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

PRESENT: **HON. SHIRLEY WERNER KORNREICH** PART 54

Index Number : 114188/2005
JAMAL-EDDINE, NADIA
VS.
FEDERATED DEPARTMENT STORES
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1, 4
Answering Affidavits — Exhibits 2, 5, 6, 8
Replying Affidavits 3, 7, 9, 10

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 6/12/08

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

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

----------X

NADIA JAMAL EDDINE,

Plaintiff,

-against-

FEDERATED DEPARTMENT STORES, INC., BLOOMINGDALES, INC., CERTIFIED INTERIORS, INC., SEABOARD CONSTRUCTION GROUP and RICHEMONT NORTH AMERICA, INC.

Defendants.

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DECISION & ORDER

Index No.: 114188/05

SHIRLEY WERNER KORNREICH, J.

In this personal injury action based on Labor Law §§ 200, 241(6), and common law negligence, defendant Richemont North America, Inc. (Richemont) moves, pursuant to Workers' Compensation Law §§ 11 and 29(6), for summary judgment dismissing the complaint and the cross-claims against it. Defendants Federated Department Stores, Inc. (Federated), its subsidiary Bloomingdale's, Inc. (Bloomingdale's), Certified Interiors, Inc. (Certified), and Seaboard Construction Group (Seaboard) cross-move to convert their direct claims against Richemont into third-party claims if Richemont's summary judgment motion is granted.

I. *Facts*

These actions arise from a September 21, 2004 incident, when plaintiff was struck on the head and shoulder by a sign that fell while she was working behind the Cartier counter at a Bloomingdale's, located at 1000 Third Avenue, New York, NY 10022. Federated, the owner of Bloomingdale's, had a contract with Seaboard, as general contractor, and a separate contract with Certified, as contractor, for construction work at that location.

A. Richemont's Submissions

Plaintiff was hired by Pomerantz Staffing (Pomerantz). Exhibit D, Motion, 21. Pomerantz advertised as a way for small businesses to outsource human resources departments to a larger company to save on costs and to allow better employee benefits packages at lower rates. Exhibit F, Motion. Pomerantz only processed payroll payments and provided workers' compensation benefits; plaintiff's wages were paid by Richemont. Exhibit C, Motion, 15.

Plaintiff had worked for various departments in Bloomingdale's, but at the time of the accident, she worked in the women's perfume department, behind the Cartier counter. Richemont owns the Cartier brand. Her immediate superior was Andre Amorim (Amorim), an employee of Cartier. Amorim trained the plaintiff. He told her how to approach customers, close a sale, and dress and controlled the hours and location that she worked. Exhibit C, Motion, 11-15. Plaintiff admits these types of instructions came from either Amorim or another Cartier manager. Exhibit D, Motion, 28-29.

In an administrative proceeding, the Workers' Compensation Board (the Board) made a ruling on plaintiff's claim for workers' compensation benefits on September 27, 2007. It calculated a total benefit amount and"general/special employment,-general-Pomerantz-15%/special-Cartier-85%." Exhibit A, Affirmation.

B. Plaintiff's Submissions

Plaintiff claims numerous injuries from the accident, including cerebral concussion, post-concussion syndrome, post-traumatic stress disorder, seizure disorder, traumatic reactive depression, memory loss, vertigo, double vision, headaches, parasthesias and dyesthesias of the left side of the body, photophobia, a herniated disc, displaced intervertebral discs, and cervical and lumbar radiculopathy. Exhibit B, Motion, ¶18. In addition to numerous psychological issues, plaintiff alleges that she cannot get more than 20 minutes of uninterrupted sleep, suffers

from daily, hours-long headaches that almost always lead to fevers and seizures, and cannot lift anything with her left side. Exhibit D, Motion, 116-125. Plaintiff is able to participate in limited physical therapy. Exhibit D, Motion, 103.

