STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

JOHN DANIEL MEYERS, JR.,
Plaintiff,

v.

TRIPLE STAR LLC d/b/a STARS ROOFTOP BAR AND GRILL ROOM, THOMAS JAY SACK, and MOTIVATED MARKETING, LLC d/b/a MOTIVATED MARKETING,
Defendants.

IN THE COURT OF COMMON PLEAS
9th JUDICIAL CIRCUIT
CASE NO.: 2017-CP-10-5140

ORDER

In this Negligence and Dram Shop case, Defendant Triple Star LLC d/b/a Stars Rooftop Bar and Grill Room's ("Stars"), moves to dismiss Plaintiff's case pursuant to Rule 12(b)(1) SCRCP based on the Statutory Employee Doctrine. Defendant alleges Plaintiff was its statutory employee and thus Plaintiff's tort action is barred by the exclusive remedy provision of the Workers' Compensation Act. The Plaintiff opposed the motion and both parties presented the Court with evidence outside the pleadings. The matter was heard on November 25, 2018. After considering the evidence of record, the arguments of counsel and the applicable law, for the reasons that follow, the Court denies Stars' motion to dismiss.

I. FACTUAL/PROCEDURAL BACKGROUND

Plaintiff was hired as an independent contractor with Clarmac LLC d/b/a Zanshin Management ("Zanshin") to provide crowd control and security to establishments in the Charleston area. Plaintiff performed these services at several venues.

Stars is a restaurant and bar and subcontracted with Zanshin to provide crowd control at its restaurant. Stars had a Consulting Services Agreement ("Agreement") with

Zanshin. The Agreement defined Zanshin as a "consultant" and "independent contractor."

On December 12, 2015, Plaintiff fractured his patella after an altercation with an intoxicated patron, Thomas Sack, while working at Stars. Plaintiff has undergone two (2) knee surgeries and is awaiting a third surgery. Plaintiff sued Stars under Negligence and Dram Shop theories alleging Stars knowingly served an intoxicated patron.

On October 16, 2017, Plaintiff personally served Stars with the Summons and Complaint through its agent, United States Corporation Agents, Inc.

On November 20, 2017, the Honorable Dedra Jefferson signed an Order of Default adjudging Stars in default.

On January 19, 2018, the Honorable Kristi Harrington referred this matter to the Honorable Mikell Scarborough, Master in Equity.

On February 2, 2018, Stars, filed an Answer and Motion to Set Aside Default ninety-nine (99) days after being served with the Summons and Complaint. Contemporaneously, Stars also filed this 12(b)(1) motion to dismiss raising the affirmative defense that Plaintiff was its "statutory employee" and that Plaintiff's tort action was barred by the exclusive remedy of the Workers' Compensation Act.

On May 9, 2018, a hearing was held before the Honorable Mikell Scarborough on the Motion to Set Aside Default. Judge Scarborough ruled from the bench that he was granting Stars' motion to set aside default, finding Stars' registered agent did not properly provide actual or constructive notice to Stars. Judge Scarborough remanded Stars' motion to dismiss to be scheduled with the Court of Common Pleas. He asked defense counsel to prepare the order, which was signed on May 21, 2018.

After Stars' motion to set aside default was granted, Plaintiff immediately filed a Form 50 workers' compensation claim on May 10, 2018 even though he did not believe he was a statutory employee of Stars.

In response, the workers' compensation employer filed a Form 51 denying the claim and asserting Plaintiff was barred by the two (2) year statute of limitations. Plaintiff contends that had Stars timely answered the complaint on or before November 16, 2017 and raised this statutory employee affirmative defense, Plaintiff would have had the opportunity to file a workers compensation claim prior to the two (2) year expiration of the statute of limitations which expired on December 12, 2017.

II. STANDARD OF REVIEW

Whether an individual is a statutory employee is not an issue of subject matter jurisdiction, but rather one of exclusive jurisdiction. *Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002). The legislature has determined that the Workers Compensation Commission shall have the exclusive jurisdiction of employee's work-related claims. Id. Rule 12(b)(1) SCRCP by its terms refers to a motion to dismiss for "lack of jurisdiction over the subject matter." Given *Sabb*, such a motion could properly be summarily dismissed. Because jurisdictional questions are questions of law, this court "has the power and duty to review the entire record and decide the jurisdictional fact in accord with its view of the preponderance of the evidence." *Posey v. Proper Mold & Eng'r, Inc.* 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008).

III. ISSUE

The question presented is whether Plaintiff - an independent contractor of Zanshin Management Company – was also a statutory employee of Stars at the time of his injury and engaged in an activity that was part of Stars, "trade, business or occupation," within the meaning of S.C. Code § 42-1-400.

