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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

CARLOS VASQUEZ,

Plaintiff,

- against-

301 WEST 111 OWNERS LLP and 557-561 WEST 149 LLC and 557 WEST 149 CORPORATION,

Defendants.

INDEX NO. 100568/2007

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 3, were read on this motion by defendant 301 West 111 Owners LLP for summary judgment; and cross-motion by plaintiff for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

Plaintiff Carlos Vasquez ("plaintiff") brings this action under Labor Law §§ 200, 240 and 241(6), against defendants 301 West 111 Owners LLP ("Owners"), 557-561 West 149 LLC and 557 West 149 Corporation, to recover damages for personal injuries he allegedly sustained when he fell from a ladder while repairing tubes on an oil tank filter during the course of his employment at 559 West 149th Street, New York, New York ("the Premises").[1] The Note of Issue has not been filed. Owners, the title owner of the Premises at the time of the incident, now moves for summary judgment, pursuant to CPLR 3212, granting judgment in its favor and dismissing all claims against it as barred by the exclusivity provisions of Workers' Compensation Law § 11, or alternatively, on the basis that Labor Law §§ 200, 240 and 241(6)

[1]The action as against defendants 557-561 West 149 LLC and 557 West 149 Corporation has been discontinued by stipulation of the parties.

are inapplicable. Plaintiff opposes the motion and cross-moves for summary judgment against Owners on the issue of liability under Labor Law §§ 200, 240 and 241(6).

BACKGROUND

In support of its summary judgment motion, Owners submits, *inter alia*, the depositions of plaintiff, Frank J. Anelante, Jr. ("Anelante"), and Richard L. Berner ("Berner"). In opposition and in support of his cross-motion, plaintiff relies upon the same depositions, as well as submits a Management Agreement Contract ("Management Contract") dated April 4, 1998. The following facts are undisputed.

A. The Business Entities

This lawsuit arises out of an incident that occurred during the course of plaintiff's employment at the Premises on January 12, 2004. Plaintiff was directly employed by the building's property manager, non-party Lemle & Wolff, Inc. ("Lemle"), as the superintendent for the Premises and two adjacent properties known as 557 and 561 West 149th Street (collectively "the adjacent properties"). Plaintiff's responsibilities as superintendent included doing maintenance and repairs at the Premises.

Owners was a limited liability company ("LLC") formed by Anelante and three other members for the sole purpose of purchasing the Premises and the adjacent properties.[2] Part of the arrangement between the members of the LLC when they bought the Premises was an agreement that the property would be managed by Lemle, a residential property management company. Anelante owned 50% of Lemle and was its President.[3] Berner was the Operations Manager for Lemle and handled day-to-day operations. Plaintiff worked under the supervision of Sean Thompson ("Thompson"), also a Lemle employee.

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[2]The three other members of Owners were Vincent Giallorenzo, Ronald Moelis and Sanford Loewentheil.

[3]The other 50% of Lemle was owned by Joseph J. Zitolo.

On April 4, 1998, Owners and Lemle executed a Management Contract under which Lemle was retained "exclusively to rent, lease, operate and manage" the Premises and the adjacent properties. Pursuant to the Management Contract, which remained in effect until the properties were sold in 2006, Lemle was responsible for running all operations of the Premises. All receipts collected and all disbursements made on behalf of Owners were handled through Lemle's business management account. Lemle controlled the management account, and Owners did not have access to it or have a separate account. Lemle did not need Owners' permission to advance funds on behalf of Owners.

Owners did not retain responsibility for any aspects of day-to day operations of the Premises, and had no functions regarding the Premises other than being the title owner of the building. All expenses for the Premises were paid by Lemle, including the mortgage, taxes and insurance. The Premises had property, general liability, umbrella, and oil and machinery insurance coverage that was obtained by Lemle, and Lemle was responsible for putting the insurance carrier on notice of any claims. Lemle was also the certificate holder and additional insured on all insurance policies involving the Premises. All landlord-tenant cases regarding the Premises were litigated by Lemle. Lemle and Owners had the same address and if anyone wanted to contact Owners they would do so through Lemle.

The Management Contract also gave Lemle authority to hire and supervise employees required for the maintenance of the Premises. Employees who worked at the Premises had no direct interactions with Owners, and were carried on the books of Lemle, were paid by Lemle, and were covered under workers' compensation through Lemle.

B. The Incident

There was a single boiler and oil tank located in the basement of the Premises that serviced the Premises and the adjacent properties. On the morning of January 12, 2004, at Thompson's direction, plaintiff went to the basement to make repairs to the tubes inside of the

oil tank's filter. The filter was located on top of the oil tank and plaintiff was provided with a ladder that was kept at the Premises. The ladder was an A-frame, approximately six feet tall, and had a broken foot on the right side.

