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

PRESENT: LOUIS B. YORK PART 2

Justice

Index Number : 111634/1998

SOODIN, GANPAT

VS.

PAPPAS, PETER

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
AUG 24 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 8/23/10

LOUIS B. YORK 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: PART 2

GANPAT SOODIN,

Plaintiff,

Index No.: 111634/98

-against-

DECISION

GREGORY FRAGAKIS and JOHN FRAGAKIS as Co-Personal Representatives of the Estate of PETER PAPAS and SYDELL PINE, Individually and GREGORY FRAGAKIS and JOHN FRAGAKIS as Co-Personal Representatives of the Estate of PETER FRAGAKIS and SYDELL PINE d/b/a DELTER REALTY CO., a Partnership and DELTER REALTY, a Partnership and DELTER REALTY, LLC,

Defendants.

LOUIS B. YORK, J.:

FACTUAL BACKGROUND

Motion sequence numbers 002 and 003 are consolidated for disposition.

In motion sequence number 002, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of defendants' liability under New York Labor Law §§ 240 (1) and 241 (6).

In motion sequence number 003, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint with prejudice, based on an allegation that the action is barred by the New York State Workers' Compensation Law.

The action concerns an injury to a worker that occurred on June 30, 1995, at 3:30 P.M. At the time of the accident, plaintiff was employed by non-party Pine Management, Inc. (Pine) for the purpose of performing scraping, plastering, taping, priming and painting in an empty apartment, 4D, at 103 West 77th Street, New York, New York. Plaintiff's EBT, at 10, 11, 13. Plaintiff averred that he never worked for any of the defendants named in this action. Plaintiff's Aff. At the time of the accident, plaintiff was working alone in the apartment, plastering the ceiling in the apartment's living room. Plaintiff was standing on a metal six-foot A-frame ladder supplied by Pine, and the feet of the ladder, which, according to plaintiff, had no rubber on them, were resting on the wood floor of the apartment that had a polyurethane-like polish. Plaintiff also stated that the ladder got progressively smaller the higher up one went, basically in the form of an inverted "V". Plaintiff's EBT, at 14, 15, 23, 26. It is noted that there is no photograph of the ladder, and its current whereabouts is unknown. Plaintiff was not provided with any drop cloths by Pine, and, at the time of the occurrence, plaintiff was wearing sneakers. *Id.* at 20, 60.

Plaintiff had worked in the apartment the previous day, and states that the ladder, both on the previous day and the day of the accident, was shaky and that he could hear the ladder "rattling." *Id.* at 33-34. Plaintiff opined that the rattling

noise was caused by a loose rivet, and that the ladder was old. *Id.* at 34. Plaintiff also averred that he had complained to his supervisor, "Tom", several times before the day of the accident that the ladder was old and uneven. *Id.* at 35-36. The accident occurred while plaintiff was on the second to last top step of the ladder, and plaintiff testified that the ladder began to shake, causing both him and the ladder to fall. *Id.* at 23, 53.

Plaintiff further stated that, before he ascended the ladder, he made sure that it was secure, and that a ladder was necessary for the work he was performing because no scaffolding was provided. *Id.* at 47, 52-53. After his fall, plaintiff informed his supervisor, "Tom", about the accident, who was identified as Thomas Rohlman (Rohlman) of Pine (*id.* at 15, 68), and, as a result of his fall, plaintiff asserts that he suffered serious injuries, specifically, an anterior wedge compression fracture of L3 and left paracentral herniated nucleus pulposos at C6-C7. Plaintiff's Motion, Ex. 6.

Defendant Delter Realty Company was a partnership consisting of defendant Peter Pappas (Pappas) and Sydell Pine, and was the owner of the building at which the accident took place. Delter Realty LLC is the successor-in-interest to Delter Realty Company. On the date of the accident, Delter Realty Company had no employees on its payroll.

Rohlman, a vice-president of Pine at the time of the

accident and now its president, testified that Pine was engaged in the business of real estate management. Rohlman EBT, at 17. Rohlman stated that he did not know how old the ladder was that plaintiff was using on the day of the accident, and he affirms that neither Pine nor any of the defendants supplied plaintiff with any safety devices. *Id.* at 45, 46. Rohlman further stated that he did not know the last time before the accident that the ladder was repaired, replaced or maintained, or the last time that Pine acquired a new ladder. *Id.* at 48. Rohlman never saw the ladder that plaintiff was using. *Id.* at 58.

