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NEW YORK SUPREME COURT - COUNTY OF BRONX

APR 12 2011

PART 06

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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LAWRENCE,DUDLEY Index №. **0309185/2008**

-against- Hon. **EDGAR G. WALKER** ,

PARALLEL PRODUCTS Justice.

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The following papers numbered 1 to _____ Read on this motion, **REARGUE/RENEW/RESETTLE/RECONSI**
Noticed on **April 26 2010** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this Motion decided in accordance with the attached decision

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 4/8/10

Hon. _____
EDGAR G. WALKER, J.S.C.

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

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Dudley Lawrence,
Plaintiff,

Hon. Edgar Walker
PART: IA 27

-against-

Parallel Products,
Defendant.

Index No. 309185/08

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Notice of Motion / OSC.....
Answering Affidavits.....
Reply Affidavits.....
Pleadings.....
Stipulations.....
Memoranda of Law.....
Other.....

Upon the foregoing papers:

Defendant's motion to renew, pursuant to CPLR 2221(e)(2), is granted. Upon renewal, defendant's motion for leave to amend its verified answer, pursuant to CPLR 3025, and for summary judgment, pursuant to CPLR 3212, dismissing the complaint, is granted. Defendant's motion to reargue is denied as moot. Plaintiff's cross-motion to compel discovery by defendant is denied as moot.

The decision and order of this court dated February 9, 2010, is hereby vacated and the following is substituted therefore:

Defendants originally moved for leave to serve an amended verified answer, pursuant to CPLR § 3025, to assert the exclusivity of the Workers' Compensation Law as an affirmative defense and for summary judgment dismissing plaintiff's action based upon such defense. This court held defendant's motion in abeyance pending determination by the Workers' Compensation Board as to the applicability of the Workers' Compensation Law to the claims asserted by plaintiff. The court based its decision on the existence of issues of fact regarding the availability of workers' compensation.

On the instant application, in addition to the papers submitted on the original motion,

defendant submits plaintiff's deposition testimony. Counsel provides no explanation as to why plaintiff's deposition was not obtained prior to the filing of the original motion. However, plaintiff has not argued that defendant was not diligent in obtaining plaintiff's deposition. As such, the court will consider this testimony in the interest of justice and "so as not to defeat substantive fairness." *See Rancho Santa Fe Association v. Dolan-King,* 36 A.D.3d 460, 461-62; *see also Mejia v. Nanni,* 307 A.D.2d 870.

This is an action for personal injuries allegedly sustained by the plaintiff as a result of a slip and fall, which occurred on October 18, 2008, on premises owned by the defendant. In June of 2007, plaintiff became employed by Active Temporaries, Ltd. ("Active Staffing"), a temporary employment agency. During such employment, he worked exclusively for Parallel Products, a recycling and waste management business. Plaintiff reported to work each day at the Parallel Products plant. Plaintiff testified in his deposition that "Louie" was his supervisor at Parallel Products and that he only reported to "Louie" while he worked at Parallel Products. Plaintiff also testified that "Louie" trained him, gave him work assignments, supervised his work, told him what hours to work including when to take breaks, and provided him with safety equipment, i.e., eyeglasses, a hat, gloves and a vest with reflective material. On his claim for workers' compensation, submitted by both parties, plaintiff lists Louis Carlo as the "employer (or supervisor)" to whom he provided notice of the accident. In his affidavit, Goutam Persaud, operations officer of Parallel Products, states that Louis Carlo is an employee of Parallel Products and that the employees provided by Active Staffing to Parallel Products are completely supervised and monitored by Parallel Products.

Active Staffing provided plaintiff with a paycheck that was distributed to him at the Parallel Products plant. After the accident, plaintiff received workers' compensation benefits under a policy issued to Active Staffing.

