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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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ROBERTO MARTIN-LOPEZ,

Plaintiff,

-against-

ARMANDO RAMOS and FLORENCE PEDRIERA,

Defendants.

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INDEX NO.: 36111/2007
CALENDAR NO.: 200900768OT
MOTION DATE: 10/22/2009
MOTION NO.: 001 CASEDISP

PLAINTIFF'S ATTORNEY:
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DEFENDANTS' ATTORNEY:
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Upon the following papers numbered 1 to 24 read on this notion and cross-motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-10 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 11-15 ; Replying Affidavits and supporting papers 16-21 ; ~~Other~~ ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is.

ORDERED that this motion (001) by the defendants Armando Ramos and Florence Pedriera, pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint is granted and the complaint is dismissed with prejudice.

The plaintiff, Roberto Martin-Lopez seeks damages for personal injuries sustained on April 26, 2007 when he tripped and fell at the premises owned by the defendants, Armando Ramos and Florence Pedriera, located at 567 Mill Road, Coram, New York. The plaintiff alleges the premises was maintained in a dangerous and unsafe condition and that the defendants had actual and constructive notice of the condition.

The defendants now move for summary judgment dismissing the complaint on the basis that the plaintiff's claim is barred by the New York Workers' Compensation Law and the doctrine of election of remedies.

The plaintiff opposes this motion on the basis that the premises was used to generate rental income and to store equipment and material for Tri-City in the basement; that Tri-City maintained its office on the premises, that Tri-City and the rental property did not share losses and profits; that financially the two businesses operated separately and were not a joint venture or the alter ego of the other.

The adduced testimony and admissible evidence establishes that Roberto Martin-Lopez received Workers' Compensation benefits from First Cardinal, LLC through his employer, Tri-City Masons, Selden, New York. On the date of the accident he resided at 567 Mill Road, Coram, described as a private home with offices for the business of Tri-City Masons, LLC. The premises was owned by Armando Ramos and Florence Pedriera. He paid rent to the defendants in this action, which rent was split between the defendants. He was employed by Armando Ramos and

Florence Pedriera of Tri-City Mason for nine months prior to the accident. In the mornings prior to beginning work, he reported to either the basement office or the yard of the premises for his instructions. The office for Tri-City was in the basement at the 567 Mill Road, Coram address. On the date of the accident he was working at the premises at 567 Mill Road, Coram loading wood planking and forms onto a truck located in the yard when he turned and stepped back to get out of the way of other workers and tripped on a piece of wood behind him and fell.

The uncontroverted testimony submitted further establishes that Florence Pedriera is a 50 % owner of the premises known as 567 Mill Road, Coram, along with Armando Ramos and that Ramos obtained a permit from the Town so they could rent the premises. Her husband, Joe, works for Tri-City as a supervisor but is not an owner. She has a 50 % shareholder interest in Tri-City Masons but never directed any of the workers at Tri-City as to how or where to store their equipment on the property and there was no written agreement for Tri-City to rent the premises at 567 Mill Road. On June 5, 2007 she signed "an agreement" with Armando Ramos which provided that he would no longer be an officer of Tri-City and she bought out his interest in the business. However, on the date of the accident, Ramos was still a partner in Tri-City, had stopped working for Tri-City on March 31, 2007, but continued to be an owner of the premises at 567 Mill Road and Tri-City continued to pay rent to Florence Pedriera and Armando Ramos. Workers from Tri-City rented rooms in the house located on the premises and Tri-City stored its equipment on the property. After Armando Ramos left the employ of Tri-City in March 31, 2007 he no longer maintained any of his own equipment at the premises. Roberto Martin-Lopez was an employee of Tri-City who was "paid on the books" and was covered by Workers Compensation through Tri-City. Florence Pedriera filed the paperwork for him to obtain Workers' Compensation benefits.

"Where an employer, in compliance with the provisions of Section 10 of Workmen's Compensation Law (Cons. Laws, ch.67), has secured compensation for his employees and has thus been brought within the statute, he is not liable, in an action at law, for an injury to an employee, since section 11 of the law provides that 'the liability of an employer prescribed by section 10 'shall be exclusive and in place of any other liability whatsoever to such employee, his personal representatives, husband, parents, dependents, or next of kin, or any one otherwise entitled to recover damages at common law or otherwise on account of such injury'" (*Leonard Noreen et al v Vogel & Bros., Inc.*, 231 NY 317 [1921]).

