STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

KEISHA GARLAND,

Plaintiff,

-against-

SODEXO, INC.,

Defendant.

DECISION and ORDER
INDEX NO. 4424-10
RJI NO. 01-11-104930

Supreme Court Albany County All Purpose Term, August 3, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

On December 6, 2008, Plaintiff was employed by the Teresian House as a dietary aide. Defendant, pursuant to its contract with the Teresian House (hereinafter "Management Contract"), was her manager. While Plaintiff was moving a pan filled with hot soup, it splashed onto her wrist. Plaintiff jerked, dropped the pan and the hot soup fell onto her leg. She then fell into the spilled soup.

To recover for the injuries she sustained as a result, Plaintiff commenced this action. Issue was joined by Defendant, discovery is complete and a trial date certain has been set.

Defendant now moves for summary judgment, claiming its entitlement to dismissal because it owed Plaintiff no duty. Plaintiff opposes the motion. Because Defendant failed to demonstrate that it owed Plaintiff no duty, its motion is denied.

It is well established that "[t]he 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 demonstrate the absence of any material issues of fact, and [t]he evidence produced by the movant must be viewed in the light most favorable to the nonmovant, affording the nonmovant every favorable inference." (Rought v Price Chopper Operating Co., Inc., 73 AD3d 1414 [3d Dept 2010], quoting Walton v Albany Community Dev. Agency, 279 AD2d 93 [3d Dept 2001] [internal quotation marks omitted]). Only if the movant establishes its right to judgment as a matter of law will the burden shift. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

As is applicable here, Labor Law §200 "codifies the common-law duty of an owner or employer to provide employees with a safe place to work." (Jock v Fien, 80 NY2d 965 [1992]). This duty is not "limited to construction work." (Id.) Its duty extends to "[a]ll places to which [the Labor Law] applies," including work conducted in "public buildings." (Labor Law §§200[1] and 2[13]). Additionally, "[i]t is well settled that an implicit precondition to this duty is that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." (Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343, 352 [1998], quoting Russin v Picciano & Son, 54 NY2d 311 [1981]; Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 506 [1993]; Rought v Price Chopper Operating Co., Inc., supra).

On this record, Defendant offered no evidence that Plaintiff was not working in a "public

building." Labor Law §2(13) defines "public building" expansively, to include any "building more than one story high except a dwelling house less than three stories high or occupied by less than three families." Defendant proffered, in admissible form, Plaintiff's deposition testimony. She testified that on the day she was injured she was working on the "tray line" at the Teresian House. As a "tray line" worker, her job was to take the food prepared by the Teresian House and assemble it for distribution to its residents on each of the Teresian House's eight floors. Such testimony clearly established that Plaintiff was not working at "a dwelling house less than three stories high or occupied by less than three families." Rather, in accord with Labor Law §2(13), she was working in a multi-story "public building."

Defendant similarly failed to demonstrate that it did not have control over the activity that caused Plaintiff's injury. Although employed by the Teresian House, Plaintiff's deposition testimony established that Defendant's employee Mark Bisio (hereinafter "Bisio") trained her in handling pans like the one that slipped and caused her injury. He also gave her refresher training. She described Bisio as her "boss," who gave her "instructions or direction... directly." Defendant also proffered, in admissible form, Bisio's deposition testimony. He confirmed that he had "supervisory capacity over" Plaintiff, that he provided her training and conducted a monthly safety meeting. Bisio stated, relative to his duties at the Teresian House, that "if I'm walking around and I see an unsafe act, I'll correct it on the spot and give guidance on how to do it correctly." He admitted that as an employee of Defendant he was "responsible for the safety procedures that [were] employed or not employed in the [Teresian House] kitchen." Defendant further proffered the Management Contract, whereby Defendant obtained the "exclusive right to manage and operate [food and dining] Services for [the Teresian House's], residents, employees,

visitors and guests." Upon such proof, Defendant failed to demonstrate that it did not "exercise[] the requisite degree of supervision and control over the portion of the work that led to [Plaintiff's] injury." (Ross v Curtis-Palmer Hydro- Electric Co., supra at 506).

Nor did Defendant demonstrate that it had no "actual or constructive knowledge of the unsafe manner in which the work was being performed." (Rought v Price Chopper Operating Co., Inc., supra 1416, quoting Lyon v Kuhn, 279 AD2d 760 [3d Dept 2001]). At her deposition, Plaintiff described her asking Bisio for help moving the soup pan that caused her injuries. While Bisio's deposition testimony denied that such request was made, this rebuttal merely creates an issue of fact. Moreover, Bisio acknowledged that Plaintiff's use of rags, instead of oven mitts, to remove the pan that caused her injury was both known to him and acceptable.

Additionally, contrary to Defendant's claim, its common-law / Labor Law §200 duty is not abrogated by the Management Contract. While Defendant is correct that generally contractual obligations will impose no duty of care upon the contracting parties towards non-contracting third parties. (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136 [2002]). Here, Defendant's potential duty arises not from the contract, but from common-law and Labor Law §200 principles based upon its supervision of the methods of Plaintiff's work. Defendant submits no case law in which a contract negates a common-law / Labor Law §200 duty.

Accordingly, Defendant's motion is denied.

This Decision and Order is being returned to the attorneys for Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: August 21, 2012
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated June 20, 2012, Affirmation of Patrick Pickett, dated June 20, 2012, with attached Exhibits A-I.
2. Affirmation of J. David Burke, dated July 25, 2012, with attached Exhibit 1.
3. Affirmation of Patrick Pickett, dated August 2, 2012.