

**Fung v Japan Airlines Company, Ltd.**

2005 NY Slip Op 30132(U)

March 30, 2005

Supreme Court, Queens County

Docket Number: 0010992/2002

Judge: Arnold N. Price

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ARNOLD N. PRICE  
Justice

IA Part 6

BRENT F. FUNG and RACHEL T. FUNG, x

Plaintiffs,

-against-

JAPAN AIRLINES COMPANY, LTD.,  
JAPAN AIRLINES MANAGEMENT CORP.  
and GALAXY SERVICES CORP.,

Defendants.

Index  
Number 10992 2002

Motion  
Date November 30, 2004

Motion  
Cal. Number 19

JAPAN AIRLINES MANAGEMENT CORP., x

Third-Party Plaintiff,

-against-

AERO SNOW REMOVAL CORP.,

Third-Party Defendant.

Index  
Number: 350528/02

JAPAN AIRLINES MANAGEMENT CORP., x

Fourth-Party Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND  
NEW JERSEY,

Fourth-Party Defendant.

Index  
Number: 350127/03

BRENT F. FUNG and RACHEL T. FUNG, x

Plaintiffs,

-against-

AERO SNOW REMOVAL CORP.,

Defendant.

Index  
Number: 299/04

x

The following papers numbered 1 to 50 read on the following motions: The motion of defendant/third-party plaintiff/fourth-party plaintiff Japan Airlines Management Corp. (JMC) and of defendant Japan Airlines Company, Ltd. for summary judgment dismissing the claims against them; on the motions of defendant/third-party defendant Aero Snow Removal Corp. (Aero Snow) for summary judgment dismissing the claims against it; and on the motion of fourth-party defendant The Port Authority of New York and New Jersey (Port Authority) for summary judgment dismissing the claims against it; and upon the cross motion of JMC for summary judgment in its favor against the Port Authority on the second and third causes of action contained in the fourth-party complaint.

	<u>Papers Numbered</u>
Notices of Motions - Affidavits - Exhibits .....	1-15
Notice of Cross Motion - Affidavits - Exhibits....	16-21
Answering Affidavits - Exhibits .....	22-33
Reply Affidavits .....	34-45
Other.....	46-50

Upon the foregoing papers it is ordered that the motions and cross motion are determined as set forth herein.

Plaintiff Bent F. Fung (Fung) sues for injuries suffered as result of a slip-and-fall that occurred on January 22, 2001 in the parking lot he utilized in the course of his employment with the Port Authority at John F. Kennedy International Airport. Plaintiff Rachel Fung brings a derivative claim. The premises in question were leased by JMC from the Port Authority, whereupon JMC subleased 70% of the premises, including the parking lot in question, back to the Port Authority. Pursuant to this sublease, JMC was responsible for maintenance, including electrical lighting and snow removal. JMC subsequently entered into a contract with Aero Snow whereupon Aero Snow was to "push and pile" snow within one hour after the accumulation of one inch of snow, with the application of salt and other de-icing services to be made upon request. Further, at the completion of each snow removal operation, the contract stated that JMC "shall release AREO to indicate the satisfactory completion of the work."

Aero Snow asserts that it engaged in snow clearing operations at 12:30 A.M. on January 22 and completed the work at approximately 3:15 P.M., at which time Aero Snow alleges that a JMC representative approved the completion of the work and released

Aero Snow. Aero Snow submits invoices to demonstrate that it did not, and was not requested to, apply salt on the date in question. Plaintiff testified at deposition that he slipped on ice only, and did not attribute his fall to snow. JMC's representative at deposition, Sameer Sikander, testified that when he left work at 6:00 P.M. on January 21, 2001, conditions were "sunny and 30 degrees Fahrenheit, and its clear and everything looks nice." There is no evidence that there was any further precipitation between this time and plaintiff Fung's accident at approximately 5:30 A.M. on January 22, 2001.

Upon initial review of the papers, it is noted that there is no substantive opposition to the motion of defendant Japan Airlines Company, Ltd., for summary judgment and, accordingly, that branch of JMC's main motion is granted.