N.Y. Work. Com. Law §11 is available as an affirmative defense in work related civil personal injury actions if the defendant and plaintiff's employer were engaged in a joint venture at the time of the underlying accident. In determining whether such a joint venture exists for purposes of §11, courts have applied common-law criteria. The elements of a joint venture include a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses (see, *Buchner v Pines Hotel, Inc.*, 87 AD2d 691, 448 NYS2d 870 [3rd Dept 1982]).

An employer is defined in N.Y. Work. Com. Law §2 (3) as follows: "Employer", except when otherwise expressly stated, means a person, partnership, association, corporation." That definition does not specifically refer to a joint venture. A partnership is not to be regarded as a separate entity distinct from the persons who compose it. A joint venture is defined as an

association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge (see, *Fallone v Misericordia Hospital, et al*, 23 AD2d 222, 259 NYS2d 947 [1st Dept 1965]).

In reviewing the admissible evidence it is determined that the defendants have demonstrated *prima facie* entitlement to summary judgment dismissing the complaint and that the plaintiff, who asserts conclusory arguments unsupported by admissible evidence, has failed to raise a triable issue of fact to preclude summary judgment in this action. It is accordingly determined as a matter of law that the plaintiff is barred from recovery in this action by N.Y. Workers' Compensation Law §11.

"Where an employer and the owner of the premises where a plaintiff is injured are distinct legal entities there is no basis to dismiss an action against the landowner based on the exclusivity provisions of the Workers' Compensation Law" (*Richardson v Benoit's Electric, Inc. et al*, 254 AD2d 798, 677 NYS2d 855 [4th Dept 1998]). The defendants have established that they are not distinct legal entities or separate corporate entities and the plaintiff has failed to raise a factual issue in that regard. Here, the owners of the real estate, Armando Ramos and Florence Pedriera jointly own the premises where the accident occurred and further were the employers of the plaintiff and the corporate officers of Tri-City Masons, LLC. There was no lease agreement between the parties for the use of the premises by Tri-City Masons who paid a monthly rent of $1500.00 to Ramos and Pedriera.

Closely associated corporations, even ones that share directors and officers, will not be considered alter egos of each other if they were formed for different purposes, neither is a subsidiary of the other, their finances are not integrated, assets are not commingled, and the principals treat the two entities as separate and distinct (*Longshore v Paul Davis Systems of the Capital District*, 304 AD2d 964, 759 NYS2d 204 [3rd Dept 2003]). In the instant action, there is no lease agreement between Armando Ramos and Florence Pedriera as owners of the property and the two shareholders of the Tri-City Masons, LLC. and no separate corporate entities have been established. The property is owned by the defendants in their individual capacities. When an employer and the owner of the premises where a plaintiff is injured are distinct legal entities, there is no basis to dismiss an action against the landowner based on the exclusivity provisions of the Workers' Compensation Law (*Richardson et al v Benoit's Electric, Inc.* 254 AD2d 798, 677 NYS2d 855 [4th Dept 1998]). In the instant action the plaintiff has failed to raise a triable issue of fact that the property owners and the corporation are separate legal entities formed for different purposes. Unlike *Rosenberg et al v Angiuli Buick, Inc*, 220 AD2d 654, 632 NYS2d 658 [2nd Dept 1995] wherein the plaintiff was injured when he slipped and fell in front of the premises owned and operated by the defendant and the plaintiff received Workers' Compensation benefits provided by his employer, the Appellate Division found that the defendant was not shielded from tort liability as the defendant was a separate legal entity from the employer.

A plaintiff may not bring an action against his employer in its capacity as a property owner; his exclusive remedy is a claim under his employer's workers' compensation policy of insurance... a partnership and its partners are considered one entity when acting in furtherance of the partnership business (*Cipriano et al v FYM Associates*, 117 AD2d 770, 499 NYS2d 101 [2nd Dept 1986]). In the instant action the owners of the property are the officers of the corporation that employed the

plaintiff (see, *Blumberg v Ten Washington Realty Associates,* 262 AD2d 592, 691 NYS2d 902 [2nd Dept 1999]; *Kupke et al v Mullane et al,* 215 AD2d 531, 626 NYS2d 277 [2nd Dept 1995]; *Coppola v Singer et al,* 211 AD2d 744, 621 NYS2d 924 [2nd Dept 1995]). "Where a landowner is also the employer of an injured plaintiff, the obligation of the owner to provide a safe workplace is held to be an inseparable subcategory of that complex of obligations which arise in connection with the employment relation, and the liability for such violations merges with and is subsumed by the employer's general liability under the Workers' Compensation Law, which is made exclusive and in place of any other liability whatsoever by N.Y. Workers' Comp. Law §11. Inasmuch as a partnership generally is not to be regarded as a separate jural entity distinct from persons who compose it, where each of the members of a partnership are an injured party's employer, they fall within the statutory protection afforded by the Workers' Compensation Law (*Diaz v Rosbrock Associates Limited Partnership,* 298 AD2d 547, 749 NYS2d 46 [2nd Dept 2002]; *Lindner et al v Kew Realty Co. et al,* 113 AD2d 36, 494 NYS2d 870 [2nd Dept 1985]; *Concepcion v Diamond,* 224 AD2d 189, 637 NYS2d 135 [1st Dept 1996]).

