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

PRESENT: WALTER B. TOLUB Justice

PART 15

Index Number : 107480/2004
PENCA, TRIFU
vs
JEFFREY MANAGEMENT CORP.
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

Is motion to/for

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... PAPERS NUMBERED
Answering Affidavits — Exhibits
Replying Affidavits

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH [illegible]

and that motion sequence 003 & 004 are consolidated for disposition

Dated: 5/15/07

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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TRIFU PENCA,

Plaintiff,

-against-

Index No. 107480/04

JEFFREY MANAGEMENT CORP., CHAMPION CONSTRUCTION CORP., and R&R ELECTRICAL ASSOCIATES,

Defendants.

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CHAMPION CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 590046/05

BROADWALL ASSOCIATES,

Third-Party Defendant.

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FILED
MAY 22 2007
NEW YORK
COUNTY CLERK'S OFFICE

TOLUB, J.

This action arises out of an alleged on trip and fall by plaintiff Trifu Penca over an exposed pipe and broken stairs in the basement area of 841-853 Broadway, New York, New York (the Premises) on August 14, 2001 .

Motion Sequence Nos. 003 and 004 are consolidated for disposition. In Motion Sequence No. 003, defendant Champion Construction Corp. (Champion) moves for summary judgment dismissing the complaint and all cross claims against it on the ground that insufficient evidence exists to support a prima facie claim of negligence. In Motion Sequence No. 004, defendant Jeffrey Management Corp. (Jeffrey Management) and third-party defendant Broadwall Associates move for summary judgment dismissing the complaint and all cross claims on the

ground that plaintiff's claims against them are barred by the Worker's Compensation Law.

For the reasons set forth below, the motions for summary judgment are granted.

FACTS

Defendant Jeffrey Management was the building manager for and was in charge of a basement renovation project at the Premises 841-853 Broadway. Prior to the date of plaintiff's accident, defendant Champion entered into a contract with Jeffrey Management to renovate the basement. This construction project included the building of walls in order to enclose several rooms in the basement to store electrical wiring.

Plaintiff was employed as a superintendent at the Premises. Plaintiff contends that, at the time of the accident, he was carrying four 20x30-inch air conditioning filters in front of him while walking through a basement passageway between 841 Broadway and 853 Broadway, when he tripped and fell over an exposed steam pipe raised several inches above the level of the floor in his path. He then fell over into the basement wall of 853 Broadway. Plaintiff alleges that he sustained serious personal injuries to his body, specifically to his shoulder, knee, elbow, back, neck and head.

Although this pipe had always been exposed, in the past it was protected by a step that was immediately adjacent to it. Defendant R&R Electrical Associates (R&R) was the electrical contractor for the basement renovation project. Plaintiff contends that R&R's work included breaking up and removing the concrete step between 841 and 853 Broadway, because the step interfered with new electrical conduits being installed. The removal of the step exposed the pipe that plaintiff tripped over.

Plaintiff commenced this action on May 13, 2004. On January 7, 2005,

Champion commenced a third-party action against Broadwall Associates, a management company which owns Jeffrey Management.

DISCUSSION

Champion's Motion for Summary Judgment (Motion Sequence No. 003)

Plaintiff alleges that on August 14, 2001 and prior thereto, Champion performed work in the basement of the Premises where a step was damaged just underneath a doorway, exposing a pipe. Plaintiff contends that his injuries were caused by Champion's negligence in permitting a tripping hazard to exist below a doorway located in the basement, which caused him trip and fall when he stepped through the doorway.

In support of its motion for summary judgment dismissing the complaint, Champion contends that it had nothing to do with the ongoing construction of the stairs/steam pipe in the basement area of the Premises where plaintiff claimed he fell. As such, Champion argues, plaintiff cannot prove a prima facie case of negligence against it.

