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

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REINALDO MELENDEZ-NATAL,

Plaintiff,

-against-

MAREN ENGINEERING CORPORATION, a division of Kine Corporation, RED APPLE GROUP, INC., NAMDOR INC., GRISTEDE'S FOOD NY, INC., GRISTEDE'S NY, LLC, NEW ENGLAND HYDRAULIC, INC. and LNS NEW LIGHT SERVICE, INC.,

Defendants.

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MAREN ENGINEERING CORPORATION,

Third-Party Plaintiff,

-against-

NAMDOR INC.,

Third-Party Defendant.

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Index No.: 101862/04

**DECISION and ORDER**

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

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REINALDO MELENDEZ-NATAL,

Plaintiff,

-against-

JACK SQUICCIARINI, UNITED REFINING COMPANY, RED APPLE COMPANY, RED APPLE INC., GRISTEDE'S OPERATING CORP., NAMDOR AS THE SUCCESSOR IN INTEREST OF GRISTEDE'S OPERATING CORP., GRISTEDE'S BROS., INC., SLOAN'S SUPERMARKET, INC., MACKENSIE, THE JENNINGS COMPANY, INC., STEVEN MOSKOWITZ, and JOHN GILDEA,

Defendants.

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Index No.: 102190/06

**DECISION and ORDER**



KORNREICH, SHIRLEY WERNER, J.:

This is a personal injury action brought by plaintiff to recover for injuries suffered by him in February, 2003, when his arm was crushed by the machine with which he was compacting

discarded cardboard boxes (the "Baler"). At the time of the accident, plaintiff was employed at Gristede's Supermarket #98 ("Store #98"). Plaintiff brought two separate actions, under Index Nos. 101862/2004 (the "First Action") and 102190/2006 (the "Second Action"), asserting claims against, among others, Namdor, Inc. ("Namdor"); putative employees of Namdor, Steven Moskowitz ("Moskowitz") and John Gildea ("Gildea"); as well as several entities involved in the administration of certain supermarket locations: Red Apple Group, Inc., Gristedes Food NY, Inc., Gristede's NY, LLC, Red Apple Company; Red Apple Companies, Red Apple, Inc., Gristede's Operating Corp., Gristede's Bros., Inc., and Sloan's Supermarket, Inc.; and Jack Squicciarini ("Squcciarini"), an employee of Red Apple Company in charge of "security" at certain supermarket locations ("Defendant Movants"). Defendant Movants, by Order to Show Cause, seek: 1) consolidation of the First and Second Actions; and 2) summary judgment dismissing the consolidated complaint as against them ("Defendants' Motion"). Plaintiff consents to consolidation and opposes summary judgment.

Plaintiff, in turn, has made a separate motion by Order to Show Cause ("Plaintiff's Motion"), seeking reargument or, in the alternative, renewal, of the motion decided by order of this court dated October 31, 2006, which dismissed plaintiff's claims against Namdor, Steven Moskowitz, and John Gildea in the Second Action. Defendants Squicciarini, Red Apple Company, Red Apple Companies, Red Apple, Inc., Gristede's Operating Corp., Namdor, Gristede Bros., Inc., Sloan's Supermarket, Inc., Moskowitz, and Gildea ("Defendant Opponents") oppose plaintiff's motion. The motions are consolidated herein for unitary disposition.

## *I. Factual Background*

### *A. Procedural History*

Plaintiff filed the First Action on March 5, 2004, against Red Apple Group, Inc., Namdor, Gristede's Food NY, Inc., and Gristede's NY, LLC, as well as the manufacturer of the Baler, Maren Engineering Corporation. On May 5, 2005, the Court dismissed plaintiff's claim against Namdor in the First Action due to plaintiff's exclusive remedy under the Workers' Compensation Law (the "May 2005 Order"). Annexed to the May 2005 Order, was a stipulation executed by all of the parties in the First Action, agreeing that Namdor was "in fact the plaintiff's employer," and that "Red Apple Group, Inc., Gristede's NY LLC and Gristede's Food NY, Inc. . . . are not plaintiff's employer." The stipulation attached to the May 2005 Order further reflected that the parties had agreed, "The direct action against Namdor is dismissed and the cross claims by Maren against Namdor are converted into a third party action . . . ."

On February 15, 2006, plaintiff filed the Second Action, asserting claims against Squicciarini, United Refining Company, Red Apple Company, Red Apple Companies, Red Apple, Inc., Gristede's Operating Corp., Gristede Bros., Inc., Sloan's Supermarket, Inc., Moskowitz, and Gildea, and again naming "Namdor" as a defendant. In the new action, plaintiff claimed that Namdor was liable for plaintiff's injury as the successor-entity of a merger with a different negligent party, Gristede's Operating Corp. (The reference to Namdor in the caption for the Second Action reads "Namdor as the Successor in Interest of Gristede's Operating Corp.") In the Second Action, the Court heard a motion to dismiss made by Namdor, Moskowitz, and Gildea, in which the movants argued that the claims against them were barred by *res judicata* [CPLR 3211(a)(5)] pursuant to the May 2005 Order. They contended that the Court had

previously held that the Workers' Compensation bar insulated Namdor and that Moskowitz and Gildea were concomitantly protected by virtue of being employees of Namdor and co-employees of plaintiff. In concluding that Moskowitz and Gildea were employees of Namdor, the Court relied on W-2 documents, submitted by the movants, which indicated that the two men were employed by Namdor during 2003, the year in which the subject accident took place. By order dated October 31, 2006 (the "October 2006 Order"), this Court granted the motion, dismissing plaintiff's claims against Namdor, Moskowitz and Gildea. Plaintiff now move for reargument or renewal.

*B. The Defendants*

The employment status of several defendants, as well as what is owned by the several corporate defendants, are highly disputed in this action. Determining the relationships among the defendants is a complicated endeavor thanks to the large degree of overlap and apparent interchangeability of employees within the interrelated group of corporations. The deposition testimony of the defendants and non-party witnesses casts some light on the roles and responsibilities of the defendants, but also reveals a great deal of confusion and contradiction.

Defendant Squicciarini, for instance, appeared on behalf of defendant Red Apple Group, Inc., but testified that his employer is Red Apple Company and that his paychecks bear the moniker United Refinery, while his business cards read "Red Apple, I-N-C."[1] Such a lack of

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[1]He further testified several times that he works for or has worked for "Red Apple companies." It is unclear whether he intended that "Red Apple companies" refers to the identical entity as "Red Apple Company," or that it refers generally to all the entities held by the Red Apple Group.

clarity regarding who is affiliated with precisely whom is typical among all of the deponents.[2] Squicciarini further testified that his title is "vice president corporate security," and that he reports directly to John Catsimatidis, who is president of Red Apple Company. Nonetheless, he explained that his job is to "oversee the security for Gristede's Supermarkets and Namdor Supermarkets." He elaborated that "security" means to "handle[] all claims made for and against the company, [and] do internal investigations [and] outside investigations." A significant element of Squicciarini's job, at the time of the accident, was to visit supermarket locations and "[m]ake sure the security people are doing what they are supposed to be doing." One of the people whom Squicciarini supervised was John Gildea.

Defendant Gildea testified that he has been "Director of Corporate Security" for the past five years, and that prior to that title, he held the position of "Security Supervisor." He was hired around 1987 by Squicciarini, but Gildea understands that his employer has been Namdor since that time. However, he was trained and directed by Squicciarini, he has reported solely to Squicciarini, and his office is next door to Squicciarini's. According to Squicciarini, Gildea's "job includes safety for all the locations." On occasion, Squicciarini and Gildea inspected stores together. Gildea admitted that one of his responsibilities was to inspect baling machines and confirm their proper functioning. On March 18, 2002, Gildea completed a "Store Safety Committee Checklist" based on one of his inspections of Store #98 (the "Report"), which included a note that "baler safety not working." Squicciarini claims that he was "probably not" made aware of the Report at the time of its preparation, but that Gildea's duty was to forward the

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[2]The common characteristic of all of the corporate entities involved herein, according to the affidavit of John Catsimatidis, submitted in support of Defendants' Motion, is the management of those entities by Mr. Catsimatidis.

report to the maintenance staff that services both Namdor and Gristede's.[3] The Report, specifically, was addressed to "Steve" Moskowitz.

Defendant Moskowitz was hired personally by Mr. Catsimatidis in 1989 to the position of "Assistant to the Director of Construction." Moskowitz testified that he had no recollection of what company he worked for at that time, but his immediate superior, Tankret Malher, worked in an office denominated "Red Apple Companies [or] Red Apple Group."[4] In any event, for about 10 years prior to his deposition (conducted January 10, 2006), Moskowitz had received his paycheck and W-2 from Namdor. Moskowitz did not recall ever receiving the Report, or any similar notification regarding the Baler in Store #98. Also, he testified that on the estimated 50–60 personal inspections he made of the equipment at Store #98 between 1992 and 2003, he never discovered any problem with the Baler. Nonetheless, he testified that there had been some number of "service calls" during that period, leading to the performance of work on the Baler.

Finally, Bruce Barootjian, who was the store manager for Store #98 at the time of the accident, testified in an examination before trial as a non-party witness. At the time of the deposition, he was an employee of Namdor, although he testified to having been an employee of the Red Apple Group for 35 years. During his tenure at Store #98 from late 2002 to early-to-mid-2003, Mr. Barootjian never inspected the Baler, and was not made aware of Gildea's having done so. After the accident, Mr. Barootjian composed an undated document he entitled

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[3]According to Mr. Squicciarini, "both Namdor and Gristede's use[d] the same form" for store safety reports.

[4]Mr. Squicciarini testified that Mr. Moskowitz was employed and paid by Namdor. When pressed at his deposition, Mr. Moskowitz thought "Supermarket Acquisitions" may have been one of his former employers.

"Accident Report Store 98," which indicated that in his estimation, the Baler was in good working order.

*C. Facts Pertaining to Ownership of the Baler*

Documentary evidence submitted by plaintiff shows that the Baler was sold and delivered in or around 1973 to "Gristedes Brothers" or "Gristedes Bros." An "Extension of Lease," dated October 12, 2000, reflects that the lease for the Store #98 premises was assigned to Gristede's Operating Corp. by Gristede's Supermarkets, Inc., on November 7, 1997, which lease continued to be in effect from that time to the present. The Extension of Lease further provides that Gristede's Operating Corp. was obliged under the agreement to update the "trade fixtures and equipment in the Demised Premises. . . ." Effective December 4, 2000, Gristede's Operating Corp. merged into Namdor, pursuant to a Certificate of Merger filed with the State of New York Secretary of State. Witness testimony all indicates that the Baler which caused plaintiff's injuries was the only such machine used by Store #98 during all relevant times. According to testimony in Squicciarini's examination before trial, agents of the Occupational Safety and Health Administration levied a fine after the accident in connection with the faulty condition of the machine's safety apparatus. The check used to discharge the obligation on the fine was issued by "Gristede's Foods, I-N-C."

***II. Conclusions of Law***

A. Defendant Movants' Motion to Consolidate

As a threshold matter, the court finds that the two actions involve common questions of law and fact. In the interest of judicial economy, the court, therefore, orders a joint trial of the First and Second Actions. CPLR 602(a).

B. Plaintiff's Motion for Reargument or Renewal

1. Namdor

In his motion for reargument, plaintiff alleges that Namdor may be held liable under an exception to Workers' Compensation exclusivity which allows for an employer to be sued by its employee if its liability derives from the employer's assumption, by merger, of the preexisting liability of a separate entity. *See Billy v. Consolidated Mach. Tool Corp.*, 51 N.Y.2d 152, 156 (1980). Plaintiff argues that Namdor assumed liability from Gristede's Operating Corp., which the latter company had accrued through the negligent maintenance of the Baler. However, Gristede's Operating Corp. was merged into Namdor approximately three years prior to the accident, and Namdor maintained the Baler during those years. No specific act of negligence attributable to Gristede's Operating Corp. (such as the defective manufacture attributed to the predecessor entity in *Billy*), prior to the merger, is alleged.

Rather than resembling *Billy*, the instant matter more closely resembles *Perez v. Tru-Fit Mfg. Co.*, 152 A.D.2d 461 (1st Dept. 1989), where the Appellate Division declined to apply the *Billy* exception even where the plaintiff alleged that the defendant-employer had inherited liability by merger with a previously-negligent entity. The court's reasoning in that case, which involved alleged negligence in the maintenance of a parking lot, was that the "maintenance, repair, and improvement of the parking lot are all inextricably interwoven with defendant's role as employer," despite the company's having merged with a separate company that allegedly had accrued liability prior to the merger. *Id.* at 462–63. Here, whatever obligations Namdor possesses as the successor to Gristede's Operating Corp. are too tightly interrelated with its ongoing duties as plaintiff's employer over the three years following the merger and plaintiff's

employment at Store #98. Hence, this court did not overlook any issues of law or fact that would have altered the dismissal of Namdor from the Second Action, and reargument is denied as to Namdor. Plaintiff's complaint against Namdor, his employer, was properly dismissed, since his exclusive remedy lay under the Workers' Compensation Law, and to apply an exception under these circumstances would undercut the policy of the Workers' Compensation Law. *See Billy*, 51 N.Y.2d at 159.

2. Gildea and Moskowitz

On the other hand, reargument pertaining to Gildea and Moskowitz is granted, because the Court did overlook the potential distinction in the legal position of those men vis-a-vis Namdor. There is a question of fact as to whether Gildea and Moskowitz were indeed co-employees of plaintiff (and therefore entitled to Workers' Compensation immunity) or rather were employed by an entity other than plaintiff's employer at the time of the alleged negligence. Plaintiff alleges that the men were employees of one of the "Red Apple" entities, according to the criteria of the relevant cases which stress control over means of work, rather than who pays the worker's wages, as the most important factor in determining the actual employer of a worker. *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 558 (1991); *Cruz v. HSS Properties Corp.*, 309 A.D.2d 720 (1st Dept. 2003). The submission of W-2s evincing Gildea's and Moskowitz's employment in some respect by Namdor during 2003 (the year during which plaintiff's accident took place) does not eliminate the possibility that either man was additionally employed by another party during that or previous years, either as a permanent employee or as a "special employee." The record in this case suggests either man may have incurred liability while working for companies other than Namdor before or during 2003, since they were shared

among a set of interrelated and overlapping entities, often performing work under the supervision of managers who were not Namdor employees. Such a state of affairs would potentially give rise to liability, because any negligence of Gildea and Moskowitz would not be insulated by the Workers' Compensation bar to the extent that they were not Namdor employees. The Court accordingly reverses the October 2006 Order insofar as it dismisses the complaint against Gildea and Moskowitz.

C. Defendant Movants' Motion for Summary Judgment

In support of their motion for summary judgment, Defendant Movants submit the affidavit of Mr. Catsimatidis. He represents that he is an officer of all of the corporate-entity Defendant Movants and that as such he is qualified to attest, without reservation, that none of them in any way participated in the day-to-day operations of Store #98, and, therefore, are free of fault in plaintiff's accident.

It is undisputed that Gristede's Operating Corp. merged with and was subsumed by Namdor. As Mr. Catsimatidis avers in his affidavit, Gristede's Operating Corp. has "ceased to exist." Although plaintiff correctly points out that a dissolved corporation may still be sued under Business Corporation Law § 1006(a), a merger is distinct from dissolution. *Patten Fine Papers, Inc. v. Commissioner*, 249 F.2d 776, 780 (7th Cir. 1957). *See Kimeldorf v. First Union Real Estate Equity & Mortg. Invs.*, 309 A.D.2d 151, 155–56 (1st Dept. 2003)(explaining the differences between the two types of transactions). No section of Article 9 of the Business Corporation Law (dealing with mergers, as opposed to dissolutions) provides for maintaining a suit against a non-existent entity parallel to the rule of § 1006(a). Accordingly, summary judgment is granted in favor of Gristede's Operating Corp.

With respect to the remaining Moving Defendants, although they conveniently claim that Namdor, the one entity that is shielded from liability by the Workers' Compensation Law, employed the individuals who were involved in security and maintenance of the Baler, there is evidence in the record from which a jury could conclude that they were employed by the Moving Defendants. For example, a jury could infer that Gildea was employed by either of the Red Apple entities or United Refining Company, as his supervisor, Squicciarini is employed by the Red Apple Company, was produced as a witness by the Red Apple Group, Inc., carried a business card with the name Red Apple, I-N-C., and was paid by United Refinery. All of the Moving Defendant entities have a common manager, Castimatidis, to whom Squicciarini reports. Moskowitz was hired by Castimatidis, and reported to someone in Red Apple Companies or Red Apple Group office for seven years. The manager of Store #98, Mr. Barootjian, was an employee of Red Apple Group for 35 years. The OSHA fine was paid by Gristede's Foods, I-N-C. Plaintiff is entitled to test the credibility at trial of the Moving Defendant entities' witnesses, who claim that Namdor is the employer of Squicciarini, Moskowitz and Gildea, individuals whose duties involved inspection of the Baler prior to the accident. Defendant Movants' claim that Squicciarini is a special employee of Namdar as a matter of law is belied by the many hats he wears. *Suarez v. The Food Emporium, Inc.*, 16 A.D.3d 152, 153 (1st Dept. 2005)(special employment is a matter of law where particular, undisputed facts compel the conclusion). Accordingly, it is

ORDERED that the motion to consolidate is granted to the extent of joining the actions, and the joined actions shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
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REINALDO MELENDEZ-NATAL,

Plaintiff,

-against-

MAREN ENGINEERING CORPORATION, a division of Kine Corporation, RED APPLE GROUP, INC., NAMDOR INC., GRISTEDE'S FOOD NY, INC., GRISTEDE'S NY, LLC, NEW ENGLAND HYDRAULIC, INC. and LNS NEW LIGHT SERVICE, INC.,

Defendants.
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Index No.: 101862/04

Action #1

MAREN ENGINEERING CORPORATION,

Third-Party Plaintiff,

-against-

NAMDOR INC.,

Third-Party Defendant.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
----------X
REINALDO MELENDEZ-NATAL,
Index No.: 102190/06

Plaintiff,

-against-

JACK SQUICCIARINI, UNITED REFINING COMPANY, RED APPLE COMPANY, RED APPLE INC., GRISTEDE'S OPERATING CORP., NAMDOR AS THE SUCCESSOR IN INTEREST OF GRISTEDE'S OPERATING CORP., GRISTEDE'S BROS., INC., SLOAN'S SUPERMARKET, INC., MACKENSIE, THE JENNINGS COMPANY, INC., STEVEN MOSKOWITZ, and JOHN GILDEA,

Defendants.
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Index No.: 102190/06

Action #2

And it is further

ORDERED that upon payment of the appropriate calendar fees, the filing of notes of issue and statements of readiness in each of the above actions, and upon service of a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), said Clerk shall place the aforesaid actions upon the trial calendar for a joint trial; and it is further

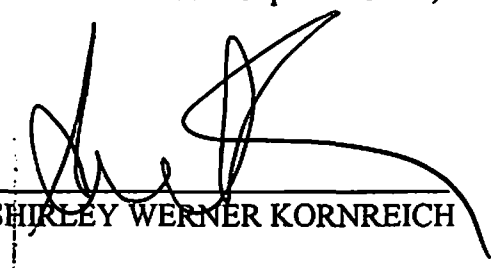
ORDERED that plaintiff's motion for reargument is granted, in part, and the order of this Court dated October 31, 2006 (Index No. 102190/06), shall be hereby modified so as to deny the motion of defendants Steven Moskowitz and John Gildea for summary judgment, and plaintiff's claim against them shall continue; and it is further

ORDERED that defendants' motion for summary judgment is granted, in part, insofar as it seeks summary judgment dismissing the complaint against defendant Gristede's Operating Corp., and the complaint is hereby severed and dismissed as against defendant Gristede's Operating Corp.; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties shall appear for a pre-trial conference in the Supreme Court, Part 54, on February 22, 2007, at 9:30 A.M.

Dated: January 29, 2007
New York, New York



SHIRLEY WERNER KORNREICH