Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

XIANYIN CHENG,

Plaintiff,

-against-

E&N DEVELOPMENT NY, LLC,

Defendant.

Index No: 23569/09

Motion Date: 5/18/11

Motion Cal. No.: 3

Motion Seq. No.: 3

The following papers numbered 1 to 11 read on this motion by defendant for summary judgment dismissing the complaint as this action is barred by the exclusivity provisions of the Workers' Compensation Law's

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 6
Answering Affidavits-Exhibits.....	7 - 9
Replying Affidavits.....	10 - 11

Upon the foregoing papers it is ordered that this motion is denied.

This is an action to recover for personal injuries the plaintiff allegedly sustained while working on a construction project at the property owned by the defendant, E & N DEVELOPMENT NY, LLC.(hereinafter LLC). Plaintiff was an employee of E & N DEVELOPMENT NY, INC., (hereinafter INC.) the general contractor for the construction project. Initially, the plaintiff commenced an action against the INC. (Index No. 2717/09) which action was discontinued with prejudice as being barred by the Worker's Compensation Law.

On August 31, 2009 the plaintiff commenced the instant action against the defendant LLC, the owner of the property under construction on asserting violations of Labor Law §§ 240(1), 246(1) and 200 and common law negligence. In a preanswer motion the defendant, LLC, moved to dismiss the complaint pursuant to

CPLR 3211(a)(7),(5) & (3) on the ground that because the LLC is a co-employee of the plaintiff, this action is barred under Workers' Compensation Law §§ 11 & 29(6). The motion was denied by Order dated January 20, 2010.

The defendant now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that the LLC is entitled to the protection afforded by the Workers' Compensation Law's because it is the "alter ego" of the INC. and the individuals Lu & Ma, and Ma is the plaintiff's co-employee and that the plaintiff's claim is barred by the doctrine of res judicata.

The defense afforded to a corporate employer by the exclusivity provisions of the Workers' Compensation Law may also extend to suits brought by a plaintiff against other entities where it is established that the defendant is the alter ego of the corporation which employs the plaintiff (see Samuel v. Fourth Avenue Associates, LLC, 75 AD3d 594 [2010]; Mitchell v A.F. Roosevelt Ave. Corp., 207 AD2d 388 [1994]). It is the defendant's, burden to show, prima facie, that it was the alter ego of with the plaintiff's employer (see Capella v. Suretsky at Hatfield Lane, LLC, 55 AD3d 522 [2008]; Donatin v. Sea Crest Trading Co., Inc., 181 AD2d 654 [1992]). To establish itself as the alter ego of the INC., the defendant must demonstrate that the INC. exercises complete domination and control over the day to day operations of the defendant or that the two operate as a single integrated entity (see Samuel v. Fourth Avenue Associates, LLC, supra; Cappella v. Suresky at Hatfield Lane, LLC, supra). However, separate legal entities which are closely associated, even those that share directors and officers, will not be considered alter egos of each other if they were formed for different purposes, neither is a subsidiary of the other, their finances are not integrated, assets are not commingled, and the principals treat the two entities as separate and distinct (see Longshore v. Davis Sys. of Capital Dist., 304 AD2d 964 [2003]; Wernig v. Parents & Bros. Two, 195 AD2d 944, 945-946 [1993]).

To prevail on this motion, it is the defendant's burden to submit sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact as to whether the LLC and the INC are alter egos of each other (see Zukerman v City of New York, 49 NY2d 557, 562 [1980]).

In support of its motion for summary judgment, the defendant submitted, inter alia, the affidavit of Ke Lu (hereinafter Lu) and Gun Leang Ma (hereinafter Ma), copies of checks drawn on the account of the defendant LLC, copies of a checks drawn on the

account of the INC. and copies of credit cards, one in the joint name of Lu and the LLC, and another in the joint name of Ma and the LLC.

As to the translated affidavits of Lu and Ma, they do not constitute evidence in admissible form inasmuch as they do not comply with CPLR 2101(b) (see Martinez v. 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2008]).

However, even overlooking the defect and considering these translated affidavits together with defendant's other evidence, the defendant has failed to sustain its burden of establishing, prima facie, its entitlement to summary judgment dismissing the complaint by demonstrating that the INC. is an alter ego of the LLC such that plaintiff should be barred from proceeding against the LLC by virtue of the Workers' Compensation Law.

Lu and Ma assert that they are the owners of both the LLC and the INC. which they formed at the advice of their accountant, that they use the LLC's bank account to pay for personal items and that they do not treat the LLC and the INC as separate from themselves. Ma further asserts that he manages and oversees the operation of both entities, that both entities share employees and office space, that he and Lu, his wife, both write checks drawn on the LLC and INC. bank accounts, that he uses the accounts interchangeably to purchase supplies for the construction, to pay the attorney representing the two entities, and to purchase the Worker's Compensation Insurance under which plaintiff received benefits.

Although the two entities have common ownership, and appear to be closely related, the defendant's evidence does not establish, as a matter of law, an alter ego relationship as there is no showing that the INC. exercised complete dominion and control over the day to day operations of the LLC (see Almonte v. Western Beef, Inc., 21 AD3d 514 [2005]; Constantine v. Premier Cab Corp., 295 AD2d 303 [2002]; Dennihy v. Episcopal Health Services, Inc., 283 AD2d 542 [2001]). The defendants have failed to submit any evidence with respect to the day to day operation of either entity except Ma's conclusory claim, without elaboration, that he oversees the operation of both entities.

