

**Sinodinos v Nomura IBJ Global Inv.
Advisors, Inc.**

2008 NY Slip Op 32306(U)

August 15, 2008

Supreme Court, New York County

Docket Number: 0116433/2005

Judge: Shirley Werner Kornreich

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PRESENT: HON. SHIRLEY WERNER KORNREICH

Justice

PART 51

Index Number : 116433/2005
SINODINOS, MICHAEL
 VS.
NOMURA IBJ GLOBAL INVESTMENT
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 4/19/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

1
2
3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

AUG 19 2008

COUNTY CLERK'S OFFICE
NEW YORK

8/15/08

Dated: _____

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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

-----X
MICHAEL SINODINOS,

Plaintiff,

INDEX NO. 116433/05

- against -

NOMURA IBJ GLOBAL INVESTMENT ADVISORS,
INC. a/d/b/a NOMURA SECURITIES a/d/b/a NOMURA
SECURITIES INTERNATIONAL.,

DECISION AND ORDER

Defendant.
-----X

NOMURA IBJ GLOBAL INVESTMENT ADVISORS,
INC. a/d/b/a NOMURA SECURITIES INTERNATIONAL.,

Third-Party Plaintiff,

INDEX NO. 591208/06

- against -

PENGUIN AIR CONDITIONING CORP.,

Third-Party Defendant.
-----X

KORNREICH, SHIRLEY WERNER, J.:

FILED
AUG 19 2008
COUNTY CLERK'S OFFICE
NEW YORK

Defendant in this personal injury action, Nomura IBJ Global Investment Advisors and its dba's (collectively "Nomura"), seeks summary judgment against plaintiff, Michael Sinodinos, on the ground that he was its special employee when he was injured and is limited in recovery to workers' compensation benefits. In addition, Penguin Air Conditioning Corp. (Penguin), plaintiff's employer, seeks summary judgment in Nomura's third-party action for indemnification and breach of contract. In response, Nomura submits opposition and moves for summary judgment on its fourth cause of action, alleging breach of contract for failure to obtain the required insurance. The three motions are consolidated for disposition.

Nomura's Motion for Summary Judgment Against Plaintiff

I. Facts

A. Nomura's Submissions

1. Plaintiff's EBT

Plaintiff testified at his deposition that on February 16, 2004, the day of his accident, he worked as an electrical foreman at Nomura. Although he received his salary from Penguin and wore a shirt with a Penguin logo, he had worked solely at a Nomura facility for twelve years doing the same job and did not report to work at any Penguin facility. Nomura had input in determining the raises he received from Penguin, Nomura set his work schedule and determined his dress code, he was trained by Nomura to operate certain of its equipment and he reported daily to a Nomura supervising employee, Ms. Nopper. Any problems were reported to Ms. Nopper. There were weekly meetings to discuss facility projects, and a Penguin employee, Mr. Spoto, attended those meetings. Plaintiff had a desk on the eighteenth floor of Nomura's facility, and Penguin had a storage room at the C-2, cellar level. Further, plaintiff had a staff of two other Penguin employees who worked for him at Nomura. Other temporary Penguin personnel were used as needed. Although no Penguin employee at the Nomura sites was superior to plaintiff, plaintiff did report to Dave Spoto, a Penguin operations manager, who acted as Penguin's liaison to Nomura. He handled any issues Nomura may have had with Penguin's work.

At the time of the accident, plaintiff was working on the Nomura HVAC and went to the C-2 level storage room to get some materials. The materials he needed were not in the Penguin storage room, so plaintiff decided to search for the material in a second, non-Penguin storage area. He walked through a Nomura storage room containing furniture, to reach the storage area containing the material he sought. As he did so, he tripped over a hump on the carpeted floor.

Plaintiff testified that he is a member of the Local 3 Union and was paid workers' compensation through the Union while he was out of work after the accident.

2. *Nomura EBT*

Eileen Nopper, a vice-president in charge of facilities design and project management at Nomura, testified that she handles construction and operations for Nomura. Plaintiff had worked for her for approximately six years, and she interacted with him daily to coordinate maintenance and operations of Nomura facilities. At the time of the accident, plaintiff was the highest ranking employee of Penguin on Nomura premises. David Spoto, a vice president of Penguin, however, appeared at Nomura for a weekly meeting.

