[* 1]

SHORT FORM ORDER

INDEX No. 07-18380
CAL. NO. 10 01309 OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 11-17-10 (#002)
MOTION DATE 10-20-10 (#003)
MOTION DATE 1-26-11 (#004)
ADJ. DATE 2-16-11
Mot. Seq. # 002 - MD # 004 - MD
003 - MD

HAROLD M. GONZALES, as Administrator of the Estate of CIRO A. MATA, deceased, Plaintiff, - against - THE WOODBOURNE ARBORETUM, INC., WOODBOURNE CULTURAL NURSERIES, INC., and GLENWOOD MANAGEMENT CORP., Defendants.	KELNER & KELNER Attorney for Plaintiff 140 Broadway, 37th Floor New York, New York 10005 FLYNN, GIBBONS & DOWD Attorney for Defendants 80 Maiden Lane New York, New York 10038

Upon the following papers numbered 1 to 68 read on this motion and cross motion for summary judgment and to strike affirmative defenses; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 17 Notice of Cross Motion and supporting papers (003) 18-32; (004) 33-42 ; Answering Affidavits and supporting papers 43-46; 47-55 ; Replying Affidavits and supporting papers 56-58; 59-64; 65-68 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motions (002), (003) and (004) are consolidated for the purpose of determination; and it is further

ORDERED that motion (002) by the defendants, Glenwood Management Corp., Woodbourne Arboretum, Inc. and Woodbourne Cultural Nurseries, Inc., pursuant to CPLR 3212 for an order dismissing the complaint, is denied; and it is further

ORDERED that motion (003) by the plaintiff, Harold M. Gonzales, pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability premised upon the defendant's alleged violation of Labor Law §240 (1), and setting this matter down for a trial on damages, is denied; and it is further

ORDERED that motion (004) by the plaintiff, Harold M. Gonzales, pursuant to CPLR 3212 for an order dismissing the fourth and fifth affirmative defenses asserted by the defendants is denied.

This action arises out of an incident which occurred on June 28, 2005, at the premises located at 221 Old East Neck Road, Melville. It is claimed that the defendants were moving an elevated structure with jack stands, a floor jack and a skid pusher, when the structure shifted and fell from a height, striking the plaintiff's decedent, Ciro A. Mata, in the head, causing him to suffer serious injury and death.

In motion (002), Glenwood Management Corp. seeks summary judgment dismissing the complaint asserted against it on the basis that it has no connection to the accident, and has no ownership or other interest in the premises where the accident occurred. The Woodbourne Arboretum, Inc. and Woodbourne Cultural Nurseries, Inc. seek summary judgment dismissing the complaint on the basis that this action, as asserted against them, is barred by Workers Compensation Law §§ 11 and 29, and by virtue of the decedent being a "special employee."

In motion (003), the plaintiff, Harold M. Gonzales, seeks summary judgment on the issue of liability based upon the defendants' alleged violation of Labor Law § 240 (1). In motion (004), the plaintiff seeks dismissal of the defendants fourth and fifth affirmative defenses which are premised upon the claim that the plaintiff's decedent was a special employee of the defendant, and that the action is barred by Workers Compensation Law §§ 11 and 29.

The Note of Issue in this action was filed on June 15, 2010. CPLR 3212 (a) provides in pertinent part that a motion for summary judgment shall be made no later than one hundred twenty days after the filing of the Note of Issue, except with leave of court on good cause shown. According to the plaintiff's affidavits of service, motion (003) was served by the plaintiff on October 30, 2010, and motion (004) was served by the plaintiff on January 18, 2011, each more than one hundred twenty days after the Note of Issue was filed. The last date to serve these motions was October 13, 2010. The plaintiff has not moved for leave of court, on good cause shown, to file these motions beyond the statutory one hundred twenty days, and, has not submitted a reason for the delay in making the motions (*see,* ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Thus, the plaintiff's motions are deemed untimely pursuant to CPLR 3112 (a).

Accordingly, plaintiff's motions (003) and (004) for summary judgment in his favor on liability and dismissing the defendants' fourth and fifth affirmative defenses are denied.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]; ***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (002), the defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answer, and plaintiff's verified bill of particulars; uncertified, redacted copies of statements by Michael Ambrosio and Roger Newell taken by the Suffolk County Police; an uncertified copy of a police report dated July 28, 2005; the affidavit of Charles Dorego, Esq. with exhibits annexed thereto; the affidavit of Michael McInerny dated October 13, 2010; the affirmation of Robert Bonomo, M.D. dated October 11, 2010; an uncertified copy of the autopsy report dated July 12, 2005; the affirmation of James C. Wilson, M.D; and the unsigned copies of the transcripts of the examinations before trial of Roger S. Newell dated July 10, 2008, Charles Ambrosio dated November 18, 2008, and Leonard Litwin dated December 22, 2009.