The evidence submitted indicates that the INC. and LLC, were formed for different purposes the property being owned solely by the LLC and the INC. to perform construction (see Rosenburg v. Angiuli Buick, Inc., 220 AD2d 654 [1995]). The claim that the LLC, the owner of the property, pays for the supplies for the construction project is not evidence of an "alter ego"

relationship inasmuch as such action is not inconsistent with its role as the owner. On the contrary, this evidence is more indicative of the separate and different purpose and functions of the LLC and the INC.

The LLC and the INC. have separate checking accounts indicating that their finances are separate and that the principals treat them separately (see Longshore v. Paul Davis Systems of Capital Dist., supra). For example, the mortgage was paid by an LLC check, and it appears that each entity paid its own attorney fees from its own separate account. Although defendant submitted both LLC and INC. checks payable to insurance agencies, there is no evidence or note on the checks, in English, indicating the nature and purpose of the insurance. Moreover, even if, as defendant claims, there exists a joint policy providing workers' compensation insurance and for which both the LLC and INC. made premium payments, this does not establish that the LLC is an alter ego of the INC. (see Dennihy v. Episcopal Health Services, Inc., supra at 543). The defendants have failed to submit any other evidence as to the finances of the LLC and the INC. to demonstrate that the two entities have integrated finances or commingle assets (see Kaplan v. Bayley Seton Hosp., 201 AD2d 461 [1994]; see also Longshore v. Davis Sys. of Capital Dist., supra; Wernig v. Parents & Bros. Two, supra).

In addition, in opposition, the plaintiff submitted an affirmation of the INC.'s attorney served in support of the INC.'s motion to dismiss the prior action (Index No. 2717/09). In that action counsel asserted that the LLC cannot be substituted in place of the INC. since they are separate legal entities, the LLC was not served with process and service upon the INC. is insufficient since the INC. does not have the authority to accept service of process on behalf of the LLC. The attorney's statement, an informal judicial admission (see Addo v. Melnick, 61 AD3d 453, 458 [2009]), is further evidence that the LLC and the INC. act separately, do not control each other and considered by the principals as separate entities rather than alter egos of each other.

Nor is defendant entitled to dismissal on the ground that Ma, a principal of both the LLC and the INC. is a co-employee of the plaintiff (see Masley v. Herlew Realty Corp., 45 AD3d 653 [2007]). This case is distinguishable from Heritage v. Van Pattern, 59 NY2d 1017 (1983) relied on by defendant. The defendant Van Patten, the sole shareholder and officer of the corporate employer, owned the real property in his individual capacity and found to be a co-employee of the plaintiff. In the instant case even if Ma is plaintiff's co-employee, the property

is owned by the LLC, a separate distinc legal entitity from Ma, and the LLC is not an officer of the INC. and not a co-employee of the plaintiff (see Masley v. Herlew Realty Corp., supra).

To avoid this distinction, the defendant, asks the court to find Ma and Lu the "owners" of the premises in their individual capacity by piercing the corporate veil, based upon Lu and Ma's conclusory self-serving assertions that they do not consider themselves separate from the LLC and INC. Although under certain circumstances the court will disregard the corporate form (see International Aircraft Trading Co. v. Manufacturers Trust Co., 297 NY 285, 292-293 [1948]; Virga v. Medi-Tech Intern. Corp., 296 AD2d 546 [2002]; Richardson v. Benoit's Elec., Inc., 254 AD2d 798 [1998]; cf Wu Qun Liu v. 98 Fourth Street Development Group, LLC, 24 Misc.3d 1244[A][Kings.Sup., 2009], 2009 N.Y. Slip Op. 51869[U]) no such circumstances exist in this case.

When individual principals and/or owners of businesses choose to operate their businesses through separate legal entities for their own purpose, the structure they create will not be lightly ignored for the asking whenever it suits their purpose nor shield one of the entities they created from tort liability (see Buchner v. Pines Hotel, Inc., 87 AD2d 691 [1982], aff'd, 58 NY2d 1019, [1983]; see also Billy v. Consolidated Mach. Tool Corp., 51 NY2d 152, 163 [1980]).

The defendant's reliance upon Braham v. Country Life Realty Co., 9 Misc.3d 88 (N.Y.Sup.App.Term Sep 16, 2005) is equally misplaced. In Braham the court held that because the defendant, a partnership is considered to be the same entity as its partners (Partnership Law § 24), and all of the partners were officers of the plaintiff's corporate employer as well as being plaintiff's co-employees the plaintiff was effectively suing his co-employees which is barred by Worker's Compensation Law § 29(6).

However, the defendant in this action is an LLC not a partnership. Unlike partners of a partnership, the members of an LLC are not considered one entity with the LLC. The liability of the individual members of an LLC is similar to that of shareholders and officers of a corporation (see Limited Liability Law § 609). Thus, this action cannot be considered as an action against Ma, even if he is shown to be plaintiff's co-employee. In addition, the INC. the sole employer of the plaintiff is a separate and distinct legal entity from the defendant LLC, and thus, the LLC is not shielded from liability by the exclusivity defense of the Worker's Compensation Law (see Canete v. Judlau Contr., 56 AD3d 407 [2008]; Rosenburg v. Angiuli Buick, supra; cf Katz v. Katz, 55 AD3d 680 [2008]).

The defendant's argument that the plaintiff's claim is barred by the doctrine of res judicata since the plaintiff is receiving Worker's Compensation benefits from his employer is without merit. A determination that an employee is entitled to Worker's Compensation benefits and the amount of such benefits are not an adjudication of the amount of the total damages which may have been sustained by an injured plaintiff/employee in an accident.

Dated: Aug. 1, 2011
D# 45

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J.S.C.