

Sangare v Edwards

2011 NY Slip Op 31373(U)

May 19, 2011

Sup Ct, NY County

Docket Number: 106554/08

Judge: Martin Shulman

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

PRESENT: SHULMAN
Justice

PART 1

MOUSSA SAUGANE
- v -
NANCY EDWARDS

INDEX NO. 106054/08
MOTION DATE _____
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

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


	PAPERS NUMBERED
Motion of Motion/ Order to Show Cause — Exhibits <u>A-I</u>	<u>1, 2</u>
Answering Affidavits — Exhibits	<u>3</u>
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is **FILED** *in accordance with the attached decision and order*
MAY 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 19, 2011


MARTIN SHULMAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X

Moussa Sangare,
Plaintiff,

-against-

Index No.: 106554/08

Nancy M. Edwards, as the Article 81 Guardian
of the Person and Property of John Edwards,
an incapacitated person and Dermer Management
Company,

Defendants.

-----X

FILED

MAY 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

Martin Shulman, J.:

In this action alleging assault and negligence, defendant Dermer Management Co. ("Dermer" or "defendant") moves by order to show cause to refer the action to the Workers Compensation Board ("WCB") to determine whether plaintiff was Dermer's special employee at the time of his injury and to stay the trial of this action pending such determination. Plaintiff opposes the motion.

On the date of plaintiff's injury, non-party Soho Plaza Corp. ("Soho"), a cooperative housing corporation, employed plaintiff as its superintendent and Dermer as its managing agent for the building located at 514 Broadway in Manhattan. Plaintiff was injured when co-defendant John Edwards, a building resident, assaulted him while he was cleaning the building lobby.¹

¹ As indicated in the case caption, Nancy Edwards, in her capacity as guardian pursuant to Article 81 of the Mental Hygiene Law, has been substituted as a party herein in place of defendant John Edwards.

Plaintiff filed the note of issue in this case on or about August 23, 2010 and trial is imminent. Defendant bases this motion on its fourth affirmative defense² alleging that Workers' Compensation is plaintiff's exclusive remedy since Soho was plaintiff's general employer and Dermer was his special employer. Deposition testimony indicates that Dermer supervised plaintiff's day to day work but Soho hired him, determined his salary and had the right to terminate his employment. Although Soho maintained a Workers' Compensation policy that covered plaintiff, Sangare did not apply for Workers' Compensation benefits because Soho paid him his full salary after the incident and his medical costs were mostly covered by his insurance.

As succinctly stated in *Alvarez v Cunningham Assocs., L.P.*, 21 AD3d 517, 517-518 (2d Dept 2005):

When an employee elects to receive workers' compensation benefits from his general employer, a special employer is shielded from an action at law commenced by the employee (*see* Workers' Compensation Law § 29 [6]; *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 555 [1991]; *Abuso v Mack Trucks*, 174 AD2d 590 [1991]; *Richiusa v Kahn Lbr. & Millwork Co.*, 148 AD2d 690, 692 [1989]). A special employee is defined as "one who is transferred for a limited time of whatever duration to the service of another" (*Thompson v Grumman Aerospace Corp.*, *supra* at 557). Principal factors in determining whether a special relationship exists include the right to control the work of the employee, the method of his or her payment, the furnishing of equipment, the right to discharge the employee, and the relative nature of the work (*see Matter of Shoemaker v Manpower, Inc.*, 223 AD2d 787, 787-788 [1996]). 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.*, *supra* at 558).

² Plaintiff alleges in his opposition that Dermer failed to allege exclusivity of Workers' Compensation as an affirmative defense. However, while defendant's initial answer (Motion at Exh. B) did not contain this defense, it is included in his answer to the amended complaint (*id.* at Exh. D).

In opposition to the motion, plaintiff contends in relevant part: 1) the action has been pending for three years and Dermer should not have waited until the eve of trial to make this motion; 2) in essence, the motion seeks summary judgment yet the time for bringing dispositive motions has expired; 3) plaintiff did not apply for Workers' Compensation benefits; 4) the facts do not support the claim that plaintiff is Dermer's special employee; 5) the management contract between Soho and Dermer expressly states that Soho's employees are not to be deemed employees of Dermer (*id.* at Exh. H); and 6) judicial economy and fairness warrant denial of a stay.

Dermer's motion is denied. This court is not obligated in all cases to defer to the WCB's primary jurisdiction by referring employment issues to the WCB. Indeed, in *Huggan v Brookdale Hosp.*, 12 Misc3d 97, 820 NYS2d 388 (App. Term, 2d & 11th Dists.), the lower court erred in referring the same special employment issue to the WCB where the defendant established that plaintiff was its special employee as a matter of law, thus entitling the defendant to summary judgment dismissing the complaint. Here, the court does not reach the merits of defendant's fourth affirmative defense, as the issue is not before the court and Dermer's time to move for summary judgment has long expired. Nor is this court willing to further delay this three year old case on the eve of trial by referring this defense to the WCB so that Dermer can essentially obtain what it failed to timely seek before this court, to wit, a summary determination of its fourth affirmative defense. *See Bastidas v Epic Realty, LLC*, 58 AD3d 776, 777-778 (2d Dept 2009)(defendants were not entitled to raise the WCB's

