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SCANNED ON 1/28/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ~~JOAN M. KENNEY~~ *Justice* **PART** 8

Index Number : 103661/2010
PRICE, JAMES
vs.
PARK AVENUE PLAZA OWNER
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 103661/10
MOTION DATE 7/13/12
MOTION SEQ. NO. 004

The following papers, numbered 1 to 35 **, were read on this motion to/for** sj motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | **No(s).** 1 - 19

Answering Affidavits — Exhibits | **No(s).** 20 - 34

Replying Affidavits | **No(s).** 35

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: January 17, 2013

JM
J.S.C.
JOAN M. KENNEY

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

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JAMES PRICE and LOIS PRICE,

Plaintiffs,

-against-

PARK AVENUE PLAZA OWNER LLC,

Defendant.

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DECISION & ORDER
Index No. 103661/10

JOAN M. KENNEY, J.S.C.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

In this action arising out of a workplace accident, plaintiffs James Price and Lois Price move for an Order pursuant to CPLR 3212 granting plaintiff summary judgment on the issue of liability under Labor Law § 240(1) (Mot. Seq. No. 003).

Defendant Park Avenue Plaza Owner LLC moves for an Order pursuant to CPLR 3212 dismissing the complaint against them (Mot. Seq. No. 004).

Factual Background

Plaintiff, James Price, was allegedly injured on April 8, 2009 while repairing a fire pump located at 55 East 52nd Street, New York, New York. Defendant is the owner of the premises located at 55 East 52nd Street. The building is a 47-story commercial office building in midtown Manhattan.

Plaintiff testified at his deposition that, on April 8, 2009, he was employed by an entity named "Fisher Brothers" as a building engineer and air conditioning operator, and had been working with that company for 25 years (Plaintiff EBT, at 12, 16, 17). His supervisors were the chief engineer, John Pyburn, and the assistant chief engineer, Jeff Moran (*id.* at 17). Plaintiff was repairing a leaking fire pump located in the basement of the building (*id.* at 21, 30). The fire pump is a large structure consisting of pipes, valves, and spools that, in the event of an emergency, directs the flow of water to all of the fire sprinklers and fire hoses in the building (*id.* at 39). Plaintiff and

his co-worker, Andrew Finnigan, were working together repairing the fire pump (*id.* at 29). The workers were replacing a part of the pump called a "spool" (*id.* at 16, 21). Plaintiff testified that the work took at least four hours (*id.* at 42). At the time of the accident, the workers were tightening up the bolts on the spool piece (*id.* at 43). Plaintiff testified that he could not recall falling to the floor (*id.* at 86, 87, 100). Plaintiff testified that he received workers' compensation benefits as a result of his accident (Plaintiff Continued EBT, at 68, 71).

John Pyburn testified that he was employed by defendant as a chief engineer at the premises (Pyburn EBT, at 8, 9). Pyburn was responsible for all mechanical equipment in the building, including operation and maintenance of the equipment (*id.* at 8). Pyburn has a crew of workers, which includes plaintiff (*id.* at 9). Although Pyburn was in the fire pump room at the time of the accident, he did not observe plaintiff's accident; however, he heard a "metal noise" when plaintiff fell (*id.* at 12, 13, 14, 25). Pyburn told Finnigan to dial 911 for an ambulance (*id.* at 40).

Andrew Finnigan testified that he works as a refrigeration engineer for defendant at the subject premises (Finnigan EBT, at 7, 8). Finnigan was working with plaintiff at the time of the accident (*id.* at 16). According to Finnigan, plaintiff was working on a spool on the fire pump at the time of the accident (*id.* at 27). Finnigan and plaintiff loosened and removed the bolts from the spool piece (*id.* at 67, 68). The old spool piece was removed (*id.* at 67). In order to remove the bolts from the old spool piece, Finnigan stood on an A-frame ladder (*id.* at 70). Plaintiff stood on "something over there," but was not standing on a ladder or scaffold (*id.* at 76). The spool was at least six to six-and-a-half feet off the concrete floor (*id.* at 27-28, 30-31). After the old spool piece was removed, all of the remaining spool pieces and gaskets had to be cleaned (*id.* at 79, 80). Plaintiff's accident occurred when Finnigan and plaintiff were in the process of tightening the bolts on the new spool

piece (*id.* at 93). Finnigan observed plaintiff fall backwards (*id.* at 96).

Jeffrey Moran testified that he is employed as an assistant chief engineer by defendant at the premises (Moran EBT, at 7, 8, 11). Moran delegated jobs and handled everyday operations of the building (*id.* at 19). Moran was working with plaintiff on April 8, 2009, and is one of plaintiff's supervisors (*id.* at 14, 65). According to Moran, the workers were in the process of replacing a leaking spool piece in the fire pump room (*id.* at 15, 17). The workers had been working on this replacement for approximately two to three hours prior to plaintiff's accident (*id.* at 16). Plaintiff stood on the base of the fire pump (*id.* at 32, 34, 35). Moran saw plaintiff fall off the fire pump onto the concrete floor below and heard his head hit the concrete floor (*id.* at 37, 40).