Defendant seeks to amend its verified answer, pursuant to CPLR § 3025, to assert as an affirmative defense that plaintiff's claim against defendant is barred by the Workers' Compensation Law and the case law thereunder. Leave to amend pleadings shall be freely given absent prejudice or surprise resulting directly from the delay. CPLR 3025 [b]; *Fahey v County of Ontario,* 44 N.Y.2d 934, 935. Since plaintiff was at all times aware of the nature and extent of

Parallel Products' role, that branch of defendant's motion which seeks leave to amend its verified answer is granted.

Defendant moves for summary judgment on the ground that plaintiff's claims are barred by Workers' Compensation Law §§ 11 and 29(6) because plaintiff was defendant's special employee at the time of the accident. Defendant argues that plaintiff was defendant's special employee because he appeared for work at Parallel Products, he reported to persons at Parallel Products and was directed and supervised by the employees of Parallel Products. In addition, defendant contends, there were no employees of Active Staffing ever directing, controlling or supervising plaintiff's work.

In opposition to the motion, plaintiff offers no affidavits but instead argues that the motion is premature because discovery is not complete and depositions of defendant, including Mr. Persaud, have not yet been held. However, the gravamen of the information plaintiff seeks in discovery is not material to the issue of plaintiff's employment relationship with Parallel Products. Moreover, plaintiff's own deposition testimony supports the contentions of Parallel Products. Without any allegation as to what plaintiff hopes to adduce at a deposition, mere hope or unsubstantiated allegations, are insufficient to defeat the motion. *Miller v. the City of New York*, 277 A.D.2d 363.

Workers' Compensation Law §§ 11 and 29(6) restrict an employee from suing his or her employer for an accidental injury sustained in the course of employment. However, the workers' compensation remedy is generally not exclusive if the employee is injured by a third party. *See Fung v. Japan Airlines Co., Ltd.*, 9 N.Y.3d 351. Notwithstanding this, the exclusive remedy doctrine has been extended to parties other than the employee's direct employer if the employee is considered to be in the "special employ" of such party. *See Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553.

"A special employee is one who is transferred for a limited time of whatever duration to the service of another." *See Brooks v. Chemical Leaman Tank Lines*, 71 A.D.2d 405, 407. A general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for the payment of wages and for maintaining workers' compensation and other employee benefits. *See Thompson v. Grumman Corp.*, 78 N.Y.2d at

557. General employment is presumed to continue, but this presumption is overcome upon a clear demonstration of surrender of control by the general employer and assumption of control by the special employer. *See Spencer v. Crothall Healthcare*, 38 A.D.3d 527. Although no one factor is determinative, a significant and weighty feature in deciding whether a special employment relationship exists is who controls and directs the matter, details and ultimate result of the employee's work. *See Fung v. Japan Airlines Company Co., Ltd.*, 9 N.Y.3d at 359; *see also Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d at 558. Thus, although a person's categorization as a special employee is usually a question of fact, summary judgment may be granted where the relevant facts establish that the special employer controlled and directed the manner, details and ultimate result of the employee's work. *See Armstrong v. Foxcroft Nurseries Inc.*, 283 A.D.2d 814.

Here, the deposition testimony of plaintiff and affidavit of Mr. Persaud establish that Parallel Products did exactly that. Plaintiff considered a Parallel Products supervisor to be his boss. He reported daily to a Parallel Products supervisor only, who regularly directed, instructed, assigned, supervised and controlled his work duties. The work plaintiff performed was solely in furtherance of Parallel Products's business at its facility. Clearly, Parallel Products assumed and exercised exclusive control over plaintiff. Active Staffing merely provided plaintiff with benefits and a paycheck. Therefore, plaintiff's receipt of workers' compensation benefits as an employee of Active Staffing is his exclusive remedy and he is barred from bringing this negligence action against Parallel Products. For this reason, that branch of defendant's motion seeking summary judgment dismissing plaintiff's claim is granted.

In light of the foregoing, defendant's motion to reargue, pursuant to CPLR 2221, is denied as moot. In addition, plaintiff's cross-motion to compel discovery is denied as moot.

Dated: 4-8-10

Hon. Edgar G. Walker, J.S.C.