However, it is evident that numerous issues of fact exist as to the actions of Aero Snow and JMC with regard to the snow removal on the date in question. While Aero Snow alleges that it was released on January 21, 2001, JMC's representative testified that he could not recall releasing Aero Snow on the date in question, and further testified that both the Port Authority and JMC had the authority to release snow removal contractors. In addition, JMC's representative testified that JMC, the Port Authority and defendant Galaxy Services Corp. were all involved in snow removal on the day in question.

Initially, it is well established that a contractor such as Aero Snow owes no duty to plaintiffs where its contractual duty existed only in relation to JMC. (Espinal v Melville Snow Contrs., 98 NY2d 136 [2002].) However, insofar as JMC seeks to recover against Aero Snow pursuant to that contract, Aero Snow's motion must be denied where questions of fact exist as to the extent of snow removal that occurred on January 21, 2002, as to which entities were involved in snow clearance and de-icing, and as to the circumstances of Aero's "release" on the afternoon of January 21, 2001. Where, as here, there is conflicting deposition testimony, determination of credibility cannot be made on a motion for summary judgment. (Ferrante v American Lung Assn., 90 NY2d 623 [1998]; Boyce v Vazquez, 249 AD2d 724 [1999].) Accordingly, the motions of JMC and Aero Snow for summary judgment in their favor dismissing the claims against them is denied.

The arguments made by JMC that plaintiffs' claims against it are barred by Workers' Compensation Law § 29(6) are without merit. JMC relies on the long-established principle that pursuant to Workers' Compensation Law §§ 11 and 29, a plaintiff is precluded from bringing an action against his employer or fellow employee for

injuries sustained in the course of his employment. (Rainey v Jefferson Vill. Condo No. 11 Assoc., 203 AD2d 544 [1994].) JMC argues that, insofar as it entered a sublease with the Port Authority whereby it acted as the agent of the Port Authority, it may rely upon the bar provided by the Workers Compensation Law. However, where it is evident that the parties in question are separate legal entities, are individual corporations with separate income tax returns, separate budgets, and separate day-to day control, the Workers Compensation bar will not apply, even where the entities may have some financial interrelation. (Kaplan v Bayley Seton Hosp., 201 AD2d 461 [1994]; Constantine v Premier Lab Corp., 295 AD2d 303 [2002].) It has long been recognized that while principals in a business enterprise may structure corporate entities for their own legal and business advantage, such separation should not then be lightly ignored so as to shield an entity from corporate liability. (Buchman v Pines Hotel, 87 AD2d 691 [1982].) In addition, JMC's contract with the Port Authority clearly states the contract creates neither a joint venture nor partnership between the parties. Accordingly, insofar as JMC is clearly a separate legal entity, it may not avail itself of the defenses of the Workers Compensation Law.

The Port Authority moves for summary judgment dismissing the claims against it on grounds that plaintiff did not suffer a "grave injury" within the meaning of Workers' Compensation Law § 11. Indeed, plaintiff's injuries, disc herniations at L4-5 and L5-S1, are not "grave" within the meaning of the statute. (Castro v United Container Mach. Group, 96 NY2d 398 [2001]; Angwin v SRF Partnership, 285 AD2d 568 [2001].) Accordingly, the Port Authority's motion is granted only to the extent that the first cause of action in the fourth-party complaint is dismissed.           

In response to the Port Authority's motion, JMC cross-moves for summary judgment in its favor on the second and third causes of action in the fourth-party complaint regarding indemnification. However, insofar as it has already been determined that questions of fact exist as to the liability of JMC in the underlying personal injury claim, any determination of the indemnification claims between JMC and the Port Authority would be premature. Accordingly, the motion of the Port Authority, and the cross motion of JMC, both seeking summary judgment on the second and third causes of action of the fourth-party complaint, are denied.

Dated: March 30, 2005

**HON. ARNOLD N. PRICE**

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J.S.C.