

**Bernard v Brookfield Props. Corp.**

2010 NY Slip Op 32050(U)

July 30, 2010

Sup Ct, NY County

Docket Number: 107211/08

Judge: Sherry Klein Heitler

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SCANNED ON 8/4/2010

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

PRESENT: HEITLER  
Justice

PART 30

BERNARD, SHALLY

INDEX NO. 107211/08

- v -  
BROOKFIELD PROPERTIES CORP,  
ET AL.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 12

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

is decided in accordance with the  
memorandum decision dated

7-30-10

Dated: 7-30-10

[Signature]  
HON. SHERRY KLEIN HEITLER

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

**FILED**

AUG 04 2010

NEW YORK  
COUNTY CLERK'S OFFICE

PAPERS NUMBERED

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 30**

-----X

SHELLEY BERNARD,

Plaintiff,

Index No. 107211/08  
Motion Seq. 012

- against -

BROOKFIELD PROPERTIES CORPORATION, et. al.  
(CITIGROUP GLOBAL MARKETS INC.and  
COLGATE-PALMOLIVE),

Defendants.

-----X

**SHERRY KLEIN HEITLER, J.:**

**DECISION/ORDER  
FILED  
AUG 04 2010  
NEW YORK  
COUNTY CLERK'S OFFICE**

In this asbestos-related personal injury action, defendant Citigroup Global Markets Inc. ("Citigroup") moves for summary judgment on the ground that as the special employer of Shelley Bernard ("plaintiff"), she is barred from recovering compensatory damages under the New York Workers' Compensation Law. Plaintiff claims that she was exposed to asbestos while working for Salomon Brothers at 55 Water Street from 1985 to 1988; however, she has withdrawn her claim as against Citigroup and, as such, does not oppose this motion. Colgate-Palmolive Company ("Colgate"), another defendant in this case opposes Citigroup's motion, asserting that Citigroup has not demonstrated that, as a matter of law, plaintiff was a special employee of Citigroup. Colgate contends that there is evidence that 55 Water Street had asbestos and that said asbestos may have contributed to Shelly Bernard's injuries. Accordingly, Colgate argues that Citigroup is liable for failure to provide a safe work environment.

From 1985 to 1988, plaintiff worked on the 28th floor at 55 Water Street for Salomon Brothers (now known as "Citigroup," as of 1998). During plaintiff's employment with Salomon Brothers, plaintiff was also employed by Computer Horizons, a temp agency who acted as a "headhunter" for plaintiff, ultimately helping plaintiff to get a job at Salomon Brothers. During

her time at 55 Water Street, plaintiff claims that she was exposed to asbestos for several months. Plaintiff subsequently sued Citigroup for compensatory damages.

Colgate argues that Citigroup has failed to prove that it exercised complete and exclusive control over plaintiff to qualify her as a special employee. Specifically, Colgate argues that plaintiff testified that she was an employee of Computer Horizons, that she was paid by Computer Horizons, filed taxes as an employee of Computer Horizons, and that she received health benefits through Computer Horizons.

Citigroup maintains that although plaintiff was an employee of Computer Horizons, it controlled plaintiff's work and, as such, she was a special employee and her action is barred by the Workers' Compensation Law.

A special employee is "one who is transferred for a limited time of whatever duration to the service of another." (*Brooks v. Chemical Leaman Tank Lines, Inc.*, 71 A.D.2d 405, 407 [1<sup>st</sup> Dept. 1979]). Some factors that are used in determining a special employee status include how the employee is paid, the degree of control the general employer has relinquished (including the right to fire), and the nature of the work. (*Quinlan v. Freeman Decorating, Inc.*, 160 F.Supp.2d 681 [S.D.N.Y. 2001]). The key factor, however, is whether the special employer "controls and directs the manner, details, and ultimate result of the employee's work." (*Shoemaker v. Manpower, Inc.*, 223 A.D.2d 787 [3<sup>rd</sup> Dept. 1996]). If a special employer has been found to have exercised complete control over an employee's work, then the special employer is entitled to assert the worker's compensation defense, in spite of the fact that the general employer continues to pay wages, maintain workers' compensation, and provide other employee benefits. (*Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553 [1991]). The special employer, however, must establish the defense of workers' compensation by a preponderance of the

evidence. (*Williams v. Forbes*, 175 A.D.2d 125 [2<sup>nd</sup> Dept. 1991].)

The relevant statute here is the New York Workers' Compensation Law. The statute states, in pertinent part, that “[e]very employer subject to this chapter shall...secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment.” (Workers' Compensation Law section 10). This statute, in turn, provides the employee with his exclusive remedy against the employer. (*McKay v. Ciani*, 280 A.D.2d 808 [3rd Dept. 2001]).