IV. LAW/ANALYSIS

A. STATUTORY EMPLOYEE- PART OF TRADE, BUSINESS, OCCUPATION

To qualify as a statutory employee under Workers Compensation, an individual must be engaged in an activity that "is a part of [the employer's] trade, business, or occupation" S.C. Code Ann. § 42-1-400 (1985). This legislation "is a protection of the employees of irresponsible contractors who do not provide workmen's compensation coverage for their employees, and prevents employers from escaping liability by doing through independent contractors what they would otherwise do through their own employees." *Adams v. Dawson-Paxon Co.*, 230 S.C. 532, 545, 96 S.E.2d 566 (1957). The primary purpose of the Act is to protect the workman who actually does the work. *Smith v. Fulmer*, 198 S.C. 91, 15 S.E.2d 681 (1941). Plaintiff asserts Stars' purported statutory employee affirmative defense does the exact opposite of protecting Plaintiff, the injured worker, and instead is being utilized to shield the Employer so that Stars can "escape liability" altogether.

A particular activity is part of the employer's trade, business or occupation if it "(1) is an important part of the [employer's] business or trade; (2) is a necessary, essential and integral part of the [employer's] business; or (3) has previously been performed by the [employer's] employees." *Cooke v. Palmetto Health Alliance*, 367, S.C. 167, 170, 624

S.E.2d 439, 442, (Ct. App. 2005) quoting *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581, S.E.2d 482, 485 (2003). If the activity meets one of these criterion, the injured worker is a statutory employee of the owner within the meaning of the Workers Compensation Act. Precedence also explains, however, that despite the three-part test, "there is no easily applied formula," and "the guidepost is whether...that which is being done is or is not part of the general trade, business or occupation of the owner." *Abbott v. Limited, Inc.*, 338 S.C. 161, 163, 526, S.E.2d 513 (2000) (quoting *Hopkins v. Darlington Veneer Co.*, 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946)). *Abbot* and *Olmstead* explain that the three-part test for statutory employee must be applied **practically rather than mechanically.**

Stars asserts all three of the tests are satisfied to qualify Plaintiff as a statutory employee. However, as noted above, the guidepost is whether that which is being done is or is not part of *the owner's* general business. One could superficially say that security and crowd control is "important" and "necessary" to Stars business, but that does not end the normative inquiry. If that were true, then virtually anyone providing services on Stars premises would by definition be a statutory employee. The court doubts Stars (or any other business) is accustomed to spending money on things that do not have some degree of importance to the business.

Stars' agreement with Zanshin specifically defined Stars as a "full service restaurant" that wished to engage Zanshin as an independent contractor for the purpose of providing "professional services." The Agreement further provided that Stars was not required to hire, supervise or pay any assistants to help Zanshin perform such services. The evidence indicates that Stars is in the business of providing food, drinks and alcohol

to its customers, not crowd control and security, which is precisely why it hired a professional services company to perform these duties.

At no time did the Plaintiff ever act in any other role or hold any other position besides that of crowd control and security. Plaintiff never acted as a bartender, server, host, hostess, bus boy, cook, dishwasher or any other role that was part of the Star's core trade, business or occupation. Stars' 30(b)(6) designee, Heather Greene, testified that Stars does not have the authority to ask Zanshin employees to fill in as a bartender or perform any other duties other than crowd control further demonstrating that Zanshin's crowd control duties are not part of Stars' general business.

Stars asserts crowd control and/or security is both an "important" and "necessary" part of its business thus satisfying the first and second tests outlined in *Cooke*. Stars relies in part on the City of Charleston's "Late Night Entertainment Establishment Ordinance" which requires security personnel to be on duty at all times from 12:00 a.m. – 2:00 a.m., Friday, Saturday, Sunday and certain holidays. As previously mentioned, the fact that Stars contracts out these professional services to Zanshin because of a "late night" ordinance actually supports the claim that crowd control and security is not part of Stars' general business. Even though Stars' asserts this ordinance is "essential" to "lawful operation," Ms. Greene later admitted at the 30(b)(6) deposition that the City of Charleston Ordinance had little impact on Stars' handling of crowd control personnel.

Defendant relies on *Chew v. Newsome Chevrolet* where the Court of Appeals determined a security guard working at Newsome Chevrolet was a statutory employee of Newsome Chevrolet. 315 S.C. 102, 105, 431 S.E.2d 631, 632 (Ct. App. 1993). Again, as precedent has repeatedly instructed there is no bright line test to determine whether an

individual qualifies as a statutory employee. There is no easily applied formula and each case must be decided on its own facts. *Meyer v. Piggly Wiggly* 338 S.C. 471, 527 SE2d 761 (2000).