Rohlman's father-in-law, Harold Pine, founded Pine, which was held by four shareholders: Sydell Pine, Harold Pine's wife, an owner of the subject building and treasurer/part-time bookkeeper for Pine; Harold Pine; Brenda Rohlman, Harold Pine's daughter; and Rohlman, Harold Pine's son-in-law. *Id.* at 15. On the date of the accident, Sydell Pine and Pappas were the general partners of Delter Realty Company. *Id.* at 20. According to Rohlman, Pine was formed to manage the buildings owned by the Pine family. Allegedly, the buildings owned by the Pine family were held by shell companies with no employees.

Rohlman testified that, as part of its usual business practices, Pine loaned its employees to work at particular buildings owned by the extended Pine family, and then charged the employee's wages to the specific building at which the employee

worked. *Id.* at 20, 27, 30. The buildings then reimbursed Pine for the wages Pine paid to its employees loaned to work at the buildings. *Id.* at 30. Rohlman also stated that any one of the four principals of Pine could have directed plaintiff on any given day, and that all of the defendant companies were totally interrelated. *Id.* at 40. However, it is noted that Rohlman never avers that plaintiff's work was actively directed or controlled by any entity other than Pine by means of Pine's officers and employees.

Defendants state that Pine and Delter Realty Company shared offices, and that Pine obtained all the Workers' Compensation and general liability insurance that named Delter Realty Company as an insured, and for which Delter Realty Company paid its proportionate share.

In the amended verified complaint, plaintiff alleges that defendants violated Labor Law §§ 200, 240 (1) and 241 (6), as well as violating the following sections of the Industrial Code: 12 NYCRR 23.0, 23-1.3, 23-1.5, 23-1.7 (e) (2) and 23-1.21, *et seq.*

In opposition to plaintiff's motion, and in support of their own motion, defendants assert that plaintiff' sole remedy lies under the Workers' Compensation Law. Defendants claim that plaintiff, who was a general employee of Pine, was a special employee of defendants, and, as such, plaintiff's exclusive

remedy is under the Workers' Compensation Law. This argument is based on the assertion that Pine, plus all of the defendant companies, were interrelated and are the alter egos of each other. It is noted that defendants provide no other specific opposition to plaintiff's motion with respect to his Labor Law claims.

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 issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders , Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

The threshold issue to be determined by the court is whether plaintiff was the special employee of the defendants, which would preclude his Labor Law claims.

"As a general rule, when an employee is injured in the

course of his employment, his sole remedy against his employer lies in his entitlement to a recovery under the Workers' Compensation Law." *Billy v Consolidated Machine Tool Corp.*, 51 NY2d 152, 156 (1980); *Gonzalez v RHQ Associates*, 263 AD2d 413 (1st Dept 1999). Further, "[t]he liability of a special employer is precisely the same as a general employer under the Workmen's Compensation Law." *Fallone v Misericordia Hospital*, 23 AD2d 222, 227 (1st Dept 1965), *affd* 17 NY2d 648 (1966).

"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 AD2d 405, 407 (1st Dept 1979).

> "[A[n employee, although generally employed by one employer, may be specially employed by another employer, and ... a special employer may avail itself of the Workers' Compensation Law to bar negligence claims against it for injuries sustained by a special employee in the course of special employment. General employment is, however, presumed to continue, and special employment will not be found absent a 'clear demonstration of surrender of control by the general employer and assumption of control by the special employer.' Whether such a complete transfer of control has occurred is ordinarily a fact-sensitive inquiry not amenable to resolution on summary judgment. 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' is summary adjudication of special employment status and consequent dismissal of an action proper [internal citations omitted]."

Bellamy v Columbia University, 50 AD3d 160, 161-162 (1st Dept 2008)(sufficient facts were alleged and evidenced to create a question of fact regarding special employment).

"To rebut the presumption of general employment the putative special employer must clearly demonstrate that the general employer surrendered control over the employee *and that the putative special employer assumed that control.*" *Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 556 (1st Dept 2008).

This relinquishment of control by the general employer and its assumption by the alleged special employer is the pivotal factor in determining whether a special employment relationship has been created. As stated by the Courts, the underlying key to making this determination is the *actual* working relationship between plaintiff and defendants. *Fung v Japan Airlines Company*, 9 NY3d 351 (2007).

> "Although no single factor is dispositive in determining whether a special employment relationship exists, a number of factors must be weighed, including: the right to and degree of control by the purported employer over the manner, details, and ultimate result of the special employee's work; the method of payment; the right to discharge; the furnishing of equipment; and the nature and purpose of the work. Of primary importance amongst these factors is the degree of control the alleged special employer has over the work of the employee. Finally, it is also well settled that an individual who is in the general employ of one party may be in the special employ of another notwithstanding that the general employer is responsible for the payment of his/her wages, has the power to hire and fire, has an interest in the work that is performed by the employee, maintains workers' compensation and other benefits for the employee, and provides some, if not all, of the employee's equipment [internal citations omitted]."