In the instant case, Salomon Brothers had complete control over Shelley Bernard's work. Specifically, she was assigned to a group of ten to fifteen Salomon Brothers employees. In that group, she was assigned work by Ms Jennings Hall, a Salomon Brothers manager.

Plaintiff's work was related solely to the Salomon Brothers computer system. Salomon Brothers was responsible for directly hiring plaintiff, giving her assignments, and terminating her employment in February of 1988.

In *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553 [1991], a worker was deemed a special employee of another company's plant, despite the general employer providing the employee with paychecks and benefits. The worker was permanently assigned to the special employer's plant, reported daily to the special employee's supervisor and did work solely for the special employer. (*Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553 [1991]). Likewise, in *Shoemaker v. Manpower, Inc.*, 223 A.D.2d 787 [3rd Dept. 1996], special employee status was granted because defendant's staff directed the employee's work, the employee worked side-by-side with defendant's permanent and temporary employees and only the defendant had the right to control the employee's work. (*Shoemaker v. Manpower, Inc.*, 223 A.D.2d 787 [3rd Dept. 1996].)

Colgate relies on the holding in *Bellamy v. Columbia University*, 50 A.D.3d 160 [1st Dept. 2008] in which the court denied summary judgment to defendant Columbia University. In *Bellamy*, plaintiff was assigned by his general employer to work as a food preparer for a University kitchen. On his second day of work, plaintiff was injured when he slipped on a greasy substance on the floor. The court ruled that there was not enough evidence that defendant exercised complete control over plaintiff. Specifically, the *Bellamy* court held that there must be a showing of control "over the 'manner,' 'details' and 'ultimate result' of the plaintiff's work," such as "to justify deeming the defendant the plaintiff's employer." *Bellamy* at 162, 164 (quoting from *Thompson*).

However, *Bellamy* is distinguishable from the case at hand because in *Bellamy* plaintiff only worked for one day at his assigned job, as compared to the case at bar wherein plaintiff worked for Salomon Brothers for three years.

Further, by contrast, plaintiff testified to the direct supervision she received at Salomon Brothers:

Q. Do you remember any people that you worked with, the names of any people that you worked with?

A. Yes.

Q. Can you give us some names, please?

A. Well, I gave you Mr. Vincequerra's.

Q. Okay.

A. I also have two other friends that are aware of my situation and they were both managers. One was my manager and her name is Cassandra Jennings Hall (phonetic).

(Plaintiff's Exhibit A, Deposition of Shelley Bernard dated June 5, 2008 ["Shelley Deposition"], pp. 78.)

Plaintiff then testified, on October 22nd, that she worked in a group with fellow Salomon Brother employees:

Q. Was there -- were you in a group when you worked at Salomon Brothers or did you work independently?

A. No. I was part of a group, but we didn't all sit together.

Q. How many people were in your group?

A. I don't know. Ten or 15 or maybe a little bit more or less. There's a large group under the manager and then there's groups split up under project leaders.

(Plaintiff's Exhibit B, Shelley Deposition, pp. 249-50)

Plaintiff also described the nature of her work with Salomon Brothers:

Q. Did you work on one consulting project with Salomon Brothers or more than one consulting project with them?

A. I worked in this one group, and I was given different assignments.

Q. Were they all computer consultant assignments?

A. Yes. They were all related to the same computer system.

Q. And what was that?

A. We were running the cashiering system in the back office, and it was related to cashiering systems and settlement, trade settlements and stuff. "Stuff" being a technical term.

(Plaintiff's Exhibit B, Shelley Deposition, pp. 251)

Finally, plaintiff testified that she was let go by Salomon Brothers, despite plaintiff's manager assuring plaintiff that Salomon Brothers would renew her contract:

Q. Why did you leave Salomon Brothers?

A. In February of '88, the crash -- the stock market crash had been October of '87, and the legal department -- my contract ran until February of '88. The legal department decided that they would not renew contracts of consultants as they were coming due.

However, my manager had told me that I was being renewed in February of '88. So, the day of my renewal, actually, they came and said, you know, you are out of here because legal won't sign your contract.

(Plaintiff's Exhibit B, Shelley Deposition, pp. 253)

Throughout plaintiff's deposition, there is no mention that Computer Horizons directed her work at Salomon Brothers. In fact, plaintiff refers to Computer Horizons as a headhunter, and does not indicate that they were directly involved in her work.

Based on the foregoing, the court finds that plaintiff was a special employee of Salomon Brothers and, thus, her claim is barred by the Workers' Compensation Law.

ORDERED that Citigroup's motion for summary judgment is granted, and that this action against Citigroup and any counter-claims related to this defendant are severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This shall constitute the decision and order of the court.

DATED: JULY 30, 2010

**FILED**  
AUG 04 2010  
NEW YORK  
COUNTY CLERK'S OFFICE  
*Sherry Klein Heitler*  
SHERRY KLEIN HEITLER  
J.S.C.