Short Form Order

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

ORIGINAL

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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MARY ELLEN SCHNEIDER,

Plaintiff,

-against-

KEYSPAN CORPORATION, KEYSPAN ENERGY CORPORATION, KEYSPAN GAS EAST CORPORATION d/b/a KEYSPAN ENERGY DELIVERY, D&H REALTY CO., LLC and C&C REALTY CO., LLC,

Defendants.

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INDEX NO.: 29498/05
CALENDAR NO.: 201101360OT
MOTION DATE: 10/24/12
MOTION SEQ. NO.: 008 MOT D;
009 MOT D

PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 34 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-7 ; Notice of Cross Motion and supporting papers 8-17 ; Answering Affidavits and supporting papers 18-24 ; Replying Affidavits and supporting papers 25-28; 29-30; 31-32 ; Other 33-34 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants D& H Realty Co. LLC (D&H) and C&C Realty Co. LLC (C&C), seeking an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that the complaint is hereby dismissed against defendants D&H Realty Co. LLC and C&C Realty Co. LLC. The action is otherwise severed and continued against the remaining defendants; and it is further

ORDERED that the motion by defendants Keyspan Corporation, Keyspan Energy Corporation and Keyspan Gas East Corporation d/b/a Keyspan Energy Delivery (Keyspan) seeking an order compelling plaintiff to provide HIPAA-compliant medical authorizations for use at the trial of this action is granted. Plaintiff shall provide the HIPAA-compliant medical authorizations demanded by the defendants within ten days of service of a copy of this order with notice of entry.

On October 12, 2004 an explosion and fire damaged premises known as Habberstad Nissan (Habberstad). The damaged premises included adjoining buildings located on two separately owned lots. The main Habberstad Nissan premises located at 850 East Jericho Turnpike are owned by defendant D&H; the adjoining premises located at 838 East Jericho Turnpike are owned by defendant C&C. Plaintiff Schneider was a Habberstad employee working in the building owned by defendant C&C.

Defendants' (D&H and C&C) motion seeks an order granting summary judgment dismissing plaintiff's complaint claiming that no viable cause of action is asserted against either defendant.

Defendants claim that the Worker's Compensation Law is the exclusive remedy for recovery by Schneider since D&H and C&C were formed as alter ego limited liability companies of plaintiff's employer Habberstad. Defendants assert that defendant Howard Habberstad's deposition testimony together with documentary evidence proves that Habberstad is the sole owner of the three companiess; that no other shareholders exist; that the two realty companies (defendants D&H and C&C) have no employees; that the records maintained by the realty defendants are kept in common with Habberstad Nissan; and that funding for all three companies are intermingled as needed. Defendants argue that the proof clearly shows that the realty companies are alter ego LLC's of plaintiff's employer Habberstad Nissan and therefore plaintiff's sole remedy for recovery is through worker's compensation. Defendants also claim that there is no proof of negligence associated with the realty companies to provide a factual foundation to find defendants liable for Schneider's injuries and therefore plaintiff's complaint must be dismissed even if the worker's compensation law were not applicable.

In opposition plaintiff claims that substantial issues of fact exist concerning the defendants negligent failure to maintain their premises in a reasonably safe condition and that the evidence indicates that the realty company defendants failed to adequately inspect, maintain and repair certain potential ignition sources in their buildings where the explosion and fires occurred including the oil burner, water heater and electric heater. Plaintiff contends that D&H and C&C are not entitled to rely upon the exclusivity provision of the Worker's Compensation Law since the proof submitted fails to show that plaintiff's employer Habberstad exerted complete dominion and control over the two realty companies in day-to-day operations sufficient to invoke the alter ego doctrine. Plaintiff claims that the evidence shows that D&H and C&C maintained separate bank accounts and operated their companies pursuant to written lease agreements with Habberstad. Plaintiff argues that there is no proof to show that Habberstad Nissan paid the realty companies taxes or bills for each company's service and maintenance contracts and that absent a clear showing that the three defendants are not distinct legal entities defendants motion to dismiss based upon the Worker's Compensation Law must be denied.