"A plaintiff injured during the course of his or her employment cannot maintain an action against the owner of the property where the accident occurred when the owner is also an officer of the corporation which employed the plaintiff. In such a case, the defendant's duties as owner are connected to his or her duties as an officer responsible for the operation of the corporation's business. The defendant-officer has duties as an officer responsible for the operation of the corporation's business. The defendant-officer has indistinguishable responsibilities for providing a safe place to work, both as an executive employee and as a property owner" (*McFarlane v Chera et al,* 211 AD2d 764, 621 NYS2d 390 [2nd Dept 1995]; see also *Halstead v Wightman et al,* 247 AD2d 909, 668 NYS2d 850 [4th Dept 1998]). Where the defendant is the alter ego of the plaintiff's employer, the plaintiff is relegated to the remedy of workers' compensation benefits (*Anduaga v AHRC NYC New Projects, Inc.* 57 AD3d 925, 869 NYS2d 801 [2nd Dept 2008; *Ortega v Noxxen Realty Corp.* 26 AD3d 361, 809 NYS2d 546 [2nd Dept 2006; *Crespo v Pucciaretti,* 21 AD3d 1048, 803 NYS2d 586 [2nd Dept 2005]). Where, however, none of the property owners' partners are officers of the injured plaintiff's corporate employer, and the partnership and corporate employer are distinct legal entities, there is no basis to dismiss based upon the exclusivity provisions of the Workers' Compensation Law (see, *Masley v Herlew Realty Corp. et al,* 45 AD3d 653, 846 NYS2D 252 [2nd Dept 2007]; *O'Connor et al v Spencer,* 2 AD3d 513, 769 NYS2d 276 [2nd Dept 2003]).

Where a realty owner is president and chief executive officer of the corporate employer, that owner is deemed a co-employee of the employee (see, *Heritage et al v Van Patten,* 90 AD2d 936, 457 NYS2d 912 [3rd Dept 1982]). The fact that an injured employee's right to compensation or benefits shall be exclusively those provided for in the New York Workers' Compensation Law where such employee is injured by the negligence or wrong of another in the same employ, under N.Y. Workers' Com. Law §29(6), not only prevents suit against the employer, pursuant to N.Y. Workers' Com. Law §11, but against a co-employee as well who, acting within the scope of his employment, causes the injury (*Heritage et al v Van Patten,* supra). "A worker injured during the course of the worker's employment cannot maintain an action to recover damages for personal injuries against the owner of the premises upon which an accident occurs where the owner is also an officer of the corporation that employs the worker.... Regardless of the status of the owner of the premises where the injury occurred, the defendant third-party plaintiff remains a co-employee with

the injured plaintiff in all matters arising from and connected with their common employment" (*Druiett et al v Brenner et al*, 193 AD2d 644, 598 NYS2d 3 [2nd Dept 1993]). In the instant action, it is determined as a matter of law that the defendants' duties as owners merged with their duties as co-employees, as owners of the premises and as employer/corporate officers, so as to preclude recovery. Here, the nature of the defendant owners' employment with Tri-City has been established. Ramos actually worked in the business on a daily basis alongside of the plaintiff and other employees. Pedriera ran the financial end of the business and was directly involved on that basis. Joe Pedriera, as an employee of Tri-City, collected the rents from the employees who were tenants on the premises on behalf of the defendants/shareholders.

In the instant action, the plaintiff alleges that the defendant owners were negligent in causing and/or creating a dangerous condition on the premises resulting in his personal injury and it has been established as a matter of law that the defendants, owners of the premises and employers of the plaintiff, are co-employees with the plaintiff and are immune from liability for negligence in this action and that the plaintiff's sole remedy is pursuant to Workers' Compensation, which benefits he has elected to receive.

Accordingly, motion (001) is granted and the complaint is dismissed with prejudice.

Dated: 7/8/10

PAUL J. BAISLEY, JR.
J.S.C.

__X__ **FINAL DISPOSITION** ___ **NON-FINAL DISPOSITION**