James Siegler testified that he was employed by Fisher Brothers Management Company as a risk manager (Siegler EBT, at 16, 40, 150). Siegler held the same title in April 2009 (*id.* at 16). Prior to April 2009, Siegler procured a workers' compensation insurance policy with Liberty Mutual Insurance Company on behalf of Fisher Brothers Management Company and 16 other entities as named insureds on the policy (*id.* at 17, 18, 19). One of the other entities included defendant (*id.* at 19). Fisher Brothers Management Company is a limited liability services company which provides accounting, legal, risk management and other services to the businesses owned by the members of the Fisher family (*id.* at 21, 141). One of the real estate holdings of the Fisher family is ownership of the subject premises (*id.* at 22). Fisher Brothers Management Company provides payroll services to defendant's employees (*id.* at 148). In April 2009, defendant had approximately 20 to 30 employees, consisting of engineers, management, security guards, and porters (*id.* at 45, 46). According to Siegler, when he was inputting the information with respect to plaintiff's accident on the Liberty Mutual online portal, he was unable to choose the name of the employer (*id.* at 69). The

online system defaulted to the first named insured on the workers' compensation insurance policy, Fisher Brothers Management Company (*id.*).

Plaintiffs commenced this action on March 19, 2010, seeking recovery for common-law negligence, violations of Labor Law §§ 200, 240 (1) and 241 (6), and loss of society, services, and consortium. In response to a notice to admit, defendant admitted that it owned the subject premises (Moses Affirm., Exh. D).

Arguments

Plaintiffs now move for partial summary judgment under Labor Law § 240 (1), arguing that plaintiff was exposed to the gravity-related hazard of falling from a height while working in defendant's building. Plaintiffs further note that plaintiff was performing "repair" work, an enumerated activity under the statute.

Defendant opposes plaintiffs' motion and moves for summary judgment dismissing the complaint in its entirety. Defendant argues that since it was plaintiff's employer at the time of the accident, plaintiff is barred from asserting any claims for personal injury pursuant to the exclusive remedy provisions of Workers' Compensation Law §§ 11 and 29 (6). Alternatively, defendant argues that plaintiff was a "special employee" of defendant because plaintiff was exclusively supervised, directed and controlled by defendant's employees. Defendant further argues that plaintiff was the sole proximate cause of his accident because he failed to use a "readily available ladder" at the time of his accident. Defendant also contends that plaintiff was performing "routine maintenance" when he was injured rather than "repair" work. As for Labor Law § 241 (6), defendant contends that plaintiff has failed to allege a specific or applicable violation of the Industrial Code. Defendant maintains, with respect to plaintiff's Labor Law § 200 and common-law negligence

claims, that defendant did not create or have notice of any unsafe condition. Finally, defendant argues that, although the work that plaintiff was performing at the time of his accident was supervised by defendant, plaintiff was not directed to stand on the fire pump in order to perform the repair.

In opposition to defendant's motion and in reply, plaintiffs contend that because the Workers' Compensation Board found that plaintiff was an employee of Fisher Brothers Management Company, defendant is collaterally estopped from challenging that determination, and that the documentary evidence also establishes that defendant was his employer. Plaintiffs maintain that, at a minimum, there are questions of fact as to whether defendant was his employer. Plaintiffs also contend that there are issues of fact as to whether he was a "special employee" of defendant. Finally, plaintiffs argue that plaintiff was performing repair work and was not the sole proximate cause of his accident because defendant failed to provide any safety devices.

In reply, defendant responds that (1) plaintiffs have not opposed dismissal of the common-law negligence and Labor Law §§ 200 and 241 (6) claims, (2) the documents relied upon by plaintiffs fail to raise a triable issue of fact as to whether defendant was plaintiff's employer, (3) at the very least, plaintiff was defendant's "special employee" because he received all work assignments, directions and supervision from defendant's employees, and (4) plaintiff was the sole proximate cause of his accident because his "normal and logical response" should have been to retrieve a readily available ladder or scaffold.

Discussion

The standards for summary judgment are well settled. "[T]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing

judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). Once the proponent has made a prima facie showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). The court's function on a motion for summary judgment is "'issue-finding, rather than issue-determination'" (*Pirrelli v Long Is. R.R.*, 226 AD2d 166 [1st Dept 1996], quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]).

