

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

EMMANUEL O. EBEA,)	
)	
Plaintiff,)	
vs.)	NO. 1:07-cv-01146-DFH-TAB
)	
G&H DIVERSIFIED,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

EMMANUEL O. EBEA,)
)
 Plaintiff,)
)
 v.) CASE NO. 1:07-cv-1146-DFH-TAB
)
 G&H DIVERSIFIED,)
)
 Defendant.)

ENTRY ON DEFENDANT'S MOTION TO RECONSIDER

On March 11, 2009, this court denied defendant G&H Diversified's motion for summary judgment of plaintiff Emmanuel Ebea's negligence claim, rejecting G&H's argument that it was, as a matter of law, Ebea's "dual employer" for workers compensation purposes under the seven-part test set forth by the Indiana Supreme Court in *Hale v. Kemp*, 579 N.E.2d 63 (Ind. 1991). Dkt. No. 61. G&H has moved the court to reconsider that decision based on *Kenwal Steel Corp. v. Seyring*, a decision by the Indiana Court of Appeals issued on March 25, 2009. See ___ N.E.2d. ___, 2009 WL 839057 (Ind. App. March 25, 2009). Because *Kenwal Steel* was decided on a legal issue not presented by G&H in its motion for summary judgment, the motion to reconsider is denied.

Standard of Review

To support its motion, G&H invokes Rule 60(b) of the Federal Rules of Civil Procedure. Strictly speaking, Rule 60(b) does not actually apply here because the

court has not yet entered a final judgment as to any party or claim. The applicable rule is Rule 59, which provides a vehicle for asking a court to reconsider a judgment or a non-final decision; the court also has inherent power to revisit interlocutory decisions. See *Peterson v. Lindner*, 765 F.2d 698, 704 (7th Cir. 1985). Motions under Rule 59 allow a party to direct the district court's attention to newly discovered material evidence or a manifest error of fact or law so that a district court can correct its own errors and avoid unnecessary appeals. *E.g.*, *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996) (affirming denial of relief where supposedly new evidence had been available to party during original summary judgment proceedings). Rule 59 "does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." *Id.*; accord, *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995).

Discussion

G&H moved for summary judgment on Ebea's negligence claim on the sole ground that Ebea was dually employed by both G&H and Express under the seven-part test for dual employment set forth in *Hale v. Kemp*, 579 N.E.2d 63 (Ind. 1991).¹ See Dkt. No. 51 at 1-2 ("Because the undisputed evidence indicates that

¹Earlier in these proceedings, G&H moved to dismiss Ebea's negligence claim for lack of subject matter jurisdiction, arguing that it was Ebea's dual employer based on the seven-factor *Hale* test. See Dkt. No. 18, 19.

Plaintiff was a dual employee of G&H and Express, G&H is entitled to summary judgment in this matter”), 8 (“Even if all evidence is construed as favorably as possible to the Plaintiff . . . the evidence unambiguously points toward a finding that Plaintiff was a dual employee of G&H and Express and that his claim is barred by the Indiana Workers Compensation Act”), 8-15 (discussing Indiana cases applying seven-part *Hale* test for dual employment), 15-22 (applying *Hale* factors); Dkt. No. 57 at 1 (arguing that plaintiff’s assertion that court should consider the language of the staffing agreement was a “distraction” from *Hale* factors). After analyzing the arguments set forth in G&H’s summary judgment papers and Ebea’s response, the court determined that the facts surrounding the *Hale* factors were sufficiently disputed to require submission of the issue of Ebea’s dual employment status to a jury. Dkt. No. 61 at 20-21.

Fourteen days later, the Indiana Court of Appeals decided *Kenwal Steel Corp. v. Seyring*, ___ N.E.2d. ___, 2009 WL 839057 (Ind. App. March 25, 2009). In *Kenwal Steel*, the plaintiff was hired by a temporary staffing service (Elwood), and was assigned to work at Kenwal Steel’s facility. The plaintiff was injured in an accident while working at Kenwal Steel. He brought a worker’s compensation claim against Elwood and sued Kenwal Steel for negligence. Kenwal Steel moved to dismiss, arguing that the plaintiff was a “leased” employee and that Elwood and Kenwal Steel as lessor and lessee were “joint employers” under Ind. Code § 22-3-6-1(a). *Kenwal Steel*, 2009 WL 839057, at *2. That provision defines “employer” for purposes of Indiana’s Worker’s Compensation Act and provides in part: “both

a lessor and a lessee of employees shall each be considered joint employers of the employees provided by the lessor to the lessee for purposes of IC 22-3-2-6 and IC 22-3-3-31.” See Ind. Code § 22-3-6-1(a). As a matter of first impression in the Indiana appellate courts, the court held that, under Ind. Code § 22-3-6-1(a), Elwood was the plaintiff’s lessor and Kenwal Steel was the plaintiff’s lessee, creating a joint employment relationship under Indiana worker’s compensation law so that its exclusivity provision applied to both employers. *Kenwal Steel*, 2009 WL 839057, at *2-3. Because the court decided the issue of joint employment under the leased employee statute, the court did not analyze the seven *Hale* factors. *Id.* at *4, n.8.

Like the plaintiff in *Kenwal Steel*, plaintiff Ebea was a temporary employee whose work was subject to a staffing agreement between an employment service and one of its customers. However, unlike the defendant in *Kenwal Steel*, G&H did not argue that as a temporary employee Ebea was a leased employee for purposes of Ind. Code § 22-3-6-1(a). Instead, G&H’s argument was limited to Ebea’s possible status as a joint employee under the seven-factor *Hale* test. G&H may not now, on the eve of trial, take a third bite of the apple and present a legal argument that it failed to present both in its motion to dismiss and in its motion for summary judgment. Its motion to reconsider is denied. Trial remains scheduled for May 11, 2009 at 9:00 a.m.

So ordered.

Date: April 20, 2009

DAVID F. HAMILTON, CHIEF JUDGE
United States District Court
Southern District of Indiana

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