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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 104480/2009

WEBER, DIANA

VS.

AMERICAN MUSEUM OF NATURAL

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

tion to/for _____

No(s). 1

No(s). 2

No(s). 3

upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

OCT 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/3/11

HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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DIANA WEBER,

Plaintiff,

- against -

THE AMERICAN MUSEUM OF NATURAL HISTORY,

Defendant.

----------X

Index No. 104480/09

DECISION and ORDER

Mot. Seq. 005

HON. EILEEN A. RAKOWER

Diana Weber ("Plaintiff") brings this action against the American Museum of Natural History ("the Museum") for personal injuries sustained on April 12, 2006. According to her complaint, Plaintiff was a "lab researcher" at the Museum, located at 79th Street and Central Park West in New York County. She alleges that "in the hallway outside of the sequencing room ... she was caused to sustain severe and permanent injuries when she slipped and fell due to a wet floor caused by custodial mopping." Presently before the court is a motion by the Museum for summary judgment pursuant to CPLR §3212. The Museum claims that Plaintiff is barred from bringing this action by the Workers Compensation Law ("WCL"). Plaintiff opposes the motion.

Plaintiff testified at her deposition on January 28, 2010 that at the time of her accident, she was conducting laboratory research at the Museum through a postdoctoral fellowship from the National Science Foundation ("NSF"). Plaintiff stated that she "wrote a grant ... to look at the genetics of the immune system in arctic mammals in relation to global warming and disease ...." She also wrote "an NSF instrumentation grant" for a piece of scientific equipment known as a "DHPLC." She was paid a stipend by the NSF. Plaintiff testified that her NSF fellowship was sponsored by Rob DeSalle from the Museum, and by Howard Rosenbaum, who was with the Wildlife Conservation Society. According to Plaintiff, sponsoring scientists are required for a fellowship.

Plaintiff further testified that she was not required to directly report to DeSalle or Rosenbaum because she was "an independent scientist." However she testified that she would go to DeSalle to ask questions or get suggestions from him. Plaintiff stated that her lab was run by two "curators:" DeSalle and an individual named Ward Wheeler. She testified that curators are

> in charge of the lab, they write grants, the oversee it, they get a budget, they're the head of the lab. And the people who work in the lab, it's not like you work for them, but ... they're above you .... [I]t's not like an employment situation ... you do answer to them, but it's far more looser. It's not like they're in there clocking you in.

The Museum issued an ID card to Plaintiff bearing the Museum logo, which granted her access to her lab. She was also provided with a Museum e-mail account. Plaintiff made her own hours. She was required to provide progress reports to the NSF, but did not have to provide any reports to the Museum. Plaintiff did not receive medical or dental benefits from the Museum. However, after her accident, the Museum told Plaintiff to seek reimbursement of medical expenses from Travelers, its insurer.

The Museum submits an affirmation in support of its motion. Annexed to the affirmation as exhibits are Plaintiff's summons and complaint; the Museum's answer, Plaintiff's deposition transcript; the affidavit of Rob DeSalle; the deposition transcript of George Amato; and receipts of payment by Traveler's Insurance for Plaintiff's medical treatment. In his affidavit, DeSalle states that he was Plaintiff's "official mentor," and that he "provided [Plaintiff] with direction, advice, and guidance ...." DeSalle further states that, in his capacity as Co-Director of the Molecular Laboratories, his responsibilities included "supervision of the laboratory that [Plaintiff] worked in." In addition, "[o]ther than the salary paid directly by NSF, [he] was responsible for the funding of [Plaintiff's] work." DeSalle also notes that, other than some samples she acquired from outside researchers, "all of the tools, data, specimens and other equipment [Plaintiff] used were owned by and supplied to her by the [Museum]." DeSalle further claims that he "was responsible for [Plaintiff's] work in the laboratory and since [he] was her mentor on the grant, her work came under [his] supervision and evaluation."

Plaintiff submits an affirmation in opposition. Annexed to the affirmation as exhibits are e-mail exchanges between Plaintiff and Museum personnel; and an affidavit from Plaintiff.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). "[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, 'the facts must be viewed in the light most favorable to the nonmoving party'" (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

WCL §§11 and 29(6) bar an employee from suing his or her employer for injuries arising out of an accident sustained in the course of employment. In addition to an individual's direct employer, the prohibition extends to suits commenced against a "special employer" as well. As explained by the Court of Appeals in *Thompson v. Grumman Aerospace Corp.*,

> 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 workers' 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 ....

> [A] person's categorization as a special employee is usually a question of fact.

(78 N.Y.2d 553, 557 [1991]). Whether or not a special employment relationship exists between an individual and an entity depends upon a number of factors, none of which, standing alone, is dispositive (*id.* at 558). However, "a significant and weighty feature in deciding whether a special employment relationship exists is who controls and directs the manner, details and ultimate result of the employee's work – in other words, who determines all essential, locational and commonly recognizable components of the employer's work relationship" (*Fung v. Japan Airlines Co.*, 2007 NY Slip Op 9815, *6 [2007]) (citation and quotations omitted).

Here, the court cannot conclude, as a matter of law, that a special employment relationship existed between Plaintiff and the Museum. Although it is undisputed that the Museum provided Plaintiff with, *inter alia*, the lab space to conduct her research, access to and use of Museum equipment, a Museum ID card granting her access to the lab, and a Museum e-mail address; there is also testimony from Plaintiff that she dictated her own hours, that she conducted her own independent research pursuant to a grant from the federal government, and that her work was not directed or controlled by Museum personnel. Accordingly, the question of whether Plaintiff was a special employee of the Museum is a question of fact for the jury (*see Mermelstein v. City of New York*, 174 A.D.2d 485 [1st Dept. 1991]).

Wherefore it is hereby

ORDERED that the Museum's motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: October 3, 2011

EILEEN A. RAKOWER, J.S.C.