Initially, the court notes that plaintiffs have not opposed the portions of defendant's motion seeking dismissal of plaintiffs' Labor Law §§ 200 and 241 (6) and common-law negligence claims. Accordingly, these claims are dismissed.

The court must first consider whether defendant was plaintiff's employer, and thus, whether he is barred from pursuing any claims for personal injuries against it.

In support of its contention that plaintiff is barred from pursuing his claims, defendant points to the following evidence: (1) a workers' compensation insurance policy effective January 1, 2009 through January 1, 2010 issued by Liberty Mutual Insurance Company for defendant (Siegler Aff., ¶ 7, Exh. A); (2) plaintiff's testimony that he received workers' compensation benefits as a result of his accident (Plaintiff Continued EBT, at 68, 71); (3) plaintiff's W-2 wage and tax statements for the years 2008 and 2009, indicating that his wages were paid by defendant and that his employer was

defendant (Dalton Aff., Exhs. A, B)[1]; (4) plaintiff's federal W-4 form dated August 13, 2003 and New York State IT-2104 form dated September 13, 2002 indicating that "Park Avenue Plaza Company" was his employer (*id.*, Exhs. C, D); (5) an incident report generated for plaintiff's accident indicating that plaintiff is an employee of defendant (Pak Affirm., Exh. M); and (6) testimony from plaintiff's co-workers, including two supervisors, that they work for defendant and that plaintiff also works for defendant (Pyburn EBT, at 8, 9; Moran EBT, at 7, 8, 11, 65; Finnigan EBT, at 7, 8).[2]

Workers' Compensation Law § 10 (1) states that "[e]very employer subject to this chapter shall in accordance with this chapter . . . secure compensation to his employees and pay or provide compensation for their disability . . . from injury arising out of and in the course of the employment without regard to fault as a cause of the injury. . . ." Workers' Compensation Law § 11 states that "[t]he liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, . . . spouse, . . . on account of such injury or death or liability arising therefrom. . . ." In addition, Workers' Compensation Law § 29 (6) states that "[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is injured or killed by the negligence or wrong of another in the same employ . . . ."

Plaintiffs contend that defendant is collaterally estopped from challenging the Workers'

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[1]Defendant also offers W-2 statements for Pyburn, Moran, and Finnigan for the year 2009, which indicate that their employer was defendant (Dalton Aff., Exh, B).

[2]In addition, defendant submits an affidavit from John Donnelly, the building manager employed by defendant for the premises, who states that plaintiff, Pyburn, Finnigan, and Moran were defendant's employees on April 8, 2009 (Donnelly Aff., ¶ 7).

Compensation Board's decision, because it found that plaintiff was an employee of Fisher Brothers Management Company. Under the doctrine of collateral estoppel, a party is precluded from relitigating in a subsequent action or proceeding an issue clearly decided in a prior action or proceeding and decided against that party or those in privity (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). The following two elements must be established for the doctrine to apply: (1) the identical issue was necessarily decided in the prior action and is decisive in the present action; and (2) that the party to be precluded must have had a full and fair opportunity to contest the prior determination (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). Collateral estoppel applies to quasi-judicial determinations of the Workers' Compensation Board (*see Ryan*, 62 NY2d at 499; *Rigopolous v American Museum of Natural History*, 297 AD2d 728, 729 [2d Dept 2002]; *Caiola v Allcity Ins. Co.*, 257 AD2d 586, 587 [2d Dept 1999]).

In *Vitello v Amboy Bus Co.* (83 AD3d 932, 933 [2d Dept 2011]), a case particularly on point, the Court held that the decision of the Workers' Compensation Board did not collaterally estop a defendant school bus company from arguing that it was the injured bus driver's employer, since there was no indication that the issue was a disputed issue in the Workers' Compensation Board proceeding or that the Workers' Compensation Board specifically adjudicated the issue. In *Vitello*, the Court noted that, in its decision, the Workers' Compensation Board concluded that plaintiff suffered a work-related injury and that, at the bottom of the decision, an entity named "Atlantic Express" was named as the plaintiff's employer (*id.*).

Similarly, in *Weitz v Anzek Constr. Corp.* (65 AD3d 678, 680 [2d Dept 2009]), the Court concluded that "since the identity of the injured plaintiff's employer was not a disputed issue in the workers' compensation proceeding, and the Workers' Compensation Board did not specifically

adjudicate this issue, the administrative finding that the injured plaintiff was entitled to recover compensation benefits from Anzek is not conclusive proof that he was employed by that corporation."

Here, the Workers' Compensation Board's decision indicates that plaintiff had a work-related injury to his head, and directed his employer and/or the insurance carrier to pay workers' compensation benefits (Moses Affirm., Exh. C). At the bottom of the decision, plaintiff's employer is listed as "Fisher Br[o]thers Management Co." (*id.*). Although the Board determined that plaintiff suffered a work-related injury, there is no evidence that the identity of plaintiff's employer was a disputed issue in the Workers' Compensation Board proceeding, and thus, its decision is not conclusive proof that he was employed by Fisher Brothers Management Company.