In support of the Keyspan defendants for a motion compelling the plaintiff to provide HIPAA-compliant medical authorizations, defendants submit an attorney's affirmation and claim that the authorizations sought are solely for the purpose of trial subpoenas. Defendants contend that the medical authorizations previously provided by the plaintiff are stale and unusable for the purposes of trial subpoenas and that plaintiff must be compelled to provide the authorizations demanded. Plaintiff claims that the defendants are not entitled to additional discovery after the note of issue was filed in this action and that the defendants' demand for medical authorizations is nothing more than an attempt to obtain Schneider's psychiatric records so as to circumvent a prior order which denied defendants' application for a psychiatric examination of the plaintiff. Plaintiff claims that the defendants waived their right to obtain additional authorizations once the note of issue was filed and no basis exists to permit additional discovery.

The proponent of a summary judgment motion must make a prima facie showing of entitlement of judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The movant bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has

been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR Section 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to her by the defendant (*see Palka v. Edelman*, 40 NY2d 781, 390 NYS2d 393 (1976); *Palsgraf v. LIRR*, 248 NY 339 (1928); Prosser "Torts" 4th Edition Sec. 30, 41-42 & 53)). Plaintiff must also demonstrate that the defendant's acts of omissions which constituted such breach were a proximate cause of plaintiff's injuries (*Sheehan v. City of New York*, 40 NY2d 496, 387 NYS2d 92 (1976)).

The law is well settled that an employee may not maintain an action against her employer for injuries sustained during the course of her employment (Worker's Compensation Law 11 & 29(6)). The affirmative defense of the exclusivity of the Worker's Compensation Law may be maintained in certain limited instances: 1) by an employer; or 2) where the corporation is engaged in a joint venture with the employer (*Brum v. Dynamic Enterprises*, 132 AD2d 964, 510 NYS2d 494 (4th Dept., 1987); or 3) where the party who owns the premises where the plaintiff was injured is either an employer or a co-employee owing a duty to the injured party directly connected with the employment relationship (*Heritage v. Van Patten*. 59 NY2d 1017, 466 NYS2d 958 (1983); *Linder v. Kew Realty Co*, 113 AD2d 36, 494 NYS2d 870 (2nd Dept., 1985); *Di Rie v. Automotive Realty Corp.*, 199 AD2d 98, 605 NYS2d 60 (1st Dept., 1993)). Where sufficient evidence is presented to prove that plaintiff's employer is the de facto owner of separate legal entities which have no employees, are controlled by common management, function under a common budget and have no purpose other than in relation to the business conducted by the employer, the exclusivity provision of the workmen's compensation law applies to bar personal injury claims against those entities (*see Crespo v. Pucciarelli and Amboy Bus Co., Inc.*, 21 AD3d 1048, 803 NYS2d 586 (2nd Dept., 2005); *Di Rie v. Automotive Realty Corp., supra.; Ramnarine v. Memorial Center for Cancer & Starrett Housing Corp.*, 281 AD2d 218, 722 NYS2d 493 (1st Dept., 2001)).

The evidence in the record shows that the realty company defendants D&H and C&C were alter egos of Habberstad Nissan formed solely for the purpose of facilitating the car dealership's business. Habberstad's corporate president's deposition testimony makes clear that D&H and C&C were owned by him, retained no employees, maintained books and financial records only in relation to the car dealership, and conducted no other business function other than as a support mechanism for Habberstad Nissan. Under these circumstances no viable causes of action can be maintained against defendants D&H and C&C based upon the exclusivity bar set forth in the Worker's Compensation Law which prevents an employee from suing her employer for injuries sustained in the workplace (*see Di Rie v. Automotive Realty Corp., supra)).* Moreover, even if the Court were to deny the realty company defendants application on these grounds, the record also clearly shows that no viable negligence claims are asserted against these defendants since there is no relevant, admissible evidence to prove that defendants breached a duty to the plaintiff which proximately caused her injuries in the explosion.

With respect to the Keyspan defendants motion seeking to compel plaintiff to provide medical authorizations, CPLR Section 3124 provides:

> **Failure to disclose; motion to compel disclosure.**
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> If a person fails to respond or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.

Defendants' demand seeks medical authorizations in anticipation of trial and does not seek to re-open discovery. Under such circumstances the defendants are entitled to obtain such records (*see Singh v. Friedson et al.*, 36 AD3d 605, 829 NYS2d 552 (2nd Dept., 2007)). Accordingly defendants' motion must be granted to the extent that plaintiff is directed to provide the HIPAA-compliant medical authorizations within ten days of service of a copy of this order with notice of entry.

Dated: January 25, 2013

J.S.C.