. 436, 445-46 (2007)). Summary judgment must be granted "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 challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

We must first determine whether the moving party has demonstrated that there were no genuine disputes as to material facts. Atl. Mut. Ins. Co. v. Hillside Bottling Co., Inc. 387 N.J. Super. 224, 230 (App. Div.), certif. denied, 189 N.J. 104 (2006). We then decide "whether the motion judge's application of the law was correct." Id. at 231. The motion judge's conclusions on issues of law are not entitled to deference. Ibid. (citing Manalapan Realty L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

As the parties raise no disputed issue of material fact, we review the trial judge's legal conclusion de novo.

N.J.S.A. 34:8-45(b) states:

A person shall not bring or maintain an action in any court of this State for the collection of a fee, charge or commission for the performance of any of the activities regulated by this act without alleging and proving licensure or registration, as appropriate, at the time the alleged cause of action arose.

The Act regulates consulting firms, employment agencies and temporary help service firms.

"Temporary help service firm" is defined as:

any person who operates a business which consists of employing individuals directly or indirectly for the purpose of assigning the employed individuals to assist the firm's customers in the handling of the customers' temporary, excess or special work loads

[N.J.S.A. 34:8-43.]

"Consulting firm" is defined as:

"any person that:

(1) Identifies, appraises, refers or recommends individuals to be considered for employment by the employer; and

(2) Is compensated for services solely by payments from the employer and is not, in any instance, compensated, directly or indirectly, by an individual who is identified, appraised, referred or recommended.

[N.J.S.A. 34:8-43]

"Employment agency" is defined as:

any person who for a fee, charge or
commission:

(1) Procures or obtains, or offers, promises
or attempts to procure, obtain, or assist in
procuring or obtaining employment for a job
seeker or employees for an employer; or

(2) Supplies job seekers to employers
seeking employees on a part-time or
temporary assignment basis who has not filed
notification with the Attorney General . . .
; or

. . . .

(4) Acts as a placement firm, career
counseling service, or resume service . . .

.

[N.J.S.A. 34:8-43.]

Despite defendant's assertion that recent decisions address
the issues presented here, there are no New Jersey decisions
interpreting N.J.S.A. 34:8-43's definitions of temporary help
service firm, employment agency or consulting firm.⁶ In

⁶ The motion judge and defendant relied on Talented IT, Inc. v. Data Group Inc., No. A-1836-08 (App. Div. October 28, 2009); Camo Technologies, Inc. v. Pathan, No. A-2793-07 (App. Div. January 2, 2009); and Peri Software Solutions, Inc. v. Saurabh Aggarwal, No. A-0388-06 (App. Div. May 1, 2007). These cases are inapplicable because they do not address the issue of whether a particular company qualifies as a temporary help service. They all involve plaintiffs who did not dispute that they were temporary help services and required to register under

Footnote continued on next page.

interpreting these definitions, we will not "resort to extrinsic interpretative aids" when "the statutory language is clear and unambiguous, and susceptible to only one interpretation." DiProspero v. Penn, 183 N.J. 477, 492 (2005) (quotations omitted). But, "if there is ambiguity in the statutory language," we may "turn to extrinsic evidence, including legislative history, committee reports, and contemporaneous construction." Id. at 492-93 (quotations omitted). We "may also resort to extrinsic evidence if a plain reading of the statute leads to an absurd result" Id. at 493.

First, we consider the motion judge's determination that Spark is a "temporary help service firm." Applying the Act's plain meaning of "temporary help service" to plaintiff's business, we conclude that Spark is not a "temporary help service firm."

A temporary help service firm "employ[s] individuals" "for the purpose of assigning the employed individuals to assist the firm's customers in the handling of the customers' temporary, excess or special work loads[.]"⁷ N.J.S.A. 34:8-43.

the Act. Moreover, they are unreported and are not precedential authority. R. 1:36-3.

⁷ The definition of temporary help service also requires that that the person operating the business "pay[] [] wages, taxes and State and federal unemployment insurance" and "carr[y] Footnote continued on next page.

As plaintiff notes, in more colloquial terms, this definition is intended to describe a staffing agency. It pertains to companies who recruit and hire individuals with the purpose of sending them to perform temporary work for third parties.

Here, Spark was formed by one individual, Meera. It was created for tax purposes. Although Yasmin is the owner of Spark, according to plaintiff, Meera is the "sole employee," and therefore Spark does not "employ[] individuals." (Emphasis added). Spark, as an entity, does not have its own clients or customers. Spark does not "assign[] the employed individuals to assist the firm's customers in the handling of the customers' temporary, excess or special work loads[.]" (Emphasis added). Finally, Spark does not "assign" Meera to work for customers. Spark is not in the business of "assigning" employees to perform work for customers. Spark, through its sole employee, Meera, is in the business of performing the work. Spark performs computer

worker's compensation insurance as required by State law[.]" The parties do not address these requirements other than plaintiff's contention that "The simple fact that Spark paid its taxes under the law is insufficient to make it a temporary help service within the meaning of the law since the other [] conditions are not met." There is insufficient evidence in the record to determine whether these criteria are met, but we conclude that an analysis of the other factors is sufficient to determine that Spark does not qualify as a temporary help service.

services; it does not exist for the purpose of staffing job seekers with clients.