Plaintiffs' reliance on *Vogel v Herk El. Co.* (229 AD2d 331, 332 [1st Dept 1996]) is misplaced. In *Vogel*, the First Department held that the Workers' Compensation Board's decision that another company, not the defendant, was plaintiff's employer, collaterally estopped the defendant from raising the affirmative defense that it had paid workers' compensation benefits to the plaintiff (*id.* at 333). In that case, the Court noted that the Workers' Compensation Board's finding was made after a hearing as to the issue of "the correct legal entity and employer-employee relationship between claimant and [defendant]" (*id.* at 332). In addition, the Court mentioned that defendant's counsel was given notice of pendency of the Board's proceeding, defendant's officers and its counsel were present at the proceeding, and the Board considered evidence including W-2 forms, pay stubs, and an employer's report of injury, which all indicated that plaintiff's employer was the other company (*id.* at 333). Here, as previously noted, there is no evidence that the Workers' Compensation Board ordered a hearing as to the identity of plaintiff's employer or that the identity

of plaintiff's employer was a disputed issue before the Board.

To support their position that Fisher Brothers Management Company was plaintiff's employer, plaintiffs refer the court to the following evidence: 1) the C-2 form filed with the Workers' Compensation Board relating to his injury, indicating that Fisher Brothers Management Company was his employer, and C-11 and C-240 forms filed with the Board for his injury, stating that "Fisher Brothers" was his employer (Moses Affirm., Exhs. A, F, G, H); 2) a letter dated November 11, 2009 on "Fisher Brothers" letterhead, indicating that plaintiff's employee file maintained by Fisher Brothers Management Company was enclosed (*id.*, Exh. J); 3) a memorandum dated January 10, 1999 on "Fisher Brothers" stationary, directing payment for unused floating holidays for the year 1998 (*id.*, Exh. K); 4) a form in which plaintiff acknowledged receipt of the "Fisher Brothers" anti-harassment policy (*id.*, Exh. L); 5) a C-240 form filed with the Workers' Compensation Board for an unrelated injury in 2000, indicating that "Fisher Brothers Mgmt Co" was his employer, and another C-240 form for an unrelated injury in 2008, reflecting that "Fisher Brothers" was his employer (*id.*, Exhs. M, N); 6) plaintiff's pay stub reflecting an "FB" logo (*id.*, Exh. O); 7) plaintiff's union records naming "Fisher Brothers I" as his employer (*id.*, Exh. P); and 8) testimony indicating that plaintiff's uniform has an "FB" logo on it (Pyburn EBT, at 9-10; Finnigan EBT, at 8-9; Moran EBT, at 9-10).

However, the court is not persuaded that there is an issue of fact as to the identity of plaintiff's employer, given that defendant issued W-2 statements to plaintiff, and that plaintiffs have not disputed defendant's evidence that he was supervised by defendant's employees. Further, "[i]t is of no consequence that [Fisher Brothers Management Company] was listed as plaintiff's employer in the files of the Workers' Compensation Board . . . ." (*Sorrentino v Ronbet Co.*, 244 AD2d 262 [1st

Dept 1997]). Accordingly, plaintiffs' complaint is barred by the Workers' Compensation Law and must be dismissed (*see Vitello*, 83 AD3d at 933-934 [defendant was entitled to summary judgment where it presented documentary evidence that plaintiff was its employee on the date of the accident and that parent company purchased workers' compensation insurance for it]; *Sorrentino*, 244 AD2d at 262 [trial court properly granted defendant's motion to dismiss pursuant to CPLR 4401, where the evidence established that worker was employee of building owner and thus action was barred; worker had been hired by building's prior owner and remained current owner's employee under express terms of agreement with management company, owner issued plaintiff's W-2 statements, worker listed owner as employer on mortgage application, and worker did not show that his activities were supervised by an employee of the management company]; *Sforza v Verizon Communications, Inc.*, 8 Misc 3d 1018[A], *6, 2005 NY Slip 51183[U] [Sup Ct, NY County 2005] [finding identity of plaintiff's employer as a matter of law, where the plaintiff received worker's compensation benefits, and the third-party defendant provided W-2s to plaintiff]). Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment (Motion Seq. 003) on the issue of liability under Labor Law § 240(1), is denied; and it is further

ORDERED that defendant, Park Avenue Plaza Owner LLC's motion for summary judgment (Motion Seq. 004), is granted and the Clerk of the Court shall enter judgment in favor of defendant and against plaintiff dismissing the complaint against defendant.

Dated: January 17, 2013

ENTER:

J.S.C.