"Negligence consists of a breach of a duty of care owed to another" (Di Cerbo v Raab, 132 AD2d 763, 764 [3d Dept 1987]). It is axiomatic that, to establish a prima facie case of negligence, plaintiff must prove that Champion owed him a duty of care, that Champion breached that duty, and that the breach proximately caused his injury (Solomon v City of New York, 66 NY2d 1026 [1985]; J.E. v Beth Israel Hosp., 295 AD2d 281 [1st Dept 2002], lv denied 99 NY2d 507 [2003]; Wayburn v Madison Land Ltd. Partnership, 282 AD2d 301 [1st Dept 2001]). Absent a duty of care to the person injured, a party cannot be held liable in negligence (Palsgraf v Long Island R.R. Co., 248 NY 339 [1928]).

Here, Champion has made a prima facie showing of its entitlement to summary

judgment by submitting evidence that it had nothing to do with the ongoing construction of the stairs/steam pipe in the basement area of the Premises where plaintiff claims he fell, and that thus, it did not owe plaintiff a duty of care.

In support its motion for summary judgment, Champion submits the deposition testimony of plaintiff (Pl Dep. [Aff. of Nancy R. Schembri, Esq., Exh H]); Reezb Kraga, a handyman employed by Jeffrey Management (Jeffrey Management Dep. [id., Exh J]); Richard Moore, R&R's president (R&R Dep. [id., Exh K]), and Richard Scannapieco, Champion's construction superintendent project manager (Champion Dep. [id., Exh L]). This testimony reveals the following: on the date of the accident, plaintiff testified that he was working as a superintendent at the Premises (Pl Dep., at 20). As part of his responsibilities as superintendent, he was required to repair air conditioner leaks, and replace the air conditioner filters at the Premises (id. at 43). There are two air conditioning units in the Premises – one at 841 Broadway and one at 853 Broadway (id. at 44). On August 14, 2001, plaintiff was carrying four air conditioning filters in front of him in a passageway between 841 and 853 Broadway to repair a bad leak (id. at 44, 46-49). He caught his feet on the pipe and hit the wall at 853 Broadway (id. at 57).

In August 2001, R&R was working in the basement, as it was hired to upgrade the electrical service in the basement of the Premises (R&R Dep., at 7). As part of this upgrade, it is undisputed that R&R was responsible under its contract with Jeffrey Management for removing the concrete step in the area where plaintiff fell (id. at 32, 34; Pl. Dep., at 55; Jeffrey Management Dep., at 36-37). Plaintiff testified that, after R&R broke up the step, "the pipe was hanging in the middle of the walkway in the door higher from the floor" (id. at 61; see also

Jeffrey Management Dep., at 15-16). The step was located at 853 Broadway (Pl. Dep., at 54).

After removing the step, Moore made a complaint at a job meeting that the steam pipe, which was exposed after the step was removed, would also have to be removed, as R&R needed to run a conduit through the area (R&R Dep., at 15-17).

During a 2½-week period during July and August 2001, Champion performed work at the Premises, which consisted of upgrading and refurbishing an adjacent electrical room located at 841 Broadway (Champion Dep., at 7-8, 14). However, Champion did not remove any pipes and/or any steps in the area where plaintiff fell (id. at 37). In fact, Champion's work at the Premises was already completed prior to August 14, 2001, the date of plaintiff's alleged accident, and Champion did not return to the Premises after it completed its 2½-week period of work at the Premises (id. at 15, 19).

The deposition testimony also reveals that plaintiff testified that he fell in the portion of the basement located at 853 Broadway, not at 841 Broadway where Champion performed its work, and that Champion was performing work a "couple feet away" from where he fell:

> Q. Where was Champion performing their work in relation to where your alleged accident of August 14, 2001 happened?
>
> A. They performed at 841 .... a couple of feet away.

Pl. Dep., at 56; see also Jeffrey Management Dep., at 23-24 [Champion was working in the 841 Broadway part of the basement, 20 feet from where plaintiff fell, and Kraga never saw anyone from Champion working on the step]; R&R Dep., at 28-29 [Champion's work was performed in the basement of 841 Broadway, and no workers from Champion were working in the doorway

where the step was located]).