3. *Batista EBT*

Michael Angelo Batista, testified that he was a building mechanic who had worked for plaintiff at the Nomura facility at the time of the accident. His job included making daily rounds, inspecting the electrical and HVAC systems and answering calls. His employer was Penguin. At the time of the deposition, he had been working at the Nomura facility for approximately twelve years.

4. *Spoto EBT*

David Spoto, a vice president of Penguin, testified that he is in charge of the electrical division for Penguin. He was plaintiff's supervisor at the time of the accident. Plaintiff worked for Penguin at the time but did his work at Nomura. Plaintiff was the foreman at Nomura, he controlled the Penguin workers and gave out their job duties. Plaintiff had work space at Nomura, not at Penguin. Moreover, plaintiff received performance evaluations from Nomura, not Penguin, and his raises from Penguin were based on these evaluations. Also, plaintiff's dress

code and work schedule were set by Nomura, and Eileen Nopper, a Nomura employee, was responsible for plaintiff's daily work. Penguin had the authority to assign different personnel to Nomura. Nomura had the authority to have plaintiff replaced. Mr. Spoto saw plaintiff every week at Wednesday meetings.

B. Plaintiff's Submissions

1. Plaintiff's Affidavit

Plaintiff submitted an affidavit in which he averred that he was employed by Penguin at all relevant times, that in his capacity as an electrician he was required to be employed by a licensed electrician or licensed contractor and that Nomura is not a licensed contractor. He further averred that his compensation was fixed by his union in consultation with Penguin. Moreover, he claimed that Nomura neither had the authority to direct his work or fire him. He claimed that the space he used at Nomura was allocated to Penguin, that Penguin ordered the tools and equipment he used on the job, that his shirt had a Penguin logo on it and that he was employed at the Nomura facility pursuant to a Penguin service contract.

2. Nomura EBT

The full Nopper deposition was submitted by plaintiff. Ms. Nopper testified that plaintiff had worked for her as the chief engineer and electrician for Penguin. She described plaintiff as her primary contact with Penguin. Penguin handled the infrastructure-- electric, mechanical, plumbing, the emergency generator system, the UPS system, lighting calls and HVAC calls. Nomura had no building engineer in its employ.

After the accident, Ms. Nopper spoke to David Spoto "to make sure that [plaintiff] was going to be taken care of, as far as from a Workman's Comp. or however Penguin was going to

handle it, and that we would assist in any way we needed to make sure that that transition would happen smoothly.” p. 21. She subsequently stated, “In truth, we wanted to make sure he was taken care of. He was a valuable employee and we wanted to make sure he was taken care of.”

P.22. The security at Nomura filled out the accident report regarding the incident.

Ms. Nopper testified that Nomura continued to pay plaintiff while he was out for his injury. She explained that Penguin paid plaintiff but that Penguin billed Nomura since “we used him, we call him and he was available to us, we used him as a consultant.” P. 94. Ms. Nopper further explained, “Nomura has the contract with Penguin, and while [plaintiff] was out, it was almost that he was never out of the office. We felt that he deserved compensation so he was, continued to be paid on his normal salary during his period while he was out of the office.” P. 97. She clarified what she meant when she said the pay-checks were from Penguin although Nomura paid Penguin. She also made clear that a Penguin employee came in to substitute when plaintiff was out. However, according to Ms. Nopper, Nomura, as a result, paid for four people, rather than the three who worked previous to plaintiff’s accident.

Penguin maintained an office and a supply room on the C-2 level, although Penguin stored supplies throughout the Nomura facility since Nomura was “tight for space.”. None of the doors from the Penguin supply room went directly to the Nomura furniture storage room on C-2. One would have to cross a hallway to go from one to the other.

On this motion, neither party submitted the contract between Penguin and Nomura.

II. Conclusions of Law

The proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact.” *Martinez v. 123-16 Liberty Ave. Realty Corp.*, 47 A.D.3d 901 (2d Dept 2008); CPLR 3212(b). Once movant has met the initial burden, the burden shifts to the party opposing the motion to establish, through admissible evidence, that there exists a triable issue of material fact. CPLR. 3212 (b). *See GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case has no merit). The adequacy or sufficiency of the opposing party’s proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). Moreover, the parties’ competing contentions must be viewed “in a light most favorable to the party opposing the motion.” *Lakeside Constr. v Depew & Schetter Agency, Inc.*, 154 A.D.2d 513, 515-515 (2d Dept. 1989). Nomura has met its burden in demonstrating exclusive control as a special employer.

