

Ahmet Telegrafi v Equity Mgt. Group

2007 NY Slip Op 30440(U)

March 9, 2007

Supreme Court, New York County

Docket Number: 0115914

Judge: Emily Jane Goodman

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

DEBENT. **EMILY JANE GOODMAN**

PART 17

Index Number : 115914/2002

TELEGRAFI, AHMET

vs
EQUITY MANAGEMENT GROUP

Sequence Number : 001

AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

*and cross motion
are decided for attached*

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

FILED

MAR 30 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/27/07

[Signature]
EMILY JANE GOODMAN c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE [* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
AHMET TELEGRAFI,

Plaintiff,

-against-

THE EQUITY MANAGEMENT GROUP,

Defendant.
-----X

EMILY GOODMAN, J.S.C.:

This is a negligence action to recover damages for injuries sustained by plaintiff, Ahmet Telegrafi (Telegrafi) as a result of an alleged accident that occurred on April 17, 2001.

Telegrafi worked for a non-party entity known as 923 Fifth Avenue Condominium Associates (Condo) as a porter and elevator operator, in a building located at 923 Fifth Avenue, New York, New York (the Premises). As of January 27, 2000, defendant The Equity Management Group (Equity), entered into a management agreement with Condo (Agreement), under which Equity was to serve as managing agent for Condo.

On April 17, 2001, Telegrafi was mopping stairs at the Premises, in staircase "B," between the first and second floors, when he allegedly lost his balance, grabbed a metal handrail, and fell when the handrail detached from the wall. As a result, Telegrafi allegedly sustained multiple serious injuries requiring surgery to his cervical and lumbar spine, and left shoulder.

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A verified complaint was filed in this action on June 5, 2002, in which Telegrafi seeks recovery for Equity's negligence in maintaining the Premises. A verified answer was filed as of October 18, 2002, in which Equity admits being a New York corporation, admits transacting business in New York, and admits that Condo is the owner of the Premises (Answer).

Upon the instant motion, Equity seeks an order: (i) pursuant to CPLR 3025(b), granting defendant leave to amend the Answer nunc pro tunc to deny ownership of the subject property; and (ii) pursuant to CPLR 3212, granting summary judgment and dismissing the complaint because (a) Equity does not own the Premises and therefore has no duty to Telegrafi, (b) Telegrafi is a special employee of Equity, and, therefore, his recovery is limited by operation of New York Workers' Compensation Law (WCL), and (3) Equity had no notice of the condition.

Telegrafi cross-moves, pursuant to CPLR 3211(b), for an order: (i) striking Equity's affirmative defense that Telegrafi is a special employee of Equity and/or for summary judgment; and (ii) striking Equity's Answer for failure to comply with Compliance Conference Orders directing Equity to produce a copy of the front entrance desk log book.

Leave to Amend

Leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay (see CPLR 3025(b));

Thomas Crimmins Contr. Co. v City of New York, 74 NY2d 166

[1989]). Although Equity has not explained why it is necessary for it to amend the answer, leave is granted given that "plaintiff does not object to that part of defendant's motion seeking to deny ownership of the premises" (see Plaintiff's Mem of Law In Opp at 7).

Equity's Motion to Dismiss

Equity, relying on, for example, Adamkiewicz v Lansing (288 AD2d 531 [3rd Dept 2001]), argues that, as it is not the owner of the Premises, it cannot be held liable to Telegrafi for his injuries. Equity also argues that Telegrafi was a "special employee" of Equity, and, therefore, cannot recover beyond compensation available under WCL. Finally, Equity asserts that it had no notice of the allegedly dangerous condition, and, as such, the action must be dismissed.

This first of these arguments is based upon a false premise. Adamkiewicz involved a situation in which the defendant had no contractual connection to the property. Here, Equity entered into a Condominium Management Agreement, dated January 27, 2000, with Condo to provide maintenance and other services to the building (the Agreement). As Plaintiff notes, a managing agent can be held liable for injuries to a building employee if the injury is the result of the managing agent's failure to undertake repairs within its contractual authority (see e.g., Tushaj v Elm

Mgmt. Assoc., 293 AD2d 44 [1st Dept 2002]; Stevanovic v T.U.C. Mgmt Co., 305 AD2d 133 [1st Dept 2003]). Although Equity argues that its contractual authority to undertake repairs was limited to repairs which cost less than \$1,000.00, Equity has not established that the repairs at issue would cost more than \$1,000.00. Moreover, under the contract there was no monetary limitation for emergency repairs immediately necessary for the preservation and safety of the building (see Stevanovic, supra [management contract which afforded managing agent authority to make repairs costing less than \$1,000.00 and to make emergency repairs, without prior approval of owner, raised an issue of fact as to whether it was under a duty to a building employee to repair a defective handrail]). Accordingly, contrary to Equity's argument, it can be held liable, even though it did not own the building.