Champion has made a prima facie showing of its entitlement to summary judgment by submitting evidence that it did not perform work on the step and/or pipe that plaintiff allegedly tripped upon, and that it completed its work at the Premises prior to plaintiff's accident. Accordingly, Champion did not owe plaintiff any duty of care, and all claims and cross claims against it must be dismissed (see Prudential Ins. Co. of America v Dewey Ballantine, Bushby, Palmer & Wood, 170 AD2d 108 [1st Dept 1991], affd 80 NY2d 377 [1992] [summary judgment granted where plaintiff failed to provide any evidence of breach of duty]; Ramos v 600 West 183rd Street, 155 AD2d 333 [1st Dept 1989] [same]; see e.g. Vrabel v City of New York, 308 AD2d 443 [2d Dept 2003] [contractor's motion for summary judgment granted, on ground that contractor did not perform any work in the specific location where the plaintiff allegedly fell]; Perez v Morse Diesel, Inc., 258 AD2d 428 [1st Dept 1999] [defendant satisfied its burden of proof that it did not cause plaintiff's injuries, since it established that neither it nor its subcontractors performed work in the immediate vicinity of plaintiff's accident]; Pignatoro v Coen, 150 AD2d 222 [1st Dept 1989] [where there was no evidence to connect contractors with the condition that caused plaintiff's fall, no liability could be imposed against the contractor]; Vigilante v City of New York, 8 Misc 3d 1016(A) [Sup Ct, Richmond County 2005] [granting summary judgment to the telephone company as it did not perform work at the location where the plaintiff fell]).

It is incumbent on plaintiff, in opposition to the motion,[1] to lay bare his proof as to

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[1] Although Champion argues that this Court should not even consider plaintiff's opposition because it was not received seven days prior to the return date, I reject this argument, in the interest of resolving this motion on the merits.

Champion's duty of care. Plaintiff has failed to discharge this burden. Plaintiff fails to present any evidence that Champion actually performed work on the step or steam pipe that allegedly caused his accident.

During his two prior depositions, plaintiff testified that Champion did not work in the precise area where he fell, and did not break the step in the area of his alleged accident. Now, in a clear effort to avoid summary judgment, plaintiff submits a self-serving affidavit in which he states that Champion was working in the basement on the date of his alleged accident, and that R&R told him that "it was part of Champion's job to remove the pipe" (1/24/07 Penca Aff., ¶ 6).

This affidavit, however, cannot be considered by the court. "Generally, a self-serving affidavit offered to contradict deposition testimony does not raise a bona fide question of fact and will be disregarded" (Lupinsky v Windham Constr. Corp., 293 AD2d 317, 318 [1st Dept 2002]; see also Joe v Orbit Indus., Ltd., 269 AD2d 121, 122 [1st Dept 2000] [citation omitted] [plaintiff's "self-serving affidavit opposing the [summary judgment] motion cannot be relied upon to contradict her prior [deposition] testimony, and, thus, is insufficient to raise a genuine, as opposed to feigned, issue of fact"]; Phillips v Bronx Lebanon Hosp., 268 AD2d 318 [1st Dept 2000] ["where, as here, the self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment"]).

Moreover, plaintiff's affidavit is nothing more than inadmissible hearsay. Plaintiff does not allege in his affidavit that he had personal knowledge that Champion was

responsible for removing the pipe. Rather, plaintiff alleges that someone from R&R told him that it was part of Champion's job to remove the pipe. Plaintiff fails to produce any affidavit or testimony from R&R that it was Champion's responsibility for removing the pipe. "[H]earsay evidence alone is insufficient to raise a triable issue of fact" (Waiters v Northern Trust Co. of New York, 29 AD3d 325, 327 [1st Dept 2006]; see also Acevedo v York Intl. Corp., 31 AD3d 255 [1st Dept 2006], lv denied 8 NY3d 803 [2007]).

