

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32879
Y/prt

_____AD3d_____

Argued - October 17, 2011

PETER B. SKELOS, J.P.
L. PRISCILLA HALL
PLUMMER E. LOTT
SHERI S. ROMAN, JJ.

2010-06747

DECISION & ORDER

Rupert Charles, appellant, v Broad Street
Development, LLC, et al., respondents.

(Index No. 36866/05)

Proner & Proner, New York, N.Y. (Tobi R. Salottolo of counsel), for appellant.

Furman Kornfeld & Brennan, LLP, New York, N.Y. (Michael Furman and Andrew S. Kowlowitz of counsel), for respondents Broad Street Development, LLC, and 61 Broadway Owner, LLC.

Sabatini & Associates (Steve S. Efron, New York, N.Y., of counsel), for respondent Schindler Elevator Corp.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Knipel, J.), dated March 5, 2010, which denied his motion pursuant to CPLR 4404(a) to set aside a jury verdict in favor of the defendants and against him on the issue of liability and for a new trial.

ORDERED that the order is reversed, on the law and the facts, with one bill of costs, the plaintiff's motion to set aside the verdict pursuant to CPLR 4404(a) is granted, and the matter is remitted to the Supreme Court, Kings County, for a new trial consistent herewith.

The plaintiff, who is employed by Guardian Services (hereinafter Guardian), was assigned as a security guard at a building owned and managed by the defendants Broad Street Development, LLC, and 61 Broadway Owner, LLC, respectively (hereinafter together the building

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defendants). The defendant Schindler Elevator Corp. was in charge of repairing and maintaining the elevators at the building. On September 8, 2005, the plaintiff's supervisor at Guardian asked the plaintiff to cover the lobby desk while he took a break. During the break, a cleaner told the plaintiff that he could not open the door to elevator number two. Without consulting the log books that indicated that elevator number two was out of service for repair, the plaintiff used an instrument to unlock the elevator hoistway doors and, having failed to notice that the elevator cab was not there, stepped into the shaft and fell 25 feet to the basement landing.

At trial, the Supreme Court charged the jury with respect to the special employee doctrine, and the jury found that the plaintiff qualified as the building defendants' special employee. The plaintiff then moved pursuant to CPLR 4404(a) to set aside the verdict, contending, among other things, that the Supreme Court should have found that he was not the building defendants' special employee as a matter of law. We agree.

“Workers’ Compensation Law §§ 11 and 29(6) provide that the receipt of workers' compensation benefits is the exclusive remedy that a worker may obtain against an employer for losses suffered as a result of an injury sustained in the course of employment” (*Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 150; *see Reich v Manhattan Boiler & Equip. Corp.*, 91 NY2d 772, 779). “A person may be deemed to have more than one employer for purposes of the Workers’ Compensation Law, a general employer and a special employer” (*Schramm v Cold Spring Harbor Lab.*, 17 AD3d 661, 662; *see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557). “A special employee is described as one who is transferred for a limited time of whatever duration to the service of another” (*Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557). While a person’s categorization as a special employee is usually a question of fact, “the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact” (*id.*) Although no one factor is decisive in determining whether a special employment relationship exists, a key consideration is the employer's right to direct the work and the degree of control exercised over the employee (*id.* at 558; *see Slikas v Cyclone Realty, LLC*, 78 AD3d at 150).

The evidence presented at trial established, as a matter of law, that the plaintiff was not a special employee of the building defendants. The plaintiff was hired by Guardian, received his paychecks from Guardian, and reported to his supervisor at Guardian rather than the director of operations for the subject building. The director of operations for the subject building testified that the building defendants had no right to tell the plaintiff what to do on a daily basis; instead, Guardian controlled the plaintiff’s daily assignments. Furthermore, the director of operations had no control over the hours the plaintiff worked. While the director of operations could recommend that Guardian employees be fired, he could not fire them himself. Moreover, after the plaintiff’s accident occurred, it was Guardian’s off-site supervisor who prepared the accident report.

In light of this evidence, we find that no special employment relationship existed between the plaintiff and the building defendants, as a matter of law (*see Slikas v Cyclone Realty, LLC*, 78 AD3d at 150; *cf. Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557-558). As a result, it was error for the Supreme Court to submit this question to the jury. Accordingly, the Supreme Court erred in denying the plaintiff’s motion pursuant to CPLR 4404(a) to set aside the jury

verdict, and the matter is remitted to the Supreme Court, Kings County, for a new trial consistent herewith.

In light of our determination, we need not reach the plaintiff's remaining contentions.

SKELOS, J.P., HALL, LOTT and ROMAN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court