The fact that Yasmin is the "sole owner" of Spark does not impact this analysis. There are many legitimate reasons for an independent contractor like Meera to form an LLC.⁸ While Yasmin owns Spark in name only, even if she actively participated in the business, it would not change the result here. The unambiguous text of the definition requires that a temporary help service "assign" its employees to perform temporary work for "customers." Spark's purpose is to perform computer services, not employment or staffing services.

We also conclude that the definition of consulting firm is unambiguous and agree with plaintiff's assertion that Spark is not a consulting firm because it did not "identify, appraise, refer or recommend" Meera or other individuals to be considered for employment.⁹ Meera, individually, posted his resume seeking employment. Spark has no other employees. Spark did not

⁸ LLCs afford individuals the opportunity to "take advantage of both the limited liability afforded to shareholders and directors of corporations and the pass through tax advantages available to partnerships." Senate Commerce Committee, Statement to Senate Bill No. 890 (Jan. 26, 1994).

⁹ Defendant argues that plaintiff "clearly performs the functions of a consulting firm and/or a temporary help service firm," but focuses its argument on temporary help service firm, making no separate argument as to why plaintiff qualifies as a consulting firm.

"recommend" that Ricoh, the end client, employ Meera. Spark did not "identify" Meera as a potential employee for Ricoh, nor did Spark "identify" Ricoh as a potential employer for Meera. Similarly, Spark did not "refer" Meera and Ricoh to each other. Rather, defendant, an actual employment or staffing agency, found Meera's resume and facilitated the relationship between Meera and Ricoh. Meera, and Spark, had no involvement in this process aside from Meera's posting of his resume. Spark does not qualify as a consulting firm based on the plain meaning of the definition.

Although defendant does not argue that plaintiff is an employment agency, plaintiff asserts that Spark is not, and we agree. Spark does not attempt to obtain or assist in obtaining work for job seekers. Meera did work for the employer, Ricoh, on a part-time or temporary basis, but Spark did not supply him. Defendant, an actual employment agency, supplied him. Spark had no involvement in the transaction. As explained above, Meera is a skilled individual and the purpose of Spark is to provide computer services, not to find open positions for job seekers.

Our determination that Spark is not required to register under the Act is consistent with the spirit and intent of the statute.

New Jersey has a long-standing practice of employment-agency regulation. Accountemps Div. of Robert Half of Philadelphia, Inc. v. Birch Tree Group Ltd., 115 N.J. 614, 618 (1989). In 1983, when the legislature passed an Act permitting municipalities to regulate employment agencies, its goal was to remedy the "evils" of private employment agencies. Ibid.

"Some of the practices of private employment agencies are very inimical to the interests of the laboring people; they invariably receive applications for employment and advance fees far in excess of their ability to supply situations; the advance fee of a poor, needy applicant is received with as much pleasure when the chances of securing a position are a thousand to one against the applicant as any other circumstances; they nearly always advertise for ten times as many laborers as needed. They advertise for laborers and mechanics to go to the State of Washington or some other remote part of the country, under the vague promise that steady employment and good wages will be secured"

[Ibid. (quoting Report of the New Jersey Department of Labor 73 (1893)).]

Municipal regulation of employment agencies became mandatory in 1907. Id. at 619. In 1951, the Legislature adopted the PEAA, L. 1951, c. 337, "which incorporated much of the prior legislation." Id. at 619. The Act was then repealed and substituted by L. 1989, c. 331 § 28, effective January 12, 1990.

The Court has observed that it is "abundantly clear" that the "Legislature's primary purpose in adopting the . . . Act was to regulate the conduct of all employment agencies providing services to New Jersey employees and employers." Id. at 623. Two years later, we explained that the purpose of the Act is to prevent "regulated agencies from engaging in deceptive or otherwise unfair practices when dealing with both job seekers and employers[.]" Data Informatics, Inc. v. Amerisource, 338 N.J. Super. 61, 71 (App. Div. 2001) (quotations omitted).

The purpose of the statute is to prevent employment agencies from engaging in deceptive and unfair practices, and to protect job seekers and employers. Here, Meera is not a job seeker who came to Spark in hopes that Spark would find him temporary employment with one of its clients. Spark does not deal with "job seekers and employers." Rather, Meera is a self-employed computer programmer. He created Spark to gain the protection of an LLC - a legitimate interest. Spark did not act as a liaison between Meera and Ricoh. Instead, defendant, an actual temporary help service or employment agency, acted as the liaison between Meera, an individual job seeker, and Ricoh, the end client. As the motion judge indicated, the logical extension of his decision is that any individual who forms an LLC for any reason, and contracts to perform work for another

party, is an employment agency. There is no indication that the Legislature intended to regulate independent contractors like Spark.

We conclude that Spark was not barred from recovery by the Act.

Reversed and remanded.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION