

**Kosiorowski v St. Catherine of Siena Nursing Home,
Inc.**

2008 NY Slip Op 30062(U)

January 7, 2008

Supreme Court, Suffolk County

Docket Number: 0011081/2005

Judge: Emily Pines

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Short Form Order

Index Number: 11081-2005

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

*Present:***HON. EMILY PINES**

Justice Supreme Court

Original Motion Date: 09-20-2007
Motion Submit Date: 11-08-2007
Motion Sequence No.: 001 MOTD

**CINDY KOSIOROWSKI and MICHAEL
 KOSIOROWSKI,**

Plaintiff,**-against-**

**ST. CATHERINE OF SIENA NURSING HOME,
 INC.,**

Defendant.

ATTORNEY FOR PLAINTIFFS
 Timothy W. Clare, Esq.
 630 Johnson Avenue, Suite 006
 Bohemia, New York 11716

ATTORNEY FOR DEFENDANT
 Patrick F. Adams, P.C.
 49 Fifth Avenue
 Bay Shore, New York 11706-7306

ORDERED, that the motion by Defendant, St. Catherine of Siena Nursing Home, for leave to amend its answer to assert the affirmative defense of Worker's Compensation is granted; and it is further

ORDERED, that the motion by Defendant for summary judgment is denied; and it is further

ORDERED, that a compliance conference is scheduled for January 24, 2008 at 9:30 a.m. before the undersigned.

Plaintiffs commenced this action against Defendant for injuries sustained by Plaintiff Cindy Kosiorowski ("Plaintiff") when she slipped and fell on property owned and operated by Defendant. It is undisputed that at the time of her accident, Plaintiff was employed by Maxim Healthcare Services, Inc. ("Maxim") as a licensed practical nurse ("LPN") and was working at the Defendant's nursing home facility. Plaintiff allegedly slipped and fell on water in the dining room while she was in the process of dispensing medication to residents. According to Plaintiff's deposition testimony, she received Worker's Compensation benefits for her injury.

Defendant moves to amend its Verified Answer to assert the affirmative defense of Worker's Compensation. Specifically, Defendant alleges that Plaintiff was a "special employee" of Defendant

and thus the action is barred by **Worker's Compensation Law §11**. Plaintiff opposes the motion on the ground that Defendant waited more than two and half years after the commencement of the action to interpose the affirmative defense and further that Plaintiff was not a special employee of Defendant. Plaintiff argues that genuine issues of fact exist as to whether a special employment relationship existed, precluding the granting of summary judgment to Defendant.

MOTION TO AMEND

CPLR §3025(b) provides that "A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." It is well settled that leave to amend should be granted provided that "the proposed amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit." *Santori v. Met Life*, 11 A.D.3d 597, 784 N.Y.S.2d 117 (2d Dept. 2004).

In the instant case, Defendant's motion seeking to amend the Verified Answer to assert the defense of Worker's Compensation is granted. Although Defendant did wait for more than two years to amend the pleading, it claims it was unaware until Plaintiff was deposed that she was actually working at the Defendant's facility at the time of the accident. Moreover, Plaintiff has failed to demonstrate any prejudice in the granting of the leave to interpose the affirmative defense, and, as analyzed below, the defense of Worker's Compensation cannot be said to be "patently devoid of merit". The Amended Verified Answer shall be deemed served *nunc pro tunc* as of the date of the Decision and Order herein. Plaintiff shall have twenty (20) days to serve a Verified Reply if so desired.

SUMMARY JUDGMENT

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 85, 487 N.Y.S.2d 316 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to

establish material issues of fact which require a trial. *State Bank of Albany v. McAullife*, 97 A.D.2d 607, 467 N.Y.S.2d 944 (3d Dept. 1983).

The law is well settled that a person may be deemed to have more than one employer for Worker's Compensation purposes, a general employer and a special employer, and a Plaintiff may not maintain an action at law against his special employer when he/she receives Worker's Compensation benefits from his general employer. *Marrero v. Akam Associates*, 39 A.D.3d 716, 834 N.Y.S.2d 285 (2d Dept. 2007); *Vanderwerff v. Victoria Home*, 299 A.D.2d 345, 749 N.Y.S.2d 75 (2d Dept. 2002). A special employee is one "who is transferred for a limited time of whatever duration to the service of another" and the employee's categorization as a special employee is usually a question of fact. *Schramm v. Cold Spring Harbor Laboratory*, 17 A.D.3d 661, 793 N.Y.S.2d 530 (2d Dept. 2005). Although many factors must be considered in determining whether a special employment relationship exists, "the key factor is the right to direct the work and the degree of control exercised over the employee". *Cameli v. Pace University*, 131 A.D.2d 419, 516 N.Y.S.2d 228 (2d Dept. 1987).

In the instant case, Defendant has met its initial burden of demonstrating entitlement to summary judgment by the submission of Plaintiff's deposition testimony together with an affidavit by an employee of Defendant. Specifically, Plaintiff testified at her examination before trial that she would report to a supervisor of Defendant to get her daily assignment and then to a floor nurse who would advise her of her responsibilities for the day. Plaintiff further testified that she would use equipment provided by Defendant during the course of her employment and that she would ask the head nurse or supervisor any questions she had about her work duties. Additionally, an affidavit by Cindy LePage, Assistant Director of Nursing for Defendant, was submitted in support of the motion. Ms. LePage states that a supervisor of Defendant would monitor the nurses provided by Maxim, the supervisors would sign off on the nurse's time sheets and that Defendant's staff had the right to dismiss any nurse that did not meet the nursing home's requirements.


Plaintiff submits an affidavit in opposition to the motion in which she states that she reported to Maxim for her work assignments and reported to Maxim to pick up her pay checks. She states that her duties as an LPN including doing medication counts, dispensing medications, nurses notes, picking up doctor's medication orders and monitoring patients. She states that Maxim was her employer and her only connection with Defendant was having been assigned to work shifts at the nursing home facility. Plaintiff further states that she received her work assignments directly from Maxim and had no specific work arrangement with Defendant. Plaintiff claims that she would arrive at the nursing home and report to the supervisor on duty

who would direct her to the floor she was assigned. Plaintiff states she would then report to the head nurse on the floor to obtain her work assignment and after she received her work assignment, she had “little, if any contact with the head nurse”, unless she initiated the contact. Additionally, Plaintiff asserts that Defendant did not control, direct or supervise the manner or details by which she performed her duties and Defendant’s personnel did not supervise her performance, rather she was expected to work independently and professionally. Finally, Plaintiff argues that her employment was never transferred from Maxim to Defendant, she received her paychecks from Maxim and only had to have her time sheet signed by a nursing supervisor to confirm she worked the shift assigned by Maxim.

Based on the foregoing, Plaintiff has offered evidence to demonstrate the existence of triable issues of fact warranting a trial and defeating the motion for summary judgment. Here, questions of fact exist as to whether Defendant had the right to direct the work of Plaintiff and the degree of control Defendant exercised over Plaintiff. Thus, the Court cannot say as a matter of law that Plaintiff was a special employee of Defendant and the motion for summary judgment is denied.

The foregoing constitutes the **DECISION** and **ORDER** of the Court.

Dated: 1/7/08
Riverhead, New York



EMILY PINES
J. S. C.