

**Williams v J.E. Levine Bldrs., Inc.**

2009 NY Slip Op 31622(U)

July 17, 2009

Supreme Court, New York County

Docket Number: 590460/06

Judge: Shirley Werner Kornreich

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SCANNED ON 7/22/2009  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 54

Justice  
**JUSTICE SHIRLEY WERNER KORNREICH**

JAMES WILLIAMS, ET AL

INDEX NO.

401397/06

MOTION DATE

J.E. Levine Builders, Inc., ET AL

MOTION SEQ. NO.

5

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2, 3, 4  
5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is denied in accordance with the annexed decision/order.

**FILED**

JUL 22 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated:

7/17/09

Shirley Werner Kornreich  
**JUSTICE SHIRLEY WERNER KORNREICH**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
JAMES WILLIAMS and MARY WILLIAMS,

Index No. 401397/06

Plaintiffs,

-against-

J.E. LEVINE BUILDERS, INC., 501 WEST 41st STREET  
ASSOCIATES, LLC, 41st STREET REALTY ASSOCIATES,  
LLC, and JRC ELECTRICAL CONTRACTOR,

**DECISION and  
ORDER**

Defendants.

-----X  
J.E. LEVINE BUILDERS, INC.,

Third-Party Plaintiff,

Index No. 590460/06

-against-

ROBERT SILMAN ASSOCIATES, P.C.,  
and DELTA TESTING LABORATORIES, INC.,

Third-Party Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

**FILED**  
JUL 22 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Motions Sequence 006 and 005 are before this court and are hereby consolidated for disposition. In the first, dated February 2, 2009, third-party defendant Robert Silman Associates, P.C. (Silman) moves for summary judgment on the claims of contractual indemnification brought against it by defendants third-party plaintiffs 501 West 41<sup>st</sup> Street Associates, LLC (501 LLC) and 41<sup>st</sup> Street Realty Associates, LLC (41 LLC). Third-party plaintiffs do not oppose. In the second, dated February 9, 2009, defendant J.E. Levine Builders, Inc. (Levine) seeks leave to amend its answer pursuant to CPLR § 3025(b). Plaintiffs and defendants 501 West 41<sup>st</sup> Street Associates, LLC and 41<sup>st</sup> Street Realty Associates, LLC oppose.

*Background*

In 1999, Silman, a structural engineering firm, was engaged by non-party architects Wormser & Wormser to assess the structural condition of the building located at 500 West 42<sup>nd</sup> Street, at that time owned by non-party Lexington Realty Group. On December 31, 2000, 501 LLC acquired the building. In June 2001, 501 LLC engaged Silman to assist in the building's renovation. On July 24, 2001, 501 LLC hired Levine as the general contractor or construction manager for the renovation project. 41 LLC is the manager of both 501 LLC and the building.

Plaintiff James Williams (Williams) was a laborer employed by non-party SMEG Corporation (SMEG) to work on the project. On March 27, 2002, Williams was injured when the building's partially demolished second floor on which he was working collapsed and he fell into the basement. On December 8, 2004, plaintiffs commenced this action for negligence, various violations of labor law and loss of consortium. Having misidentified the owner of the building, plaintiffs were granted leave to amend their complaint to add 501 LLC and 41 LLC as defendants. They did so, serving defendants with the amended complaint August 27, 2008. On November 5, 2008, 501 LLC and 41 LLC submitted an amended answer to the amended complaint, in which they asserted cross-claims of common-law indemnification, contractual indemnification and breach of contract against Silman.

Silman now seeks summary judgment dismissing third-party plaintiffs' contractual indemnification claim. Separately, Levine seeks leave to amend its answer by adding the affirmative defense that the exclusivity provision of Workers' Compensation Law § 11 bars the suit.

#### *Silman Motion*

Silman contends that neither its 1999 agreement with Wormser & Wormser nor its 2001 agreement with 501 LLC contained a provision requiring Silman to indemnify third-party

plaintiffs for loss or damage. The agreements attached to Silman's affirmation are indeed devoid of any reference to the indemnification of Silman's client. Silman Exhs. D, E. Third-party plaintiffs do not dispute the validity of Silman's documents, nor do they oppose the dismissal of their cause of action. Accordingly, the contractual indemnification claim is dismissed.

*Levine Motion: Applicable Law*

Leave to amend a pleading should be "freely given." CPLR § 3025(b). Nevertheless, in the interests of judicial economy the court may reject the proposed amendment for lack of merit. *Zaid Theater Corp. v Sona Realty Co.*, 18 AD3d 352, 355 (1<sup>st</sup> Dept. 2005). A proposed affirmative defense must be supported by evidentiary proof that could be considered in a motion for summary judgment. *Id.* If the proof is obviously unreliable or insufficient to support the claim, leave to amend may be denied. *Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 (1<sup>st</sup> Dept. 1989); see *Heller v Louis Provenzano Inc.*, 303 AD2d 20, 25 (1<sup>st</sup> Dept. 2003).