Plaintiff actively sought employment as an actor after the accident, but claims that she was unable to secure any employment or complete the search because of her injuries. Exhibit D, Motion, 80. Any work, theater-related or otherwise, that she participated in was prior to the accident. *Id.* at 78.

II. *Motion for Summary Judgment dismissing the Plaintiff's Complaint*

A. Parties' Arguments

Richemont argues the plaintiff was a "special employee" whose exclusive remedy was workers' compensation under Workers' Compensation Law §29(6), that the Board already made a ruling as to that remedy by finding a special employee relationship between it and plaintiff, and that the ruling is binding on this court. Plaintiff claims that the Board found there to be an issue of fact as to whether the plaintiff was a special employee of Cartier (Richemont). Richemont disagrees, contending that the ruling was clear and left no issue of fact as to special employment. The central question is what impact that prior ruling of the Board has on the power of this court to adjudicate the facts of the case.

B. Labor Law §241(6)

Upon searching the record, plaintiff's claim under §241(6) is dismissed. C.P.L.R 3212(b). Section 241(6) protects workers involved in renovation or construction work. *Yong Ju Kim v. Herbert Const. Co., Inc.*, 275 A.D.2d 709, 712 (2d Dept. 2000); *Mordkofsky v. V.C.V. Development Corp.*, 76.N.Y.2d 573, 576-577 (1990). Plaintiff was not a worker involved in renovation or construction work.

C. Standard for Summary Judgment

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant the court to direct judgment in its favor as a matter of law. C.P.L.R. 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067 (1979). It must do so through evidentiary proof in admissible form. *Zuckerman, supra*, 49 N.Y.2d at 562-563. Once the movant's initial burden has been met, the burden shifts to the party opposing the motion to establish, through admissible evidence, disputed issues of material fact. C.P.L.R. 3212(b); *Zuckerman, supra*, 49 N.Y.2d at 560. Sufficiency of the opposing party's proof is not an issue until the moving party has met its initial burden. *Bray v. Rosas*, 29 A.D.3d 422, 422 (1st Dept. 2006). Contentions of the party opposing the motion must be viewed in the light most favorable to the non-moving party. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept. 1997).

D. The Impact of the Board's Ruling

The First Department has found that whether a general employer has completely transferred control to a special employer "is ordinarily a fact-sensitive inquiry not amenable to resolution on summary judgment." *Bellamy v. Columbia Univ.*, 50 A.D.3d 160, 161-162 (1st Dept. 2008). Summary judgment is appropriate, "only where the defendant is able to demonstrate conclusively that it has assumed exclusive control over 'the manner, details and ultimate result of the employee's work.'" *Id.* at 162; *see also*; *Perkins v. Dryden Ambulance*, 31 A.D.3d 859, 859-860 (3d Dept. 2006).

However, primary jurisdiction in determining the question of special employment status lies with the Board. *Santigate v. Linsalata*, 304 A.D.2d 639, 639 (2d Dept. 2003). The question then is whether the Board's ruling leaves an issue of fact for this court to consider on a summary

judgment motion and what powers of review, if any, the court does have.

The Court of Appeals has noted that the Board has primary jurisdiction. *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d 15, 20 (1986). What this means in practice is that: (1) plaintiffs must litigate their claims before the Board and cannot choose the court as a forum of choice; (2) courts should remit factual analysis to the Board if a plaintiff fails to go to the Board first; (3) the Board's decision on the controversy is binding as to the parties before the Board; and (4) the Board's decision is not binding on defendants not party to the hearing or who did not participate due to a lack of notice. *Id.* at 21-22; *see also*; *O'Connor v. Midiria*, 55 N.Y.2d 538, 540 (1982); *Maropakis v. Stillwell Materials Corp.*, 38 A.D.3d 623, 623 (2d Dept. 2007).