Gannon v JWP Forest Electric Corp., 275 AD2d 231, 232 (1st Dept 2000); *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 (1991).

In the case at bar, defendants have failed to provide any evidence that plaintiff was their special employee. Defendants' exclusive argument is that they are all the alter egos of Pine, but no hard evidence to substantiate that contention has been provided.

There is no evidence that the companies are directed by a common management, that they operate under a combined budget, that they issue combined audited financial statements, or that they have a common payroll, all indicia of common ownership generally used by the courts to determine the interrelationship of multiple companies. *Paulino v Lifecare Transport,* 57 AD3d 319 (1st Dept 2008); *Ramnarine v Memorial Center for Cancer and Allied Diseases,* 281 AD2d 218 (1st Dept 2001). In fact, Rohlman testified that Pine paid plaintiff's wages, then allocated his work among the various buildings that Pine managed, and that the buildings then reimbursed Pine for the wages Pine had extended. This indicates separate books and management.

Even though the companies are closely related, and share several directors, officers and partners, each one was formed for a different purpose, their finances are not commingled, and none is the subsidiary of another. *Wernig v Parents and Brothers Two, Inc.,* 195 AD2d 944 (3d Dept 1993). Therefore, defendants have failed to demonstrate that the various entities should be treated as a single employer. *Cruz v HSS Properties Corp.,* 309 AD2d 720

(1st Dept 2003).

Furthermore, since defendants cannot be deemed to be the alter egos of Pine, there is no allegation and no evidence that control over plaintiff's work was transferred from Pine and assumed by defendants, the most determinative factor in evidencing a special employment relationship. *See Gonzalez v Lovet Assoc.*, 228 AD2d 342 (1st Dept 1996)(summary judgment properly denied where defendant did not establish employer surrendered control of employee).

> "The Workers' Compensation Law defense ... turns on the actual exercise by the defendant of authority to control plaintiff employee's work. The putative special employer must demonstrate that its actual working relationship with plaintiff employee allowed it to control and direct 'the manner, details and ultimate result of' plaintiff's work, and determine 'all essential, locational and commonly recognizable components' of that work [citation omitted]."

Voultepsis v Gumley-Haft-Klierer, Inc., 60 AD3d 524, 525-526 (1st Dept 2009).

In the case at bar,

> "there is no indication, nor does defendant building owner claim, that it directed or controlled the manner in which plaintiff performed his job. Rather, it is clear that the management company exclusively controlled and directed the manner, details and ultimate result of plaintiff's work. In the absence of evidence that an actual employment relationship existed between plaintiff and defendant[s], or that plaintiff was performing duties on behalf of and under the direction of defendant[s] at the time of the accident, or that defendant[s were], for the purposes of the Workers' Compensation Law, an alter ego of the managing agent, defendant[s'] motion for summary judgment, based on its Workers' Compensation Law defense, [is] properly denied [internal citation omitted]."

Cruz v Regent Leasing Limited Partnership, 39 AD3d 396, 396 (1st Dept 2007).

As a consequence of the foregoing, the court cannot grant defendants' motion for summary judgment based on the argument that the claims are barred by the Worker's Compensation Law.

The court must now address plaintiff's Labor Law claims.

Section 240 (1) of the New York Labor Law states, in pertinent part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

However, it is well established that proof of a fall from a ladder alone does not automatically establish liability under Labor Law § 240 (1). *See Miro v Plaza Construction Corp.*, 38 AD3d 454 (1st Dept) *affd in part* 9 NY3d 948 (2007). Plaintiff must first establish that the fall from the ladder occurred while he was performing the type of work that is encompassed by the statute.

The court notes that in his memorandum of law in support of his motion, plaintiff simply asserts that his accident is the type covered by the labor law statutes, but he fails to address

with specificity that the type of work that he was performing at the time of the occurrence is the type of work protected by Labor Law §§ 240 (1) and 241 (6).

In the case at bar, plaintiff was plastering and painting the interior of an empty apartment. However, even though the term "painting" is used within the context of Labor Law § 240 (1), not all painting activities are covered by the statute. Whereas the Court of Appeals has held that the painting of the exterior of a house is the type of painting envisioned by the statute (*Rivers v Sauter,* 26 NY2d 260 [1970]), it has also held that "routine maintenance and decorative modifications should fall outside the reach of the statute." *Joblon v Solow,* 91 NY2d 457, 465 (1998).