It is determined that the unsigned copies of the transcripts of the examinations before trial are not in

admissible form, fail to comport with the requirements of CPLR 3212, and are not accompanied by an affidavit pursuant to CPLR 3116. Therefore, those transcripts are not considered on this motion for summary judgment (see, ***Martinez v 123-16 Liberty Ave. Realty Corp,*** 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; ***McDonald v Maus,*** 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; ***Pina v Flik Intl. Corp.*** 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]). The police report and statements taken by the police department of Michael Ambrosio and Roger Newell are not certified and, thus, are not in admissible form. The affirmations of Robert Bonomo, M.D. and James C. Wilson, M.D. pertain only to the injuries sustained by the decedent and do not address the issues currently before this court.

Based upon the paucity of the moving parties' evidentiary submissions, this court cannot determine, as a matter of law, whether plaintiff's decedent was a special employee of Woodbourne Cultural Nurseries, Inc. (Nurseries) at the time of the accident. The submissions establish that Mr. Mata was working for The Woodbourne Arboretum, Inc. (Arboretum), and while he was working on the brakes of his car during his lunch break, the manager from the defendant Nurseries asked him to assist in moving a Hydro Traveler, thus raising a factual issue concerning whether or not Mr. Mata was a special employee of Nurseries. Additionally, it cannot be determined if the plaintiff's claim is barred by Workers' Compensation Law §§ 11 and 29, as no evidentiary submissions have been provided to demonstrate that a Workers' Compensation Claim was filed, or that there was a determination of a claim. Therefore, the defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint against them.

The affidavit of Charles Dorego, Esq., submitted on behalf of the moving defendants, raises factual issues which preclude summary judgment as to Glenwood Management Corp. (Glenwood). Dorego states that Glenwood has no connection to the accident and has no ownership, or other interest, in the premises where the accident occurred. There are factual issues concerning the relationship between the defendants and as to whether Glenwood has an ownership interest in the defendant corporations. Dorego's affidavit is conclusory, unsupported with any documentary evidence, and does not set forth the relationship of Glenwood to the other defendants, Arboretum and Nurseries. An affidavit from a person with knowledge has not been submitted on behalf of Glenwood. Moreover, certificates of incorporation revealing the principals and members of the various corporations and their addresses have not been provided. It is noted, however, that the State Insurance Fund declaration page insured Glenwood, whose policy covered many entities, including Nurseries and Arboretum. Therefore, there are factual issues as to whether there is a connection between Glenwood and defendants Nurseries and Arboretum. Additionally, a copy of a decision regarding the decedent's Workers' Compensation claim, referenced by counsel, has not been submitted to establish who the Workers' Compensation Board determined was the plaintiff's decedent's employer. Accordingly, it has not been established prima facie that Glenwood bears no relation to the remaining defendants.

In view of the foregoing, that part of motion (002) which seeks summary judgment dismissing the complaint as asserted against Glenwood is denied.

Dorego states that the defendants, Woodbourne and Nurseries operated as a joint venture, and that the plaintiff's decedent was "loaned" from the defendant Arboretum to Nurseries at the time of the accident. Although Dorego asserts that Leonard Litwin is the president of the Arboretum, and had been the president of the Nurseries, he continues that, at some point, Carole Pittleman, Litwin's daughter, took over as president of the Nurseries. However, copies of the certificates of incorporation have not been submitted to show who the other officers and principals of the corporations were at the time of the accident, and when the change involving Carole Pittleman occurred. Dorego continues that all Leonard Litwin employees were paid by check issued by Litwin in 2005, however, no proof of this conclusory statement has been submitted. Dorego indicates that, in 2007, LL Farm Trust began issuing payroll checks to Litwin employees. However, he has not submitted records to show by whom the plaintiff's decedent was actually employed and paid at the time of the accident. Counsel merely avers that the plaintiff's decedent was a "Litwin employee" covered by Workers' Compensation at the time of the accident. No accounting records, logs, or

books demonstrating payment, or copies of such checks have been submitted. Based upon the foregoing, the Dorego affidavit does not establish prima facie who employed the plaintiff's decedent, and whether he was a special employee of any of the defendants.