Plaintiff leaned the ladder against the oil tank and climbed up. He loosened the tubes in the filter and somehow ended up on the floor. When he regained consciousness, he saw the ladder on the floor and a lot of oil all over the floor. He believed that the ladder slipped when he was on top of it as oil fell from the filter when the tubes were loosened.

As a result of the fall, plaintiff received workers' compensation benefits through his coverage with Lemle. He has not named Lemle as a defendant in this action, and instead brings Labor Law claims against Owners.

DISCUSSION

A. Summary Judgment Standards

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

B. Workers' Compensation § 11

Generally, an employee injured during the course of employment is barred from bringing a personal injury action against his or her employer by the exclusivity provisions of Workers' Compensation Law § 11 (*see* Workers' Compensation Law § 11; *O'Rourke v Long*, 41 NY2d 219, 221 [1976]; *Valenziano v Niki Trading Corp.*, 21 AD3d 818, 820 [1st Dept 2005]).[4] However, the defense afforded to employers by the exclusivity provisions of the Workers' Compensation Law may also extend to other entities (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 358-59 [2007]; *Cruz v Regent Leasing Ltd. Partnership*, 14 Misc 3d 307, 309 [NY Sup Ct Bronx County 2006], *aff'd* 39 AD3d 396 [1st Dept 2007]).

Included among the circumstances where Workers' Compensation Law § 11 may bar an action against an entity that is not the plaintiff's direct employer are situations where different businesses, though legally separate, operate as a single integrated entity, and thus, are treated as a single entity for exclusivity purposes *(see Ramnarine v Memorial Ctr. for Cancer and Allied Diseases*, 281 AD2d 218 [1st Det 2001]; *Samuel v Fourth Ave.* Assoc., 75 AD3d 594 [2d Dept 2010]). Examples include cases where an entity is found to be the "alter ego" of the plaintiff's

[4]The exclusivity provisions also extend to "co-employees" (*see* Workers' Compensation Law § 29 [6]). Owners, however, does not allege that it was plaintiff's co-employee and moves for summary judgment only under Workers' Compensation Law § 11.

employer (*see Kudelski v 450 Lexington Venture*, 198 AD2d 157, 157 [1st Dept 1993]; *Devorin v One Wall St. Corp.*, 210 AD2d 37, 38 [1st Dept 1994]); or "joint ventures" (*see Kudelski*, 198 AD2d at 157; *Fallone v Misericordia Hosp.*, 23 AD2d 222 [1st Dept 1965], *aff'd* 17 NY2d 648 [1966]). The common thread among these cases is that the entities are so intertwined that they are treated as a single employer for purposes of workers' compensation.

In this case, Owners claims that Workers' Compensation Law § 11 shields it from liability because it and Lemle functioned as a single integrated entity with respect to the Premises. Specifically, Owners argues that it should be granted summary judgment dismissing plaintiff's claims because it has prima facie established either that Owners was Lemle's "alter ego" since Lemle exercised complete managerial and financial control over Owners; or that Owners and Lemle were "joint venturers" because they had integrated finances and shared profits.

Plaintiff argues that Owners has not established entitlement to judgment as a matter of law because Owners and Lemle did not operate as a single integrated entity. Rather, plaintiff maintains that the Management Contract establishes that Lemle acted as Owners' agent in the management of the Premises, and that the exclusivity provisions do not apply in the owner/agent context.[5]

Under the present circumstances, in order to prevail on its summary judgment motion based on the exclusivity defense, Owners is required to show, prima facie, the existence of either an alter ego relationship between it and the entity that employed plaintiff, or a joint venture between them (*see Kudelski*, 198 AD2d at 157). The burden of proof rests with Owners, as the party asserting the existence of an alter ego or joint venture.

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[5]Plaintiff also argues that Owners has not established that plaintiff was a "special employee" (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 [1991]), which it claims is required in order to establish the exclusivity defense. The Court need not address the special employee issue since Owners correctly acknowledges in its reply papers that it is irrelevant to its motion as it seeks summary judgment under the alter-ego or joint venture theories.

"A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity" (*Samuel*, 75 AD3d at 594; *see also Cappella v Suresky at Hatfield Lane, LLC*, 55 AD3d 522, 523 [2d Dept 2008] [entity met its burden of showing an alter ego relationship by proffering evidence that one entity exercised managerial and financial control over the other]). Conversely, "a mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other" (*Samuel*, 75 AD3d at 594).