The second of Equity's arguments, that Telegrafi was a "special employee" of Equity, and, therefore, cannot recover beyond worker's compensation is also misguided. Although the determination special employee status is more often a question of fact than a question of law (see Ramsey v New York Cent. R. Co., 269 NY 219, 223-224 [1935]), Equity is correct in noting that summary judgment is appropriate where undisputed critical facts compel it (see Thompson v Grumman Aerospace Corp. (78 NY2d 553, 559-560 [1991])). In an appropriate case, a managing agent may be

entitled to summary judgment based upon the special employment defense (see Erazo v 136 East Mgmt., Inc., 302 AD2d 282 [1st Dept 2002]). However, not only has Equity not shown that it is entitled to that defense, Telegrafi, who has cross moved for summary judgment, has meet his burden on the issue.¹

Equity maintains that Telegrafi was its special employee based upon (1) the fact that Equity sent one letter to Plaintiff, dated January 12, 2001, and (2) based on the Agreement. The letter, written by Equity employee Tammy Craig-Smith, states that Plaintiff took off an excessive amount of sick days and warns "this will not be tolerated in the future." The Agreement provides, in relevant part, that Equity shall "[c]ause to be hired, paid and supervised, all persons necessary to be employed in order to properly maintain and operate the building".

General employment is presumed to continue; the presumption is only overcome upon a clear demonstration of surrender of control by the general employer (Condo) and assumption of control by the special employer (Equity) (see Thompson v Grumman Corp., 78 NY2d 553 [1991]). Here, the overwhelming evidence, which is undisputed, is that general employment continued. Not only are

¹Equity maintains the Plaintiff's cross motion should be denied as untimely. However, as Plaintiff notes, the defense of Worker's Compensation Law §29, based on special employment, was not raised in any prior pleadings, and was raised for the first time in Defendant's motion for summary judgment. Therefore, any delay in moving for summary judgment on the issue is excused.

the provisions of a contract between the general and special employer not determinative (see Thompson, supra), but even if the Agreement entitled Equity to exercise the requisite level of supervision and control necessary to establish the defense, the overwhelming evidence indicates that Equity did not exercise such powers. Contrary to Equity's unsupported argument, the authority to supervise and control is of no consequence if those rights are never exercised.²

The record indicates that Telegrafi was paid by Condo (see Telegrafi 2001 W-2, Notice of Cross Motion, Exhibit F), that four years before the Agreement was even signed, Telegrafi was hired by Husenaj, who stated that no-one from Equity was ever involved in hiring for Condo (see Husenaj Deposition, Notice of Motion, Exhibit I, at 21, 29-30), that Telegrafi's undisputed supervisor, Husenaj, worked for Condo (see Husenaj Deposition, Notice of Motion, Exhibit I, at 7, 10, 20-21), that Telegrafi never

²Assuming that the relevant test for special employment was based upon a defendant's authority to control and supervise, as opposed to the actual exercise of such authority, other aspects of the Agreement dictate against a finding of special employment. Paragraph 2 of the Agreement states that any employees hired by Equity shall, in each instance, be Condo's employees and further conditions Equity's authority to hire and fire the approval of Condo, which supports the denial of the special employment defense (see Gonzalez v Lovett Assoc, 228 AD2d 342 [1st Dept 1996] [managing agent's defense of special employment stricken in part because even though managing agent agreement provided that managing agent was responsible for hiring and firing building employees, the authority was conditioned on the building owner's approval]).

received any instructions or supervision from anyone who worked with Equity (see Telegrafi Deposition, Notice of Motion, Exhibit D at 49-50), and that Disciplinary Action Reports concerning Plaintiff were filed by Husenaj, on the letterhead of Condo (see Telegrafi Disciplinary Action Reports, Notice of Motion, Exhibit L).

Further, Craig Smith admits that she was the only Equity employee who had responsibility for management of the building and that during the year in question she only visited the building between one and four times to meet with Husenaj during lunch to discuss the building's budget, that she had no contact with any other building employee prior to this accident, that she never hired any building employees, which she admitted was Husenaj's job, nor did she even know the hiring procedures (see Craig-Smith Deposition, Notice of Motion, Exhibit F at 12, 19-24, 33).

