

**Gherghinoiu v Atco Properties & Management Inc.**

2005 NY Slip Op 30224(U)

February 14, 2005

Supreme Court, New York County

Docket Number: 0107066/2004

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECEMBER

PART 51

0107066/2004

GHERGHINOIU, NICOLE  
VS  
ATCO PROPERTIES & MGMT, INC.

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

SEQ 1

SUMMARY JUDGMENT

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

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)  
decided in accordance with  
the attached decision/order  
of even date.

**FILED**  
FEB 23 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/14/05

J.S.G.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 10**

-----X  
Nicolae Gherghinoiu and  
Eugenia Gheorghiu,  
Plaintiff,

**DECISION/ORDER**

Index No.: 107066/04  
Seq. No.: 001

-against-

Present:  
Hon. Judith J. Gische  
J.S.C.

Atco Properties & Management Inc.,

Defendant.  
-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Def N/M S/J w/JDB affirm, LB affid, pleadings, exh. . . . .	1
PI opp w/PPV affirm, NG affid in opp, exh . . . . .	2
JDB reply affirm . . . . .	3

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*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action for personal injuries. Plaintiff, a stationary engineer/mechanic, fell from a ladder while at a work site in Glendale, New York ("premises"). Co-plaintiff, Eugenia Georghiu, has a derivative cause of action for loss of consortium.

Defendant Atco Properties & Management ("Atco") is the managing agent for the premises, where a cooperative complex is located. Atco seeks summary judgment in its favor and dismissal of the complaint. Atco claims that plaintiff's claims are barred, as a matter of law, because sections 11 and 29 of the New York Workers' Compensation Law applies.

Issue has been joined and the note of issue has yet to be filed. This motion is, therefore, timely and ready to be heard. The court's decision and order follows.

## Discussion

Plaintiff claims to have sustained serious injuries at the premises while removing a steam valve with a co-worker. He contends this occurred because Atco failed to provide him with a safe work environment. Labor Law §§200, 240[1], 240-a and 241[6].

It is undisputed that plaintiff has already filed a worker's compensation claim under the plan "The Hemmerdinger Corporation" maintains. Hemmerdinger owns the real property where the accident is alleged to have occurred and they are plaintiff's employer of record.

Atco contends that it is a wholly owned subsidiary of Hemmerdinger. In particular, they claim the two entities have a common workers' compensation plan and that there is a single premium. Atco's legal argument is that the legal relationship between it and Hemmerdinger, as a matter of law, bars plaintiff from suing it (Atco) for negligence. Atco further maintains that it is Hemmerdinger's "alter ego." See: Ortega v. Noxxen Realty Corp., 5 Misc3d 1003 (N.Y. Sup Ct. N.Y. Co 2004). In the sworn affidavit of its treasurer (Mr. Bernacke), Atco asserts various facts about the two entities sharing bank accounts. He further avers that as a wholly owned entity of Hemmerdinger, all of Atco's profits and losses are Hemmerdinger's. Atco further contends that the two entities have the same principals and officers. Mr. Bernacke further contends that those principals and officers, the highest position within Hemmerdinger is "Foreman," a position held by someone not identified in that affidavit. Thus, it is Atco's contention that the two companies are, for all intents and purposes, one and the same. Atco underscores that the premiums paid for the workers' compensation insurance, and plaintiff's salary, all come from these unified bank accounts. Thus, Atco factually claims that plaintiff is restricted to his Worker's

Compensation benefits as the sole relief against Atco.

Atco separately claims that plaintiff is their "special employee." A "special employee" is someone who is temporarily transferred to the service of someone other than their nominal employer. Thompson v. Grumman, 78 NY2d 553 (1991). Thus, Atco contends that at the time of his fall, he was their special employee, having been transferred to them by Hemmerdinger, his general employer. They factually maintain that as a "special employee" he is restricted to his Workers' Compensation benefits, and cannot sue Atco for negligence.