The primary avenue for appeal involves requesting a timely review by the Board itself. Workers' Compensation Law §23. Such an appeal was not pursued here. The doctrine of collateral estoppel prevents relitigation of issues already decided by a Workers' Compensation hearing if the party against whom the doctrine is being applied received a full and fair opportunity to contest those issues. *Brown v. Verizon New York, Inc.*, 8 A.D.3d 838, 839 (3d Dept. 2004); *Rigopolous v. American Museum of Natural History*, 297 A.D.2d 728, 729 (2d Dept 2002).

Plaintiff, thus, is collaterally estopped from challenging the Board's findings because she had a full and fair opportunity to contest those findings through the Board's appeals process and chose not to. Consequently, a review of the specifics of the Board's ruling is not before this court. Nonetheless, plaintiff claims that the Board's decision creates an issue of fact as to whether Cartier was the plaintiff's special employer because the Board "could not reach that conclusion with 100% certainty." Opp. to S.J., ¶5. However, the Board clearly found both Pomerantz and Cartier to be employers when it found "general/special employment." *Id.*, Exhibit

A. Plaintiff argues that the percentages indicates equivocation on a ruling of a general/special employee relationship, but a finding of special employer status necessarily negates plaintiff's argument. An employee can have more than one employer. "A general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits." *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557 (1991). A special employee is an employee who is transferred to the service of another employee for a limited period of time of any duration. *Id.* at 557. General employment is presumed to continue unless the presumption is defeated by a clear demonstration of surrender of control by the general employer and a corresponding assumption of control by the special employer. *Id.* at 557.

Under that standard, there is no such thing as partially being a special employer or only being a special employer by a certain percentage because a special employment finding requires clear surrender by the general employer and clear assumption of control by the special employer. The percentages allocate the amount of workers' compensation benefits to be paid by the parties, not a lack of certainty by the Board. Summary judgment must be granted for Richemont because the Board's ruling is binding and leaves no issue of fact for this court to decide on the special employment issue. Plaintiff's complaint against Richemont, therefore, is barred by the exclusivity of Workers' Compensation Law §29(6).

E. Common Law Negligence

The common law negligence claims against Richemont also are dismissed as part of the exclusivity of Workers' Compensation Law §29(6). Plaintiff's common law claims against the other defendants remain. Moreover, plaintiff's claims pursuant to Labor Law §200 should be considered alongside these common law negligence claims, since §200 is a codification of the

common law obligation of employers to provide a safe workplace for their employees. *Jock v. Fien*, 80 N.Y.2d 965, 967 (1992); *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 503 (1993).

III. *Cross-Motions to Convert Cross-Claims to Third-Party Claims*

A. Parties' Arguments

Co-defendants Federated, Certified, and Seaboard are cross-moving for leave to amend their cross-claims against Richemont into third-party claims if summary judgment is granted dismissing plaintiff's complaint. Richemont opposes amendment and argues that there is no evidence to support a finding of grave injury, as required by Workers' Compensation Law §11, which bars employer liability to third parties based upon liability for injuries sustained by employees in the scope of employment unless there is a "grave injury." Without evidence to support "grave injury," Richemont contends the proposed amendment should be denied as a matter of law. Cross-movants' claim that the evidence in the record shows that the plaintiff suffered a grave injury.

B. Discussion

A court should convert a cross-claim for indemnification to a third-party claim when the plaintiff's claim against a co-defendant has been dismissed, but the dismissal does not reach the cross-claim itself. *Aarvac Properties Corp. v. Sterling & Fleetwood Co.*, 129 A.D.2d 600, 601 (2d Dept. 1987); *Nelson v. Chelsea GCA Realty, Inc.*, 18 A.D.3d 838, 840 (2d Dept. 2005); *Jones v. New York City Hous. Auth.*, 293 A.D.2d 371, 372 (1st Dept. 2002). Consequently, the court will not consider the cross-motion as one to amend the pleadings, but rather, will automatically convert the cross-claims to third-party claims and treat Richemont's opposition as a motion to dismiss.