Here, the evidentiary proof submitted by Owners is sufficient to prima facie establish that Owners was the "alter ego" of Lemle for purposes of Workers' Compensation § 11 (see *Samuel*, 75 AD3d at 594; *Capella*, 55 AD3d at 523). The undisputed evidence establishes that Lemle exercised complete managerial and financial control over Owners, and that Lemle ran all day-to-day operations of the Premises. Owners retained no responsibility for any aspects of day-to day operations other than being the title owner, which was the purpose for which it was formed. Notably, Owners did not maintain a separate bank account, and all financial receipts and disbursements made on its behalf were handled by Lemle though a business management account that only Lemle controlled. Lemle could advance funds without Owners' consent. Lemle was responsible for paying all expenses for the Premises, including the mortgage, taxes and insurance. Lemle was a certificate holder and additional insured on all insurance policies, and was responsible for giving notice of claims. Lemle hired and supervised the employees who worked at the Premises, and any such employees had no direct interactions with Owners. Lemle also handled the litigation of landlord-tenant cases. Lemle and Owners shared the same address, as well as had common ownership to the extent that Anelante was a principal in both entities.

This Court is persuaded by the reasoning of *Cappella*, 55 AD3d at 522, where the Second Department upheld a finding of an alter ego relationship between an employer and a

property owner for workers' compensation purposes on similar facts. In that case, the plaintiff was an employee of a car dealership and was allegedly injured during a fall in the dealership lot, which was owned by the defendant, a LLC. The defendant moved for summary judgment dismissing the complaint on the ground that the action was barred by the Workers' Compensation Law because the defendant was the alter ego of the plaintiff's employer. The trial court granted the motion, finding that the employer exercised complete dominion and control over the defendant's day-to-day operations. The decision was affirmed on appeal on the basis that the defendant met its burden of proof by proffering evidence that the employer exercised managerial and financial control over the defendant sufficient to establish a prima facie defense and that the plaintiff failed to raise a triable issue of fact. A review of the underlying trial court decision reveals facts similar to the case at bar:

> "Defendant proffers evidence to show, among other things, that [the LLC] was formed solely for the purpose of owning the premises upon which plaintiff's employer . . . operates its car dealership; that defendant's sole member . . . is Chairman of the Board of plaintiff's employer; that defendant has no employees and does not have a separate bank account; that there is no written lease agreement between the two entities; that the two entities share the same liability policy; that all of the defendant's school, real property and village tax bills are paid directly by plaintiff's employer and processed by an employer's accounting manager, . . . and that all bills for service and maintenance contracts benefitting defendant are paid by plaintiff's employer. Under these circumstances, defendant has met its burden of establishing a prima facie defense under Workers' Compensation Law § 11" *(Cappella v Suresky at Hatfield Lane, LLC*, 2007 WL 6830765, *2 [NY Sup Ct Orange County 2007]).

The reasoning of *Cappella* is equally applicable to this case, and other cases have ruled similarly (*see e.g. Anduaga v AHRC NYC New Projects, Inc.*, 57 AD3d 925 [2d Dept 2008] [finding defendant landowner the alter ego of the plaintiff's employer and dismissing the complaint]; *Perry v AHRC NYC New Projects Inc.*, 2009 WL 2984833 [NY Sup Ct Richmond County 2009] [holding that defendant property owner established that it and the plaintiff's employer were operating as a single integrated entity where the defendant had no employees

and all bills and operating expenses of the premises were paid by the employer and they operated as one single unit]; *cf. Gonzalez v 310 West 38th, L.L.C.*, 14 AD3d 464, 464 [1st Dept 2005] [alter ego argument correctly rejected where record failed to demonstrate that plaintiff's employer exercised complete domination and control over defendant's everyday operations]; *Cruz*, 39 AD3d at 396 [defendant building owner's summary judgment motion based on Workers' Compensation Law § 11 was properly denied in "the absence of evidence that an actual employment relationship existed between plaintiff and defendant, or that plaintiff was performing duties on behalf of and under the direction of defendant at the time of the accident, or that defendant was, for purposes of the Workers' Compensation Law, an alter ego of the managing agent"]).

In opposition, plaintiff has failed to raise a triable issue of fact that Owners was not Lemle's alter ego (*see Alvarez*, 68 NY2d at 324). The Management Contract submitted by plaintiff actually supports a finding of an alter ego relationship, and plaintiff has submitted no other evidence disputing Lemle's complete management and control over Owners. As such, summary judgment is appropriate (*see Cappella*, 55 AD3d at 523; *Ortega v Noxxen Realty Corp.*, 26 AD3d 361, 362 [2d Dept 2006]).

Accordingly, Owners' motion for summary judgment dismissing all claims against it is granted. Plaintiff's cross-motion for summary judgment is denied as moot.

For these reasons and upon the foregoing papers, it is,

ORDERED that Owners' motion for summary judgment is granted; and it is further,

ORDERED that plaintiff's complaint against Owners is hereby dismissed in its entirety; and it is further,

ORDERED that plaintiff's cross-motion for summary judgment is denied as moot; and it is further,

ORDERED that Owners shall serve a copy of this order, with Notice of Entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: October 27, 2010

Paul Wooten J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**