

Pueng Fung v 20 W. 37th St. Owners, L.L.C.

2008 NY Slip Op 30167(U)

January 7, 2008

Supreme Court, New York County

Docket Number: 0100468/2004

Judge: Debra A. James

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

PUENG FUNG,

Plaintiff,

Index No.: 100468/04

- v -

Motion Date: 05/08/07

20 WEST 37TH STREET OWNERS, L.L.C.,
WINOKER REALTY COMPANY, INC., MINOS
RENOVATIONS, INC., and CENTENNIAL ELEVATOR
INDUSTRIES, INC.,

Defendants.

Motion Seq. No.: 08

Motion Cal. No.: 40

20 WEST 37TH STREET OWNERS, L.L.C.,
Third -Party Plaintiff,

- v -

MINOS RENOVATIONS, INC., WINOKER REALTY
COMPANY, INC., and CHARWIN MANAGEMENT
CORP.,

Third -Party Defendants.

Third-Party
Index No.: 591045/04

CENTENNIAL ELEVATOR, INC.,
Second Third -Party Plaintiff,

- v -

Second Third-Party
Index No.: 591045/06

D.T.M., INC.,
Second Third -Party Defendant.

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

FILED
JAN 22 2008
NEW YORK
COUNTY CLERKS OFFICE

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

<u>1</u>
<u>2, 3</u>
<u>4, 5</u>

Cross-Motion: Yes No

Upon the foregoing papers,

For the reasons stated in the Order deciding Motion Sequence No. 7, the court shall grant movant 20 West 37th Street Owners, LLC (the "Owner") summary judgment dismissing plaintiff's Labor

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

Law 240 cause of action because plaintiff's work and the conditions of the accident are not within the coverage of that statute.

The court shall also grant the Owner's motion for summary judgment dismissing plaintiff's Labor Law 241 (6) claim as plaintiff has not presented a prima facie case of a predicate violation of the Industrial Code.

The court shall further grant the Owner's motion for summary judgment dismissing the remaining causes of action in plaintiff's complaint for negligence and Labor Law 200 liability.

It is undisputed that plaintiff was employed as a Building Superintendent at the subject premises on the date of the accident, February 24, 2003. The parties disagree, however, as to who employed the plaintiff.

There is testimony that Charwin Management provided payroll services including the issuance of plaintiff's paycheck and provided workers' compensation insurance. The record also contains a copy of a Decision by the State Workers' Compensation Board dated May 12, 2004, which sets forth that Charwin Management is the plaintiff's employer. Also, there is no dispute that Winoker Realty as managing agent of the property directed the plaintiff to perform certain work on the premises. Finally, there is evidence that the Owner's principal was in constant communication with the plaintiff and directed certain activities at the building during the construction.

Based on the evidence in the record, plaintiff's claims against the Owner are barred by Workers' Compensation Law Sections 11 and 29 (6). The court agrees with the Owner that the Decision of the Workers' Compensation Board does not bind the Owner because the Owner was not a party to that proceeding. See Liss v Trans Auto Systems, Inc., 68 NY2d 15, 18 (1986) (determination made in a workers' compensation proceeding does not bind defendants in a liability suit who were not parties to the compensation proceeding).

Plaintiff stated at his deposition that he was in almost daily contact with the Owner regarding various issues concerning the renovation. He also testified that the Owner established the work to be performed on the building premises and that he then carried out the Owner's directives. This constitutes sufficient evidence that plaintiff was the Owner's special employee and therefore covered by the Workers' Compensation Law. See Gherghinoiu v ATCO Properties & Management, Inc., 32 AD3d 314, 315 (1st Dept 2006) lv denied 7 NY3d 716 (2006) (where plaintiff was directed and controlled on a daily basis by defendant's employees and executives, who had the exclusive right to hire and fire them at this job site defendant sustained it's burden as the proponent of summary judgment asserting the defense of workers' compensation); Gonzalez v RHQ Associates, 263 AD2d 413, 414 (1st Dept 1999) (where defendant supervised and directed the work performed by plaintiff defendants, plaintiff was held to be a special employee of defendant).

Accordingly, it is

ORDERED that the motion of defendant 20 WEST 37TH STREET OWNERS, L.L.C., for summary judgment dismissing the complaint is GRANTED and the Clerk is hereby directed to enter judgment DISMISSING the complaint in its entirety against defendant 20 WEST 37TH STREET OWNERS, L.L.C.; and it is further

ORDERED that as a matter of law, the third party action is DISMISSED, and the Clerk is directed to enter judgment DISMISSING the third party complaint against defendants Minos Renovations, Inc., Winoker Realty Company, Inc. and Charwin Management Corp., and it is further

ORDERED that the mediation conference before Part Mediation-1 on February 4, 2008, at 10:30 A.M. is hereby cancelled, and the parties are directed to attend a status conference in IAS Part 59, Room 1254, 111 Centre Street, New York, NY 10013, on January 29, 2008, at 2:30 P.M. to set a schedule for the completion of outstanding discovery.

This is the decision and order of the court.

Dated: January 7, 2008

ENTER:

FILED
JAN 22 2008
NEW YORK
COUNTY CLERK'S OFFICE

Debra A. James
DEBRA A. JAMES J.S.C.
J.S.C.