R&R's arguments in opposition to the motion are equally unavailing. R&R contends that there is an issue of fact as to whose responsibility it was to remove the steam pipe. However, R&R does not submit any evidence, other than plaintiff's hearsay statements, that it was Champion's responsibility to remove the pipe. As such, its arguments are insufficient to raise an issue of fact.

Accordingly, because Champion did not perform work on the step and/or pipe that plaintiff allegedly tripped upon, and because it completed its work at the Premises prior to plaintiff's accident, it had no involvement with the cause of plaintiff's fall, and is thus entitled to summary judgment dismissing all claims and cross claims against it.

Jeffrey Management and Broadwall Associates'
Motion for Summary Judgment – Motion Sequence No. 004

In the complaint, plaintiff alleges that he was employed by "Broadway Associates," which, in reality, is third-party defendant Broadwall Management Corp., sued herein as Broadwall Associates (hereinafter, Broadwall Management), and that Jeffrey Management maintained and controlled the Premises, including the renovation work occurring in the basement. Jeffrey Management and Broadwall Management now move for summary judgment dismissing plaintiff's

claims against Jeffrey Management and the third-party claim against Broadwall Management on the ground that such claims are barred by the Workers' Compensation Law.

In support of their motion for summary judgment, defendants point to plaintiff's deposition testimony, which reveals the following: on August 14, 2001, plaintiff was employed as a building superintendent at the Premises by "Broadway Associates" (Pl. Dep., at 17-21). His responsibilities included supervising other building employees, such as porters, handymen and doormen (id. at 21). Broadway Associates is located at 370 Seventh Avenue, and is also known as "Jeffrey Management" (id. at 37). Broadwall Management is the owner and/or managing agent of 841-853 Broadway (Third-party Complaint, ¶ 10).

Plaintiff began working for Jeffrey Management in 1990 or 1991, and believed that he was still working for Jeffrey Management at the time of his accident (Pl Dep., at 129). When plaintiff first started working at the building, he was interviewed by a individual named "Graff" (id. at 135). Plaintiff understood that Graff was a Jeffrey employee. This individual told plaintiff what his duties and responsibilities would be (id.).

According to plaintiff, the building manager was "in charge" (id. at 40). When plaintiff first started working at the Premises, the building manager at the Premises was John McMahon (id. at 40, 41). The building manager at the time of plaintiff's accident was Lisa Sorace, and plaintiff understood that she was an employee of Jeffrey Management (id. at 131). If plaintiff ever had a problem at the building, he would speak to the building manager.

Plaintiff always considered the building manager to be his supervisor (id. at 136). All of plaintiff's orders and directions came from Jeffrey Management (id. at 142, 144). Plaintiff's paychecks were issued by Jeffrey Management (id. at 130). Plaintiff always wore a

blue uniform which consisted of blue pants and a white shirt with the name "Jeffrey Management" on the pocket (id. at 139). Jeffrey Management was in charge of the Premises (id. at 144).

Defendants also submit the affidavit of Jeffrey Feil, the president and managing member of Jeffrey Management, Broadwall Management and 841-853 Broadway Associates, LLC (Broadway Associates). According to Feil, Jeffrey Management is primarily involved in the management of commercial properties, while Broadwall Management is primarily involved in the management of residential properties. Broadway Associates is a limited liability company that owns the Premises. All three entities are part of the Feil Organization, which is a trade name for several related corporations involved in the ownership and management of real estate (Feil Aff., ¶ 2).

Jeffrey Management is 100% owned by Broadwall Management (id., ¶ 3). Lisa Sorace, the property manager at the time of plaintiff's accident, as well as John McMahon, her predecessor, were either Jeffrey Management or Broadwall Management employees (id., ¶ 4). The building staff, including the superintendent, were hired by Broadwall Management employees (id.). The authority to terminate building staff rested with the property manager, subject to the approval of Andrew Ratner, the head of property management, who was a Broadwall Management employee (id.).