Michael McInerny has set forth in his affidavit that he was employed by Leonard Litwin as manager of the Arboretum in June 2005, and that his paychecks were issued by Litwin at the time. Copies of those paychecks have not been submitted for this court's review. He continues that Mr. Mata was an employee of Mr. Litwin and that he was Mr. Mata's supervisor. He states that all employees consider themselves employees of Mr. Litwin, whether they work for the Nursery or at the Arboretum. McInerny states that on the date of the accident, Mr. Mata was working on his car during his lunch hour, fixing his brakes. As he worked on his brakes, McInerny states that Roger Newell, the manager of the Nurseries, asked Mr. Mata to help him move a Hydro Traveler. It was during the course of moving the equipment, while assisting Newell, that Mr. Mata sustained his injury which resulted in his death. Based upon the foregoing, there are factual issues concerning whether Mr. Mata was actually working during the course of his employment at the time the accident occurred, or whether, during his lunch break, he was simply assisting Newell at Newell's request. Further, Mr. McInerny, by his affidavit, raises factual issues concerning what entity actually employed the decedent and whether or not Mr. Mata was working as a general employee or a special employee at the time of the accident.

"A general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining worker's compensation and other employee benefits. A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer" (***Thompson v Grumman Aerospace Corporation***, 78 NY2d 553, 587 NYS2d 106 [1991]). "Control is presumed to continue in the general employer in the absence of proof that it has passed to a second employer. The party with power to control rather than the party temporarily designating the place of work, the details and the time of the work is the party who is the employer" (see, ***Bird v New York State Thruway Authority,*** 8 AD2d 495, 188 NYS2d 788 [4th Dept 1959]).

"Whether a general employee of one employer is in the special employ of another generally presents a question of fact...Principal factors in determining whether a special relationship exists include the right to control, the method of payment, the furnishing of equipment, the right to discharge and the relative nature of the work. Although no one factor is decisive, a key element is the question of who controls and directs the manner, details and ultimate result of the employee's work" (***Eddy v White et al,*** 304 AD2d 959, 759 NYS2d 200 [3rd Dept 2003]; see also, ***Sherman et al v Reynolds Metals Company,*** 295 AD2d 843, 744 NYS2d 553 [3rd Dept 2003]).

The determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact. While employers certainly may contract as between themselves to define their business relationships and accomplish their business objectives, an agreement between the employers may not be determinative of the issue of special employment (see, generally ***Thompson v Grumman Aerospace Corporation***, supra). Unlike the situation in ***Thompson v Grumman***, supra, in this action no written agreement has been submitted between the Arboretum and the Nurseries for the work that was being performed to establish as a matter of law whether or not the Mr. Mata was a special employees of either defendant. In fact, based upon the evidentiary submissions, it cannot be determined who employed the decedent.

Where an arrangement is made in which a general employer performed work and provided services for another business, and, in the course of doing so, an employee and equipment of the general employer were necessarily used and temporarily assigned to work for the business, referred to as a "lent employee," such cases rest

on their particular facts and do not create a per se rule that a question of fact always exists and do not require that the question of special employment inevitably go to a jury. The determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact" (***Thompson v Grumman Aerospace, Inc.***, supra, see also, ***Montalbano v Kurt Weiss Florist, Inc. et al,*** 1AD3d 414, 767 NYS2d 113 [2nd Dept 2003]).

In the instant action, there has been no proof submitted that control over Mr. Mata passed from the Arboretum to the Nurseries, or that any of the defendants had control over the decedent during his lunch break, precluding summary judgment as a matter of law on the issue concerning whether the decedent was a special employee at the time of the accident.

Accordingly, summary judgment is denied on the issue that the decedent was a special employee at the time of the accident.

Turning to that part of motion (002) which seeks summary judgment on the basis that the action is barred by the Workers' Compensation Law, it is noted that ***Hageman v B&G Building Services, LLC***, 33 AD3d 860, 823 NYS2d 211 [2nd Dept 2006], held that "[g]enerally, an injured employee's sole remedy against his or her employer is recovery under the Workers' Compensation Law (Workers' Compensation Law §§ 11, 29 (6)). In instances regarding injuries that occur during the course of a plaintiff's employment, the defense afforded by the exclusivity provisions of the Workers' Compensation Law may also extend to suits brought by a plaintiff against corporations which are the alter egos of, or joint venturers with, the corporation which employs the plaintiff."

As set forth in ***Samuel v Fourth Avenue Associates, LLC,*** 75 AD3d 594, 906 NYS2d 67 [2nd Dept 2010], the court stated that "[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." However, it continued, that 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. In the instant action, the defendants have not demonstrated such control in the day-to-day operations of the other or that they were alter egos of each other, or in joint venture with each other, thus precluding summary judgment on this issue.

Accordingly, that part of motion (002) which seeks summary judgment on the basis the action is barred by Workers' Compensation Law §§11 and 29 is denied.

Dated: 5 July 2011

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**