On a motion to dismiss, the court determines "whether the plaintiff's pleadings state a cause of action." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). Its inquiry is a narrow one that liberally construes the facts alleged in the complaint, gives the pleader every possible favorable inference, and determines whether the alleged facts fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *Demicco Bros., Inc. v. Consolidated Edison Co. of New York, Inc.*, 8 A.D.3d 99, 99 (1st Dept. 2004).

Workers' Compensation Law §11 bars employer liability to third parties based upon liability for injuries sustained by employees in the scope of employment, " unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury. '" Hence, cross-movants must allege facts legally sufficient to support a finding of grave injury. Section 11 defines grave injury, *inter alia*, as, "an acquired injury to the brain caused by an external physical force resulting in permanent total disability." A brain injury results in "permanent total disability" when the evidence shows that the "injured worker is no longer employable in any capacity." *Rubeis v. Aqua Club, Inc.*, 3 N.Y.3d 408, 418 (2004).

Plaintiff's claims of injury and her testimony that those injuries prevented her from finding and completing her search for employment must be accepted as true for the purposes of a motion to dismiss. Hence, Richemont's motion to dismiss is denied because the alleged facts state a cause of action under Workers' Compensation Law §11.

IV. *Motion for Summary Judgment Dismissing the Converted Third-Party Claims*

There is no basis in Workers' Compensation law to deviate from normal summary judgment standards only in the area of grave injury. *Way v. Grantling*, 289 A.D.2d 790, 793 (3d Dept. 2001). When moving for summary judgment on a third-party claim for indemnification against the employee of the injured worker, it is the burden of the movant to show by competent

medical evidence that the plaintiff's injuries were not grave; only after such a showing has been made does the burden shift to the opposing party to show a triable issue of fact to support grave injury through competent medical evidence. *Altonen v. Toyota Motor Credit Corp.*, 32 A.D.3d 342, 343-344 (1st Dept. 2006). Richemont has not met its burden. It presented no competent medical evidence demonstrating that the plaintiff's injuries were not grave. Plaintiff did actively seek employment as an actor, but any work she received was prior to the accident. Exhibit D, Motion, 78. She testified that her injuries prevented her from successfully finding employment. *Id.* at 80. There may be evidence to show that a person with her conditions is employable in some capacity, but Richemont provides no such evidence at this time. As a result, summary judgment cannot be granted. Accordingly, it is

ORDERED that:

1) Richemont's motion for summary judgment dismissing the complaint and all cross-claims against it is granted solely to the extent that plaintiff's complaint against Richemont is dismissed;
2) in searching the record, plaintiff's claims pursuant to Labor Law §241(6) are dismissed;
3) the cross-motions by Federated, Certified, and Seaboard to convert are granted solely to the extent that said parties' cross-claims are converted to third-party claims against Richemont;
4) Richemont's motion for summary judgment on said resulting third-party claims is denied;
5) the caption of the action is hereby amended as follows:

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NADIA JAMAL EDDINE,

Plaintiff,

-against-

FEDERATED DEPARTMENT STORES, INC., BLOOMINGDALES, INC., CERTIFIED INTERIORS, INC., and SEABOARD CONSTRUCTION GROUP,

Defendants.

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FEDERATED DEPARTMENT STORES, INC., BLOOMINGDALES, INC., CERTIFIED INTERIORS, INC., and SEABOARD CONSTRUCTION GROUP,

Third-Party Plaintiffs,

-against-

RICHEMONT NORTH AMERICA, INC.,

Third-Party Defendant.

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6) cross-movants shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the Trial Support Office, who shall amend their record accordingly upon payment of the appropriate fee for a third-party index no.; and

7) third-party defendant shall service answers to the third-party claims upon service upon them of a copy of this order with notice of entry.

Dated:

FILED
JUN 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

6/13/08

J.S.C.