First, Chew was an employee of Am-Pro Protective agency, not an independent contractor of Am-Pro Protective agency, whereas Plaintiff was an independent contractor of Zanshin. Second, it is not clear whether or not there was a dispute that security work was a necessary and integral part of Newsome Chevrolet's business. Third, there is no discussion on how many hours a day the security officers worked at the dealership and no mention of whether or not Newsome Chevrolet's own employees also provided security work. Finally, security services in Newsome Chevrolet dealt with vandalism and theft, which was not the purpose of Stars' security work. As such, this court finds little guidance in *Chew*.

Plaintiff cites *Dickerson v. Eastman Kodak Co.*, 569 F. Supp. 1221 (D.S.C. 1983), where the district court addressed whether a subcontractor's activity is necessary to an employer's trade, business or occupation. *Dickerson* provided:

> "Professor Larson's summary of the test applicable here is particularly instructive: '**the test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensible to the statutory employer's business, since, after all, this could be said of practically any repair, construction or transportation service**. The test ... is whether this indispensible activity is, in that business, **normally** carried on through employees rather than independent contractors.'" *Dickerson* at 1224, quoting Larson's *Workmen's Compensation Law* §49.12 at 9-53 (1982). **(emphasis added)**

In applying this test, the court found that Plaintiff, a truck driver, employed by Blalock Truck lines to pick up yarn for Eastman Kodak was not a statutory employee of Kodak. Kodak argued that Plaintiff was engaged in work which was part of Eastman's

trade and business since the very nature of the work at Eastman's manufacturing plant involved manufacturing its products for sale to its customers requires transportation of those products to its markets. 569 F. Supp. at 1222-1223. In rejecting this argument, the court relied primarily on the fact that Eastman did not maintain its regular employees to transport its product but elected to subcontract out common carriers to do this work. *Id.* at 1224.

Similarly, Stars also subcontracts out its security work to an independent contractor during the ordinance times and does not normally use its own employees to perform this work. In fact, there has been no evidence that Stars employees are used instead of Zanshin employees at the times required during the late night ordinance which is the timeframe it asserts is essential to lawful operation. Although Stars claims that its own employees "were capable" of performing crowd control services at Stars without the use of Zanshin, Ms. Greene testified that at no time has any Stars' employee sat outside to check IDs when Zanshin was not employed to do so. Ms. Greene's Affidavit provided that "management and bartenders employed by Triple Star, LLC, have the ability to provide crowd control at Stars Rooftop Bar and Grill Room, but it is Triple Star, LLC's preference for Claramac, LLC, to handle that role." In fact, Stars' Agreement specifically provides that it shall not be required to supervise or help Zanshin perform these services.

Conversely, Zanshin's duties involve a variety of activities necessary for the lawful and proper business operations at Stars, including, but not limited to, ensuring safety of patrons, checking identification to ensure patrons were of legal drinking age and ensuring compliance with local occupancy law. Zanshin personnel wore dark uniforms

with a security lanyard and carried flashlights and radios with earpieces. On many of the ordinance nights, there would be up to 6 Zanshin personnel performing these crowd control and professional security services upstairs and downstairs throughout the restaurant.

Ms. Greene's statements are contradicted by 1) the Affidavit of John Daniel Meyers; 2) the Affidavit of Zanshin employee Alex Mireages; and 3) the deposition testimony of Stars' manager Peyre Lumpkin. Mr. Meyers' Affidavit states that during his 21 months providing crowd control services at Stars, he never witnessed any Stars employees perform any of the functions of crowd control services, which Zanshin had been contracted to perform. Similarly, Mr. Mireagas provided an affidavit stating: "While working at Zanshin Management, I never witnessed any Stars employee performing the same functions that Zanshin Management provided." Finally, Mr. Lumpkin testified that it was never officially his role to provide crowd control services for Stars and it was never the role or job of Stars' employees to perform crowd control services.

Plaintiff relies as well on *Cooke v. Palmetto Health* where the Court found a helicopter pilot was not a statutory employee of Palmetto Health Hospital. Petroleum Helicopter was contracted to transport critically injured patients to the emergency room. The court held that the helicopter service was not "necessary, essential or integral" to the hospital's operation because the hospital's emergency room services do not cease when the helicopter cannot fly.

Similarly, Plaintiff contends that Stars' security work is not necessary, essential or integral to its business as the city ordinance only requires security work for limited time -

on weekends - 12-2 am - 6 hours total - and some holidays. The vast majority of the time Stars does not require any type of crowd control or security work as the typical weekly hours of operation during the season are 92 hours[1]. Thus, the ordinance only requires security approximately 6% of the time weekly during its peak seasons. In fact, Stars' typically makes its last call at 1:15 a.m. and tries to close by 1:30 a.m. There is nothing in the record to indicate that Stars business would cease to operate if it were unable to provide security during these limited times. Rather, Zanshin's security work merely allows Stars to generate additional income by staying open longer during these limited hours.