New York law provides that workers' compensation benefits are the exclusive remedy available to an employee from his employer. N.Y. Workers' Comp. § 11 (McKinney Supp. 2009). In the event that the employee was transferred to the service of a third-party, the third-party employer, or the "special employer," also enjoys limited liability under the workers' compensation law. *Fung v Japan Airlines Co.*, 9 NY3d 351, 359 (2007). However, "general employment is presumed to continue, and special employment will not be found absent a 'clear demonstration of surrender of control by the general employer and assumption of control by the special employer.'" *Bellamy v Columbia Univ.*, 50 AD3d 160, 161 (1<sup>st</sup> Dept. 2008) (quoting *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 (1991)). While no one factor is dispositive in determining the existence of a special employment relationship, one consideration is "who controls and directs the manner, details and ultimate result of the employee's work."

[\* 5 ]

*Thompson*, 78 NY2d at 558. Evidence of the assumption of such control would show that the plaintiff was “directly answerable to and supervised by [the putative special employer] in the details of his work.” *Bellamy*, 50 AD3d at 169.

*Levine Motion: Conclusions*

Levine supports its special employment claim with statements made by Williams in his July 21, 2006 deposition. Williams testified that he was supervised by a man named “Tim,” whom he called the “boss.” Williams testified that Tim “told him what to do and things like that,” Williams Dep. 31:11-22, and said “I always had to speak to the super [Tim] or the foreman and find out what’s on the agenda for that day.” *Id.* at 41:17-19. On the morning of the accident, Williams overheard Tim order the foreman to move the team of SMEG workers to the second floor. *Id.* at 47:6-19. Levine asserts that it can show that this “Tim” was Antimo Carola, Levine’s project superintendent, and so claims that this testimony indicates that Williams took direction from Levine, thereby making him Levine’s special employee.

Even assuming that “Tim” was Carola, Williams’s testimony is insufficient proof of a special employment relationship. There is no evidence that SMEG, which directed the labor team through its foreman, ever surrendered its control over Williams. In fact, in the one instance on record of Carola directing certain work to be done, he did so by ordering the SMEG foreman to have his men go up to the second floor to clear debris. While Williams affirmed that Carola “told him what to do and things like that,” merely “being told what job to do does not suffice to demonstrate the existence of a special employment relation.” *Bellamy*, 50 AD3d at 164. Similarly, the fact that Williams recognized Carola as a supervisor, calling him “boss,” is irrelevant. A mere title is insufficient to bestow on a party special employer status. *Fung*, 9 NY3d at 360. The fact that the employee believed someone to be his supervisor is no substitute

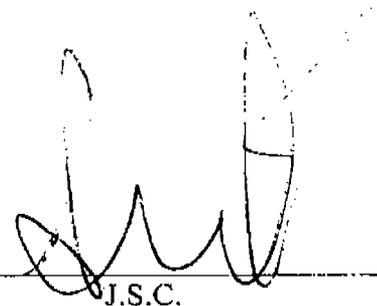
for the actual surrender of control by the general employer and assumption of control by the special employer. *Id.*

The cases Levine cites are distinguishable. In *Ribeiro v Dynamic Painting Corp.*, 23 AD3d 795 (3<sup>rd</sup> Dept. 2005), the general employer had completely relinquished control over the employee. *All* supervision and *all* equipment was provided by the special employer, and the general employer had no presence at the work site at all. 23 AD3d at 796. Levine also misconstrues the holding of *Brown v Bruckner Plaza Assocs.*, 295 AD2d 207 (1<sup>st</sup> Dept. 2002), claiming that it shows that a general employer cannot be said to retain control over its employee merely by maintaining a "low-level foreman" as a supervisor. In fact, that case held that defendant was plaintiff's special employer for one job despite the plaintiff's subordination to a different company's foreman at another, different job. *See Brown*, 295 AD2d at 208. In sum, the proof submitted by Levine is insufficient to support the proposed amendment, and leave to amend is denied for lack of merit. Accordingly, it is

ORDERED that the motion for summary judgment brought by third-party defendant Robert Silman Associates, P.C. is granted, and third-party plaintiffs' action for contractual indemnification is dismissed, and it is further

ORDERED that the motion by J.E. Levine Builders, Inc. for leave to amend the answer is denied

ENTER:



**FILED**  
JUL 22 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Date: July 17, 2009  
New York, New York