SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. PART 8

Justice

Index Number : 101048/2010
WARNER, MARGUERITA
vs.
CONTINUUM HEALTH PARTNERS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 101048/10
MOTION DATE 3/2/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 17, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1-12
Answering Affidavits — Exhibits | No(s). 13-14
Replying Affidavits | No(s). 15-17

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED
APR 19 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/17/12

J.S.C.
JOAN M. KENNEY
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

----------X

Marguerita Warner,

Plaintiff,

-against-

Continuum Health Partners and
St. Luke's Roosevelt Hospital Defendants,

----------X

DECISION AND ORDER
Index Number: 101048/10
Motion Seq. No.: 001

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motions to dismiss.

Papers	**Numbered**
Notice of Motion, Affirmation, and Exhibits	1-12
Opposition Affirmation, and Exhibits	13-14
Reply Affirmation, Exhibits	15-17

In this personal injury action, defendants, Continuum Health Care Partners, Inc. and The St. Luke's Roosevelt Hospital Center, move for an Order, pursuant to CPLR § 3212, dismissing the complaint.

Factual Background

On October 14, 2009 plaintiff, Marguerita Warner, was employed as a travel nurse at St. Luke's Roosevelt Hospital Center (sister company of Continuum Health Care). According to plaintiff at her examination before trial (EBT), a travel nurse is a nurse that travels from location to location and works under a contract and then has the option to renew that contract, or seek employment elsewhere (Warner EBT at 12-13). It is undisputed that plaintiff's primary employer and the entity that gave her the travel nurse assignment was non-party Med Staff (Warner EBT at 13).

Plaintiff had worked at St. Luke's for approximately four years. During her four years at

St. Luke's, plaintiff did not work elsewhere. While working at St. Luke's, plaintiff was supervised by a St. Luke's employee. Plaintiff testified at her deposition that she would receive her daily assignments from the nurse at the desk, that her evaluations were given by St. Luke's employees on a yearly basis, and that St. Luke's had the authority to fire her. (Warner EBT at 27). As per one of its managing nurses, defendant maintains that its supervisors had the authority to control and direct the manner of employment of the travel nurses on a daily basis (November 21, 2011 affidavit of Maureen Stone-Martin, ¶ 5).

Despite being given daily direction from St. Lukes' staff, plaintiff claims that she was not told "how" to do her job, but to perform her duties "in accordance with generally accepted nursing standards." (plaintiff's February 16, 2012 affidavit, ¶ 5). Plaintiff alleges that St. Luke's supervisors "had little input as to how she performed her nursing duties," and that "no one from St. Luke's controlled, directed, or supervised the manner or details by which she performed her duties" (plaintiff's 2/16/12 affidavit). Plaintiff was also paid exclusively by Med Staff, and her work uniform, or, "scrubs," were not provided by St. Luke's. (Warner EBT at 21).

On October 14, 2009, plaintiff slipped and fell on a puddle of barbeque sauce on the floor of the cafeteria at St. Luke's (the accident). Defendants' employee, Ms. Redden, testified that she did inspections of the area multiple times during that day and during one such inspection discovered plaintiff on the ground. (Redden EBT at 46-47). While defendants claim to have no prior knowledge of alleged barbeque sauce on the floor, Ms. Redden testified that the area in which plaintiff fell would occasionally have liquid on the floor because the soda fountain was right in this area. (Redden EBT at 62). In fact, defendants admitted that at minimum, twice a day, there would be liquid on the floor that required clean up in the area where plaintiff fell.

Arguments

Defendants aver that plaintiff was a special employee and therefore cannot bring this negligence suit since she is barred by N.Y. Workers' Comp. Law §11. Defendants also assert that they did not create the alleged dangerous condition, or have any actual and/or constructive notice of said condition, and therefore cannot be held liable.

Plaintiff argues that she was not a special employee subject to the workers' compensation laws of New York. Plaintiff also claims that defendants had constructive notice of the alleged defective condition because of the recurring spills in the area of the accident.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "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."

(*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Torterello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

A special employee is described as "one who is transferred for a limited time of whatever duration to the service of another." (see *Gannon v. JWP Forest Elec. Corp.*, 275 A.D.2d 231,712 N.Y.S.2d 494, 495 [2000]). "Although no single factor is dispositive in determining whether a special employment relationship exists, a number of factors must be weighed, including: the right to and degree of control by the purported employer over the manner, details, and ultimate result of the special employee's work; the method of payment; the right to discharge; the furnishing of equipment; and the nature and purpose of the work. Of primary importance amongst these factors is the degree of control the alleged special employer has over the work." (*Gannon* 275 A.d.2d 231).

A special employer may avail itself of the Workers' Compensation Law to bar negligence claims against it for injuries sustained by a special employee in the course of special employment (see *Bellamy v. Columbia Univ.*, 50 A.D.3d 160, 161, 851 N.Y.S.2d 406, 408 [2008]). A "worker who was assigned to another company's plant was 'special employee' of that company and, therefore, under exclusive remedy provision of Workers' Compensation Law, was barred from bringing negligence action against special employer, even though general employer was responsible for paychecks and benefits, and even though contract between special and general employer treated general employer as the employer." (see *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 585 N.E.2d 355 [1991]).

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or

constructive notice of the defective condition alleged (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002]). A genuine issue of material fact exists when defendant fails to establish that it did not have actual or constructive notice of a watery or hazardous condition (*Aviles v. 2333 1st Corp.*, 66 A.D.3d 432, 887 N.Y.S.2d 18 [1st Dept. 2009]; *Baez-Sharp v. New York City Tr. Auth.*, 38 A.D.3d 229, 830 N.Y.S.2d 555 [1st Dept. 2007]). In *Baez*, the Court stated that defendant "failed in its initial burden, as movant, to establish, as a matter of law, that it did not create and did not have actual or constructive notice of the watery and hazardous condition." To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it (see *Strowman v. Great Atl. & Pac. Tea Co., Inc.*, 252 A.D.2d 384, 675 N.Y.S.2d 82 [1998]). A personal injury plaintiff may satisfy burden of showing landowner's constructive notice of hazardous condition by evidence that an ongoing and recurring dangerous condition existed in the area of accident (see *O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 A.D.2d 106, 650 N.Y.S.2d 717 [1996]).

Here, an issue of fact exists as to whether plaintiff was a "special employee." Plaintiff claims that she was not under the control of defendant, and therefore not a special employee. Defendants claim it had total control of plaintiff, and thereby plaintiff was a special employee. If plaintiff is found to be a special employee of defendant, plaintiff would be barred from bringing this case. As noted above, multiple factors are weighed, and the most important of those factors, the issue of who "controls" the employee, is contested by the parties in this case.

Additionally, because defendants' own employee testified that the area where the accident occurred was "constantly overflowing" with liquid from the soda machine, an argument could be

made that defendants had constructive notice of the defective condition that caused plaintiff's accident. Accordingly, it is

ORDERED that defendants' summary judgment motion, is denied, in its entirety; and it is further

ORDERED that the parties proceed to mediation, forthwith.

Dated: 4/17/12

ENTER:

Joan M. Kenney, J.S.C.