The question of whether an activity is routine maintenance not covered by Labor Law § 240 (1), as distinguished from a repair or alteration covered by Labor Law § 240 (1), is a question of degree which must be considered in light of the legislative purpose to protect against risks related to elevation differentials. *See Rocovich v Consolidated Edison Company,* 78 NY2d 509 (1991). Routine maintenance of a building is not the type of activity that is protected by the provisions of Labor Law § 240 (1). *See Broggy v Rockefeller Group, Inc.,* 30 AD3d 204 (1st Dept 2006).

Generally, in order to consider painting or any other type

of work to be an "alteration" pursuant to Labor Law § 240 (1), rather than routine maintenance or decoration, the work must make a *significant* physical change to the configuration or composition of the building or structure. To determine whether such change is significant, the court must examine

> "the totality of the work done on the project to determine whether it resulted in a significant physical change to the building or structure. Where the work does not involve a significant or permanent physical change, dismissal of a Labor Law § 240 (1) claim is appropriate [internal quotation marks and citation omitted]."

Maes v 408 W. 39 LLC, 24 AD3d 298, 300 (1st Dept 2005).

In the instant matter, although plaintiff's work may have changed the visible appearance of the apartment's interior, that change is akin to cosmetic maintenance or decorative modification, makes no significant permanent change to the building, and is therefore is not covered by Labor Law § 240 (1). *Id.*

As a consequence of the foregoing, that portion of plaintiff's motion seeking partial summary judgment on defendants' liability under Labor Law § 240 (1) is denied, and that cause of action is dismissed.

Labor Law § 241 (6) states:

> "Construction, excavation and demolition work. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

***

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

As stated in *Kane v Coundorous* (293 AD2d 309, 310-311 [1st Dept 2002]):

"The liability for injuries resulting from a violation of Labor Law § 241 (6) is 'absolute.' In addition, property owners and their agents are vicariously liable under section 241 (6) for injuries sustained by construction workers due to the negligence of a subcontractor in failing to maintain the worksite in reasonably safe condition, even when the owner exercises no direct supervisory control over the subcontractor [internal citation omitted]."

To prevail on a cause of action based on Labor Law § 241 (6), a plaintiff must establish a violation of an Industrial Code provision which sets forth a specific standard of conduct. *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 (1998).

Plaintiff has alleged that defendants violated 12 NYCRR 23-1.21, which states, in pertinent part:

"Ladders and ladderways

* * *

(b) General requirements for ladders.
(1) Strength.
Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four time the maximum load intended to be placed thereon

* * *

(3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:
(I) If it has a broken member or part.
(ii) If it has any insecure joints between members or parts

* * *

(iv) If it has any flaw or defect of material that may cause ladder failure

* * *

(4)

* * *

(ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings."

Since plaintiff has only argued the application of this section of the Industrial Code in support of the instant motion, all allegations that other sections of the Industrial Code have been violated by defendants are deemed abandoned.

In order for plaintiff to maintain a cause of action under Labor Law § 241 (6), he must evidence that the accident occurred as part of construction, demolition or excavation work. *Cordero v SL Green Realty Corp.*, 38 AD3d 202 (1st Dept 2007). "[T]he protections of Labor Law § 241 (6) do not apply to claims arising out of maintenance of a building or structure outside of the construction context ... ." *Nagel v D & R Realty Corp.*, 99 NY2d 98, 99 (2002).

In the instant case, as discussed above, plaintiff's work of plastering and painting an empty apartment is cosmetic regular maintenance, and therefore is beyond the reach of Labor Law § 241 (6). *Acosta v Banco Popular*, 308 AD2d 48 (1st Dept 2003)

(protections of Labor Law § 241 [6] are not available to a worker who fell from a ladder while attempting to install a key box close to the top of a 10-foot ceiling).

Based on the foregoing, that portion of plaintiff's motion seeking partial summary judgment on the issue of defendants' liability pursuant to Labor Law § 241 (6) is denied, and that cause of action is dismissed.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion (motion sequence number 002) is denied; and it is further

ORDERED that the portion of defendants' motion (motion sequence number 003) seeking to dismiss the complaint with respect to plaintiff's causes of action based on violations of Labor Law §§ 240 (1) and 241 (6) is granted; and it is further

ORDERED that the remainder of defendants' motion (motion sequence number 003) is denied; and it is further

ORDERED that the remainder of this action shall continue.

Dated: 8/23/10

ENTER:

Louis B. York, J.S.C.