Plaintiff factually disputes that he is Atco's "special employee." He denies receiving work assignments, directions or instructions from anyone other than his foreman, and he also denies that anyone at Atco directed the manner and methods he used in performing his assigned tasks. He factually claims that Mr. Polisca, his foreman, gave him assignments, and that this foreman is, like himself, a Hemmerdinger employee. Thus, he contends he never became a special employee because it was Hemmerdinger that provided him with instructions, etc., and they never relinquished their control over him. Sanfilippo v. City of New York, 239 AD2d 296 (1<sup>st</sup> Dept 1997).

Plaintiff further maintains that he has always been identified as, considered himself, and been paid as, a Hemmerdinger employee. He further contends that he was directed to disconnect the steam pipe by his foreman, and that no one at Atco instructed him how to do this, or controlled the manner in which he did it. Thus, he contends to have no special employer/special employee relationship with the defendant at all. Finally, plaintiff claims he was unaware of any business or other relationship between the companies. He claims that since discovery is not yet completed, and he has no information about these factual claims by Atco, he is in no position to evaluate

them at the present time.

A person's categorization as a "special employee" is usually a question of fact, dependent on various factors, including whether there was a surrender of control by the general employer to the special employer. Thompson v. Grumman, supra. Since defendant has not provided evidentiary proof, in admissible form, these and other disputed facts about plaintiff's employment must be resolved at the trial, and summary judgment denied. CPLR 3212 [b]; Zuckerman v. City of New York, 49 NY2d 557 (1980); Thompson v. Grumman, supra.

While Atco contends that these two entities (Atco and Hemmerdinger) are indistinct, and that it is an 'alter ego' of Hemmerdinger, all it provides is the sworn affidavit of Mr. Bernacke, Atco's treasurer. While Mr. Bernacke avers that two entities file a consolidated tax return, a consolidated financial statement, and that Hemmerdinger shares in Atco's profits and losses, no documentary proof of any of these factual claims has been provided. Likewise, there is no documentary proof that, as the treasurer avers, the two entities maintain a 'unified' bank account for operating expenses, including payroll. Also undocumented in this motion is Atco's factual claim that the two entities share a common workers' compensation insurance policy with a single premium paid from that unified bank account.

The lack of documentation is particularly significant where, as here, the movant would normally be expected to have such information in his custody, control or possession. Consequently, all these disputed facts, and others, must be decided by the trier of fact and not as part of a summary adjudication.

The court has also considered that since discovery is not yet complete (it appears a preliminary conference has not even been held), plaintiff has not yet had a

\* 6 ]  
full opportunity to develop his case, and independently evaluate defendant's factual claims about these entities. This further supports the denial of this motion for summary judgment. Groves v. Land's End Housing, 80 NY2d 978 (1992).

Atco has alternatively claimed that plaintiff is Hemmerdinger's "general employee," and their "special employee." Thus, by implication, he may really be both of their employees because of Atco's arguments that the two entities are legally indistinct. All these are disputed facts that need to be tried. Thompson v. Grumman, *supra.*; Sanfilippo v. City of New York, 239 AD2d 296 (1<sup>st</sup> Dept 1997).

For each of the reasons above, and as a result of the expressed factually disputed claims, and others not expressly addressed in this decision/order, defendant's motion for summary judgment must be DENIED. Since the court's file does not reflect that a preliminary conference has ever been held in this case, such a conference is scheduled for **March 17, 2005 at 9:30 a.m.** before this court at 80 Centre Street, Room 122.

It is hereby

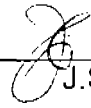
ORDERED that defendant's motion for summary judgment is hereby DENIED; and it further

ORDERED that the preliminary conference is hereby scheduled for **March 17, 2005 at 9:30 a.m.** before this court at 80 Centre Street, Room 122; and it is hereby

ORDERED that any relief not expressly addressed in this decision/order has nonetheless been considered and is hereby expressly denied; This shall constitute the decision and order of the court.

Dated: New York, New York  
February 14, 2005

So Ordered:

  
\_\_\_\_\_  
J.S.C.  
HON. JUDITH J. GISCHE

**FILED**  
FEB 23 2005  
NEW YORK  
COUNTY CLERK'S OFFICE