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

WALTER B. TOLUB

PRESENT: _____ Justice PART _____

Index Number : 107052/2006
ESTRADA, ARTEMIO
VS
417 PARK AVENUE
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

...is motion to/for _____

	PAPERS NUMBERED
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

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 8/27/09

WALTER B. TOLUB J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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ARTEMIO ESTRADA,

Plaintiff,

-against- Index No. 107052/06

417 PARK AVENUE CORPORATION, SLADE INDUSTRIES, INC., and BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC,

Defendants.

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WALTER B. TOLUB, J.:

The defendants 417 Park Avenue Corporation (417 Park) and Brown Harris Stevens Residential Management, LLC (Brown Harris) (collectively, the moving defendants), move for summary judgment dismissing the complaint.

Facts

This is an action to recover damages for personal injuries plaintiff claims he sustained while working for 417 Park, as a porter/elevator operator. Plaintiff claims he was injured when the elevator car dropped five stories due to a defective slack cable switch. The defendant 417 Park owned the building, and the defendant Brown Harris managed the building.

In support of their motion for summary judgment, the moving defendants argue that this action is barred by the exclusive remedy provisions of the Workers' Compensation Law. The moving defendants claim that since plaintiff was receiving worker's compensation benefits from his employer, 417 Park, and he was defendant Brown Harris's "special employee" and he is barred from recovering against the moving defendants. The moving defendants also argue lack of notice of the defective elevator slack cable switch.

In opposition, plaintiff concedes that he was an employee of the defendant 417 Park, but argues that he was not a "special employee" of the defendant Brown Harris. The plaintiff cites a recent case (*Bautista v David Frankel Realty, Inc.*, 54 AD3d 549 [1st Dept 2008]) with remarkably similar facts, in which the Appellate Division, with one Judge dissenting, found that a question of fact was presented as to whether the plaintiff in that case was a "special employee". On the question of notice, the plaintiff argues that both the Multiple Dwelling Law, and the New York City Building Code, impose a nondelegable duty on the owner and managing agent to keep a multiple dwelling in good repair. The plaintiff also argues that the moving defendants had actual notice of the defective elevator cable switch.

Counsel for the moving defendants, although purporting to deal with each case cited by the plaintiff in opposition, does not address *Bautista*.

Discussion

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 eliminate any material issue of fact from the case (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is uncommon to grant summary

judgment in a negligence action, even where the facts are uncontroverted (*Ugarriza v Schmieder*, 46 NY2d 471, 475 [1979]; *Andre v Pomeroy*, 35 NY2d 361, 366-367 [1974]).

Workers' Compensation Law §§ 11 and 29 (6) provide that an employee who is entitled to receive Workers' Compensation benefits may not sue his or her employer for personal injury. The Workers' Compensation Law also shields entities other than the injured plaintiff's direct employer from suit, including special employers in the managing agency context, an employer in the joint venture context, or a co-employee. Thus, an injured person who is entitled to receive Workers' Compensation benefits from his or her general employer is barred from maintaining a personal injury action against his or her special employer (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351 [2007]).

Factors weighed in determining whether a special employment arrangement exists include who is responsible for the payment of wages, who furnishes the worker's equipment, who had the right to hire and discharge the worker, and whether the work being performed was in furtherance of the special employer's or the general employer's business (*Navarrete v A & V Pasta Prods., Inc.*, 32 AD3d 1003 [2d Dept 2006]). Although no one factor is controlling, the key to the determination is "who controls and directs the manner, details and ultimate result of the employee's work" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 558 [1991]). The determination of an employee's status is usually a question of fact (*Suarez v Food Emporium, Inc.*, 16 AD3d 152, 153 [1st Dept 2005]).

Here, applying the above relevant factors, the moving defendants fail to make a prima facie showing of their entitlement to judgment as a matter of law (Workers' Compensation Law §§ 11, 29 [6]). In *Bautista v David Frankel Realty, Inc.*(54 AD3d 549, *supra*), counsel argued, as here, that the injured porter was the managing agent's special employee, because the managing agent

controlled the superintendent's work, and the superintendent, in turn, controlled the injured porter's work. The Court held that the fact that the superintendent exercised general supervisory authority over the injured porter from time to time was not sufficient to establish, as a matter of law, that the defendant managing agent was the injured porter's special employer.

As in *Bautista v David Frankel Realty, Inc.*(54 AD3d 549, *supra*), a reasonable inference could be drawn that the defendant Brown Harris did not control and direct the manner and details of the superintendent's work, and concomitantly, that Brown Harris did not, through the superintendent, control and direct the manner and details of plaintiff's work. Given the principle that the question of whether a special employment relationship exists is generally one for the trier of fact, and the requirement that all reasonable inferences be drawn in favor of the party opposing summary judgment, the defendant Brown Harris's motion for summary judgment dismissing the complaint on the ground of the Workers' Compensation Law must be and is denied.

Turning to the question of notice, two statutes impose a nondelegable duty of the owner of the building to maintain a safe premises.

Multiple Dwelling Law § 78 (1) provides:

> Every multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section.

New York City Building Code (Administrative Code of the City of New York 27-128), repealed effective July 1, 2008, but applicable to this 2005 accident, also imposes a nondelegable duty upon building owners to maintain their premises in a safe condition.

The breach of a landlord's general statutory duty to maintain leased premises in a safe condition does not impose liability without fault, but requires a showing of those elements comprising common-law negligence, including proof of notice, actual or constructive (*Juarez v*

Wavecrest Management Team, Ltd., 88 NY2d 628 [1996]).

Contrary to the moving defendants' assertion, an issue of fact as to whether the defendants had notice of the claimed defective slack cable switch is raised by the elevator's service records, and the affidavit of the plaintiff's expert. This accident occurred on January 19, 2005. On July 14, 2004, Brown Harris received a report from its elevator consultant recommending the replacement of the slack cable switch.

Accordingly, it is

ORDERED that the motion is granted solely as to defendant 417 Park and denied as to Brown Harris.

Counsel for the parties are directed to appear, as scheduled for a pre-trial conference on September 25, 2009 at 11:00AM in room 335 at 60 Centre Street.

Settle Order.

Dated: 8/27/09

ENTER:

WALTER B. TOLUB J.S.C.