This court notes that just because there is an ordinance requiring compliance does not automatically mean that such a law creates a necessary and integral part of the business under the statutory employee analysis. If this were the case, then a building code inspector, fire marshal, elevator inspector, DHEC, food and beverage distributors all could conceivably be considered statutory employees for places they service as they would be important, necessary and integral to the business.

B. STARS CONTRACTED AWAY ITS ALLEGED WORKERS COMPENSATION COVERAGE OF ZANSHIN PERSONNEL

Stars failed to obtain workers compensation coverage on any person providing crowd control and/or security through Zanshin management evincing its intent and belief that Zanshin subcontractors were not statutory employees of Stars. Moreover, the Agreement between Stars and Zanshin specifically excluded any contemplation of workers compensation coverage:

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[1] Monday – Thursday: 2:30 p.m. – 2:00 a.m.
Friday: 12:00 p.m. - 2:00 a.m.
Saturday & Sunday: 10:00 a.m. – 2:00 a.m.

"THE CONSULTANT SHALL HAVE NO CLAIM AGAINST THE COMPANY HEREUNDER OR OTHER WISE FOR...WORKERS COMPENSATION...OR EMPLOYEE BENEFITS OF ANY KIND."

Ms. Greene testified that the Agreement represented the relationship between Stars and Zanshin that was in effect when Plaintiff was injured on December 12, 2015. Stars also admitted the Agreement is inconsistent with the position it is now taking that Plaintiff is a statutory employee. Ms. Greene further testified that Stars failed to notify the Plaintiff that he was entitled to make a claim under its worker's compensation policy which should have been done had Stars considered Plaintiff a statutory employee.

In response, Stars asserts that S.C. Ann §42-1-610 prevents an employer from contracting away Workers Compensation. Although the Agreement by itself does negate a statutory employee defense, Stars' conduct is relevant to show why Plaintiff never filed a workers' compensation claim with Stars and is also important in any equitable estoppel consideration. **If Stars did not consider Plaintiff one of its employees and <u>even indemnified such in writing</u> then how would Plaintiff have ever known to file a workers compensation claim with Stars?** Although Stars' maintains Plaintiff is a statutory employee, it has now asserted the statute of limitations as a bar to Plaintiff's workers compensation claim. On the one hand Stars seeks to bar Zanshin employees from filing workers' compensation claims, yet on the other hand when sued in tort it claims immunity under workers compensation. Thus, Stars seeks to escape liability altogether.

In *Glover v. United States,* the South Carolina Supreme Court stated:

> "Under the Act, the basic duty of any employer, whether it be the direct employer or statutory employer, is the obligation to secure the payment of compensation as prescribed by Section 42-5-20. Compliance with this obligation is the quid pro quo exacted from the employer in exchange for

> immunity. Thus, a statutory employer who fails to secure the payment of compensation as prescribed by section 42-5-20 may not claim immunity under the Act." *Glover, 337 S.C. 307, 523 S.E.2d 763 (1999)*

Stars asserts *Glover* is distinguishable because the employer in *Glover* failed to procure *any* workers compensation insurance at all. Plaintiff responded that Stars only procured workers compensation coverage on clerical employees and restaurant workers, not security personnel and continues to this day to exclude Zanshin personnel from its workers' compensation policy. Ms. Greene admitted that when Stars renewed its worker's compensation policy in May 2018, it chose not to identify any Zanshin personnel in its new worker's compensation policy even though Ms. Greene previously provided an affidavit stating Plaintiff was a statutory employee.[2]

Plaintiff argues that since Stars has continually chosen to exclude Zanshin contractors under its workers compensation policy both before and after this lawsuit, it stands to reason that the Court should apply the same "quid pro quo" analysis in *Glover*. Plaintiff further asserts that this "quid pro quo" analysis should also apply to Stars intentionally excluding Zanshin contractors from workers compensation in Agreement discussed above and Stars' should be equitably estopped from prevailing on the defense statutory employee defense. This court agrees.

V. CONCLUSION

This court declines Stars' invitation to classify it as a security company so that it may avoid alleged liability under common law for Mr. Meyer's injuries. The Motion to Dismiss is therefore respectfully denied.

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[2] On May 1, 2018, Ms. Greene signed an Affidavit under oath, which was filed with this Court as an Exhibit to Stars Motion to Set Aside Default. In Ms. Greene's Affidavit she provided, "At the time of the accident, Plaintiff was a statutory employee of Triple Star." However, when questioned at her deposition about the term, she testified that she did not know what that term means.

Edward W. Miller
Circuit Judge

Mount Pleasant, South Carolina
12/5, 2018