Broadwall Management, Jeffrey Management and Broadway Associates share common offices at Seven Penn Plaza, New York, New York. Broadwall Management employees perform payroll functions for all three entities. Non-emergency tools, equipment and supplies used at the Premises were provided by Broadwall Management. In May 2004, separate bank accounts were held for the Premises and other buildings managed by Broadwall Management or

Jeffrey Management. Building staff payroll was paid through those accounts. Workers Compensation policies, including the one in effect at the Premises, were obtained by Broadwall Management, and the premiums were paid through the building account (id., ¶ 5).

The sole remedy of an employee against his employer for injuries in the course of employment is benefits under the Workers' Compensation Law (see Gonzales v Armac Indus., Ltd., 81 NY2d 1 [1993]; Lane v Fisher Park Lane Co., 276 AD2d 136 [1st Dept 2000]; see also Workers' Compensation Law, §§ 11, 29 [6]). It is well-established that, for statutory purposes, an employee may have more than one employer (Ramnarine v Memorial Center for Cancer and Allied Diseases, 281 AD2d 218 [1st Dept 2001]; Bradford v Air La Carte, Inc., 79 AD2d 553 [1st Dept 1980]). Thus, a general employee of one employer may also be in the special employ of another, and the employee's remedies against both are limited to the exclusive remedies of the Workers' Compensation Law (Thompson v Grumman Aerospace Corp., 78 NY2d 553 [1991]). Consequently, when an employee elects to receive Workers Compensation benefits from his general employer, a special employer is shielded from any action at law commenced by the employee (id.). A special employee is defined as "one who is transferred for a limited time of whatever duration to the service of another" (id. at 557).

The fact that an employer's organization is divided into separate legal entities does not preclude an employee from being limited to the remedies provided under the Workers' Compensation Law (Ramnarine v Memorial Center for Cancer and Allied Diseases, 281 AD2d 218, supra). A key factor in determining whether a special employment relationship exists is "who controls and directs the manner, details and ultimate result of the employee's work" (Thompson v Grumman Aerospace Corp., 78 NY2d at 558; see also Suarez v Food Emporium,

Inc., 16 AD3d 152 [1st Dept 2005] [the single most important factor in determining an employee's status is the degree of control exercised by the special employer]; Rothenberg v Erie Metal Stamping Co., Inc., 204 AD2d 249 [1st Dept 1994], lv dismissed 84 NY2d 1026 [1995] [same]). Although "a person's categorization as a special employee is usually a question of fact," the determination may be made as a matter of law "where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact" (Thompson v Grumman Aerospace Corp., 78 NY2d at 557-558).

Here, defendants have made the requisite prima facie showing that they controlled and directed the manner, details, and ultimate result of plaintiff's work (see Villaneuva v Southeast Grand St. Guild Hous. Dev. Fund Co., Inc., 37 AD3d 155 [1st Dept 2007]; Ayala v Mutual Hous. Assn, Inc., 33 AD3d 343 [1st Dept 2006]). It is undisputed that Broadway Associates owned the building where plaintiff worked, and was his general employer. It is similarly undisputed that defendants Broadwall Management and Jeffrey Management exercised exclusive control over plaintiff's work, had the authority to hire plaintiff, and had the authority to terminate him (Feil Aff., ¶ 4). The building managers to whom plaintiff reported and considered to be "in-charge" were Broadwall Management and Jeffrey Management employees (id.). All three entities share common ownership, management, and administrative functions (id.). Indeed, plaintiff considered himself, at all times, to be a Jeffrey Management employee, and even wore a uniform identifying himself as such.

Thus, defendants have provided ample evidence to demonstrate plaintiff's status as a special employee of Jeffrey Management and Broadwall Management. Plaintiff's claims against Jeffrey Management and Broadwall Management are therefore barred by the exclusive remedies

provided by the Workers' Compensation Law.