The exclusive remedy doctrine bars an employee from suing his employer or co-employee for accidental injury when covered by Workers’ Compensation. Workers’ Comp. Law §§11, 29(6). An employee generally employed by one employer may be considered specially employed by another and, thus, barred from bringing a personal injury action against his special employer by the exclusivity doctrine. *Bellamy v. Columbia Univ.*, 50 A.D.3d 160, 161 (1st Dept. 2008); *Villanueva v. Southeast Grand St. Guild Hous. Dev. Fund Co.*, 37 A.D.3d 155, 156 (1st Dept. 2007). Essential to the determination of special employment “is a working relationship with the injured plaintiff sufficient in kind and degree so that the third party, or the third party’s employer, may be deemed plaintiff’s employer.” *Fung v. Japan Airlines Co., Ltd.*, 9 N.Y.3d 351, 359 (2007).

In the seminal case of *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557 (1991), the Court of Appeals defined a special employee “as one who is transferred for a limited time of whatever duration to the service of another.” The Court explained that “[g]eneral employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer.” *Id.* *Thompson* noted that “special employment status may be [determined] as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact.” *Id.* (Citations omitted). *Accord Villanueva, supra; Suarez v. Food Emporium, Inc.*, 16 A.D.3d 152, 153 (1st Dept. 2005).

The *Thompson* Court outlined several relevant factors to a determination of exclusivity, specifically observing that a general employee of one employer may also be in the special employ of another, even where the general employer maintains responsibility for payment of wages and for maintaining workers' compensation and other employee benefits. It held:

While not determinative, a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employees work. (Citations omitted)

Id. at 357-8. *Accord Fung, supra; Bellamy, supra* at 162; *Villanueva, supra; Suarez, supra.*

Here, defendant presented evidence demonstrating that while employed by Penguin, he was assigned to serve as an electrical foreman at Nomura for approximately twelve years. He worked exclusively and continuously for Nomura during that period, had his office and shop on Nomura premises, was trained by Nomura, was supervised and directed on a daily basis by a Nomura employee who he considered his boss and was evaluated by Nomura. Plaintiff's work schedule and dress code were determined by Nomura, his raises were based upon Nomura

performance evaluations and when he suffered his accident, Nomura security filled out an accident report. Finally, Nomura, if unsatisfied with his work, could have had him replaced. Clearly, Nomura demonstrated daily control and direction of the manner, details and ultimate result of plaintiff's work, thereby, overcoming the presumption of control by Penguin.

Plaintiff presented no admissible proof which overcame Nomura's showing of special employment. The fact that Penguin paid plaintiff's salary and benefits is not sufficient to undermine Nomura's showing of special employment. *See Thompson, id.* at 357. Nor are the facts that plaintiff considered himself a Penguin employee and never consented to a special employment relationship or Penguins's ultimate power to hire and fire plaintiff, decisive. *See Ramirez v. Miller*, 41 A.D.3d 298, 299 (1st Dept. 2007), *lv. dismissed* 10 N.Y.3d 704 (2008)(that general employer retained ultimate power to hire and fire to no avail in refuting special employment relationship); *Gherghinoiu v. ATCO Props. & Mgt., Inc.*, 32 A.D.3d 314,315 (1st Dept.), *lv. denied* 7 N.Y.3d 716 (2006)(that plaintiff never considered himself employee of defendant or consented to special employment are irrelevant to determination of special employment). If anything, the Nopper testimony submitted by plaintiff supports a finding of special employment. Ms. Nopper testified that she considered plaintiff a valuable Nomura employee. Plaintiff remained available to Nomura while he was recovering from the accident, and Nomura continued to pay his salary. To the extent that plaintiff's affidavit in opposition contradicted his deposition testimony or refuted testimony by Ms. Nomura or Mr. Spoto of which he could not have had knowledge, it is to no avail.

Penguin's Motion Against Nomura and Nomura's Motion

The third-party complaint has four causes of action. The first three seek indemnification

for, respectively: breach of Penguin's warranty that its employees "shall have the proper skill, training and background to be able to perform (all work) in a competent and professional manner"; breach of Penguin's contractual obligation to maintain the work area and support space; and acts or omissions of plaintiff for which Penguin assumed full responsibility under the contract. The fourth cause of action alleges breach of Penguin's contractual obligation to procure and maintain "comprehensive general liability insurance in an amount not less than \$10,000,000 including the interests of third parties."