Realizing that the elements of supervision and control over Telegrafi were lacking, Defendant devotes much of its later briefs to the argument that because Craig-Smith meet with the building superintendent Husenaj, who "reported" to her, and, because Husenaj supervised and controlled Plaintiff, Plaintiff was a special employee of Defendant. Even if the evidence supported a finding that Husenaj was a special employee of

Defendant, Husenaj is not Defendant's agent.³ No cases are cited for the novel proposition that special employment status can be imputed in this manner.

Equity's third argument, that it is entitled to summary judgment because Telegrafi has failed to prove that Equity had notice of the condition, is also unavailing. Upon its motion for summary judgment, the burden is upon Equity to demonstrate entitlement to judgment as a matter of law. Equity argues that no notice was received by some of the witnesses and submits affidavits from building employees regarding the absence of notice. In opposition, Telgrafi, who is entitled to the inference of truth in his allegations (see Creighton v Milbauer, 191 AD2d 162, 166 [1st Dept 1993]), maintains that Equity had constructive notice of the condition.

To support the allegation of constructive notice, Telegrafi submits the affidavit of a former building employee stating that the condition existed for years prior to his accident and that he personally observed the ongoing practice of the removal of the handrail at issue, for the purpose of making room for large deliveries, supporting the theory that the handrail loosen over

³Accordingly, the Court need not discuss the evidentiary problems Defendant faces in establishing that it had a special employment relationship with Husenaj. The Court notes that the Affidavits in support of this argument, submitted as Exhibit D in opposition to Plaintiff's cross motion and in reply to Defendant's motion, are conclusory and of no value.

time (see Cartagena Affidavit, Notice of Cross Motion, Exhibit I, ¶¶7, 8). Equity challenges the credibility of Cartagena, but upon summary judgment, "[t]he credibility of the parties is not a proper consideration for the court, and statements made in opposition to the motion must be accepted as true" (Creighton, 191 AD2d at 166 [internal citations omitted]; see also Medina v 203 W. 109th St. Realty Corp., 16 AD3d 220 [1st Dept 2005])).

Plaintiff also submits the affidavit of Steven Kane, P.E., stating that, in his opinion, the handrail was loose for over a year prior to the accident and was improperly mounted to the wall. Although Equity asks the Court to disregard Kane's affidavit because his actual inspection of the site occurred years later, Kane states that in reaching his opinion, he viewed photographs of the condition taken shortly after the accident, which depict large, elongated holes greater than the size of the screws which would be used to mount the handrail. The photographs do in fact depict large, elongated holes, and therefore, the expert's affidavit and the photographs raise an issue of fact as to constructive notice. Further, Equity cannot carry its burden upon summary judgment, as it attempts, simply by pointing to deficiencies in Telegrafi's proofs (see Valdez v Aramark Servs., Inc., 23 AD3d 639 [2d Dept 2005])). Accordingly, the motion to dismiss the complaint is denied, and Plaintiff's cross motion on the unplead affirmative defense of special

employment is granted.

Telegrafi's Cross Motion to Strike For Failure to Comply

To the extent that Telegrafi's cross motion seeks an order striking Equity's Answer for failure to comply with Compliance Conference Orders, it is denied. The last of the Compliance Conference Orders, dated January 12, 2006, states that Equity shall provide a copy of the front entrance desk log book of the Premises, or an affidavit in lieu thereof (see Notice of Cross Motion, Exhibit K, at 4). Equity has provided an affidavit from Sedji Husenaj, supervisor for the Premises, averring that he searched for the applicable log book, but that it was likely destroyed in the ordinary course of business.

Accordingly, it is hereby

ORDERED that the motion of defendant, The Equity Management Group, for leave to amend the Answer to deny ownership of the Premises is granted as unopposed; and it is further

ORDERED that the motion of defendant, The Equity Management Group, for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion of plaintiff, Ahmet Telegrafi, for an order striking defendant's affirmative defense of special employment and/or for summary judgment in its favor, is granted to the extent that partial summary judgment is awarded in favor of Plaintiff on the unplead defense of special employment given

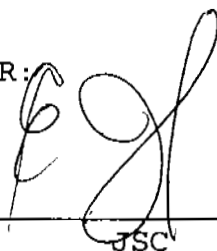
that as a matter of law, Plaintiff has established that no special employment relationship exists; but is denied to the extent that Plaintiff seeks to strike the Answer for non-compliance; and it is further

ORDERED that the action shall otherwise continue.

This Constitutes the Decision and Order of the Court.

Dated: March 9, 2007

ENTER:

A handwritten signature in black ink, appearing to read 'EJG', written over a horizontal line.

JSC

EMILY JANE GOODMAN

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