In opposition to the motion, both plaintiff and R&R contend that there are material questions of fact regarding plaintiff's status as a special employee. However, by arguing that plaintiff was, in fact, an employee of Broadway Associates, the building owner, plaintiff and R&R misconstrue the issue presented by defendants' motion. The issue is not whether plaintiff was an employee of Broadway Associates – it is undisputed that he was. Rather, the issue is whether plaintiff was also a special employee of the moving defendants.

Rather than offering evidence to demonstrate a material issue of fact regarding plaintiff's employment status, plaintiff and R&R complain that Jeffrey Feil's affidavit does not explain in detail the structure of every corporation, limited partnership and trust making up the Feil Organization. However, this information is completely irrelevant with respect to the issue of plaintiff's special employment status.

Indeed, the only proof offered in opposition to defendants' motion is plaintiff's statements that he did not report to anyone when he started or ended his shift, that he used his own tools, and that his paychecks were signed by a man whose name he did not recognize.

None of these indicia of employment are sufficient, however, to rebut defendants' prima facie demonstration that plaintiff was, in fact, a special employee of the moving defendants, and that the moving defendants exercised exclusive control over plaintiff's employment situation. Plaintiff and R&R fail to offer any evidence to dispute the fact that plaintiff considered himself to be, at all times, a Jeffrey Management employee; that the Premises' building manager was the individual who was in charge; that plaintiff fully understood the building manager to be a Jeffrey Management employee; that if plaintiff had any problems with the building he would contact the

building manager; that plaintiff was originally interviewed by a Jeffrey Management employee; that this same individual told plaintiff what his duties and responsibilities would be; that plaintiff considered the building manager to be his supervisor; that all of plaintiff's orders and directions came from Jeffrey Management; and that plaintiff always wore a uniform, which identified him as a Jeffrey management employee.

Under similar circumstances as those presented here, courts have uniformly held that building superintendents, porters and others who are general employees of a building owner or manager are also the special employees of the other (see e.g. Ramnarine v Memorial Center for Cancer and Allied Diseases, 281 AD2d 218, supra; Evans v Citicorp, N.A., 276 AD2d 370 [1st Dept 2000]; Perez v 1860 Morris Assocs., 275 AD2d 248 [1st Dept 2000]; Gubitosi v National Realty Co., 247 AD2d 512 [2d Dept], appeal dismissed 92 NY2d 843 [1998]; Zabava v 178 East 78, Inc., 212 AD2d 406 [1st Dept 1995]).

Finally, plaintiff testified that he received workers' compensation benefits from Broadway Associates, his general employer (see Pl. Dep., at 30, 35, 138; see also 1/24/07 Penca Aff., ¶¶ 10-11). Accordingly, plaintiff's claims against Jeffrey Management and Broadwall Management are barred, because of the exclusive workers' compensation benefits he received from his general employer, and defendants' motion for summary judgment dismissing the complaint and all cross claims against them is granted (see Thompson v Grumman Aerospace Corp., 78 NY2d 553, supra; Villaneuva v Southeast Grand St. Guild Hous. Dev. Fund Co., Inc., 37 AD3d 155, supra).

The court has considered the remaining claims, and finds them to be without merit. Accordingly, it is

ORDERED that the motion of defendant Champion Construction Corp. for summary judgment (Motion Sequence No. 003) is granted, and the complaint and all cross claims are hereby severed and dismissed as against defendant Champion Construction Corp., and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the motion of defendant Jeffrey Management Corp. and third-party defendant Broadwall Associates for summary judgment (Motion Sequence No. 004) is granted, and the complaint and all cross claims are hereby severed and dismissed as against defendants Jeffrey Management Corp. and Broadwall Associates, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 5/11/07

ENTER:

WALTER B. TOLUB J.S.C.