Third-party defendant Penguin seeks summary judgment against Nomura on its third-party complaint for contractual indemnification and for breach of contract to procure insurance. Penguin bases its motion on the following grounds: (1) the contractual indemnification obligation was not triggered as it owed no duty to maintain the floor of the room where plaintiff allegedly fell; and (2) Penguin honored its contractual obligations to procure additional insured coverage. Third-party plaintiff Nomura opposes and, by motion, seeks summary judgment on its fourth cause of action for breach of Penguin's obligation to procure insurance.

Penguin's Operation and Maintenance Agreement with Nomura is attached as Exhibit A to Nomura's Bill of Particulars. The relevant provisions are, in pertinent part:

3.5 Personnel supplied by Operator hereunder are not Customer's personnel or agents, and Operator [Penguin] assumes full responsibility for their acts....

4.4 Warranty Operator warrants that each of its employees, agents or representatives assigned to perform services hereunder shall have the proper skill, training and background to be able to perform in a competent and workmanlike manner and that all work will be so performed

8.2 Operator shall indemnify, defend and hold harmless Customer, ... from and against any loss, cost, damage or expense (including, without limitation, reasonable counsel fees and expenses) arising or resulting from or caused by (a)

any act or omission constituting negligence or willful misconduct of Operator or ... [its employees, subcontractors and/or agents] or (b) any breach or default by Operator in the performance of its obligations under this Agreement....

Penguin has met its burden with respect to the first and second causes of action. The excerpted EBT'S of plaintiff, his Penguin co-worker Battista, and Nomura employee Nopper establish the following undisputed facts: the actions plaintiff undertook in walking through Nomura's storage room did not constitute the performance of services referred to in the performance warranty; and the room plaintiff was walking through when he fell was a Nomura furniture storage room, not a space Penguin was responsible for maintaining. Nomura has not come forward with any evidence contradicting these facts.

As to the third cause of action, the evidence submitted by Penguin is disputed as to whether plaintiff committed an act that constituted negligence or willful misconduct that would have triggered Penguin's indemnification obligation under the Agreement. The evidence submitted by Penguin establishes that plaintiff cut through the Nomura storage room, that plaintiff was aware of the hump under the carpet and that, according to him, he had complained about it to Nomura. Whether plaintiff should have used the short cut or whether he was careless when he did so, are disputed facts.

Finally, the evidence regarding whether Penguin met its contractual obligation to obtain the requisite insurance remains in dispute. The Agreement required Penguin to obtain and maintain comprehensive general liability insurance in an amount not less than \$10,000,000, covering "Nomura Holding America, Inc., Nomura Securities International, Inc. and Merrill Lynch/WFC/L, Inc." Penguin submitted proof that it obtained and maintained \$1,500,000 of the required coverage. Since the main action has now been dismissed, Nomura has not been

damaged by Pyramid's alleged failure to obtain the requisite amount of insurance coverage for it. At most Penguin's obligation now would be the coverage of attorney's fees, an amount within the coverage obtained. No damages, therefore, could be proved. Consequently, Pyramid's motion to dismiss the fourth cause of action in the third party complaint is granted. Accordingly, it is

ORDERED that defendant Nomura's motion for summary judgment is granted and the action under Index No. 116433/05 is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

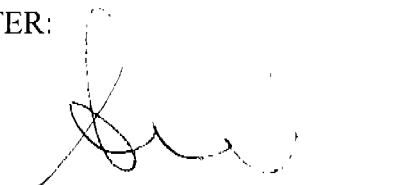
ORDERED that the third-party complaint (Ind. No.591208/06) is severed and third-party defendant Penguin's motion for summary judgment on the third-party complaint is granted in part as to the first, second and fourth causes of action, which are dismissed, and denied as to the third cause of action; and it is further

ORDERED that a copy of this order is to be served upon the trial support office for the purpose of severance; and it is further

ORDERED that third-party plaintiff Nomura's cross-motion for summary judgment on the fourth cause of action in the third-party complaint is denied; and it is further

ORDERED that the parties in the third-party action are to appear in Part 54 on August 21, 2008 for a status conference.

ENTER:



J.S.C.

FILED

AUG 19 2008

COUNTY CLERK'S OFFICE
NEW YORK

Date: August 15, 2008
New York, N.Y.