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

MICHAEL LYONS,

Plaintiff,

-against-

MAXWELL-KATES, INC.,

Defendant.

Index No.: 162072/2014

DECISION/ORDER

Motion Seq. 002

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations Annexed	1
Answering Affidavits/Affirmations	2
Reply Affirmation	3

ERIKA M. EDWARDS, J.:

Defendant Maxwell-Kates, Inc.'s ("Defendant") motion for summary judgment dismissal of Plaintiff's complaint is GRANTED and Plaintiff Michael Lyons' ("Plaintiff") complaint is dismissed against Defendant. Defendant demonstrated its entitlement to summary judgment as a matter of law and established that Plaintiff was both a general employee of non-party 55 East 86th Street Condo Association ("Condo Association") and a special employee of Defendant, which was the managing agent of the building where Plaintiff worked as a doorman/porter. Therefore, Plaintiff is precluded from suing Defendant based on the exclusivity provisions of the Workers' Compensation statute.

In his opposition to Defendant's motion, Plaintiff primarily provided support for the fact that Plaintiff was employed by the Condo Association and not Defendant, but that issue is not in dispute. Plaintiff failed to raise any triable issues of fact to support his claim that he was not

Defendant's special employee, that Defendant did not have exclusive control over Plaintiff's work or that the Condo Association relinquished all control of Plaintiff's work. As such, the court grants Defendant's motion for summary judgment and dismisses Plaintiff's complaint against Defendant.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

The sole remedy of any employee against his employer for injuries sustained during the course of his employment is benefits under the Workers' Compensation Law (Workers' Compensation Law §§ 11 and 29 [6]). An employee could have more than one employer for statutory purposes and when an employee elects to receive Workers' Compensation benefits from his general employer a special employer is also shielded from any actions at law commenced by the employee based on the exclusivity provisions of the Workers' Compensation Law (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 560 [1991]; *Fung v Japan Airlines co., Ltd.*, 9 NY3d 351, 358-359 [2007]).

A special employee is "one who is transferred for a limited time of whatever duration to the service of another" (*id.* at 557). Principle factors in determining the existence of a special employment relationship include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer' or the general employer's business (*see Alvarez v. Cunningham Assoc., L.P.*, 21 AD 3d 517 [1st Dept 2005]). Many factors are weighed in deciding whether a special employment relationship exists, and generally no one is decisive, but the key to this determination is "who controls and directs the manner, details and ultimate result of the employee's work" (*Thompson*, 78 NY2d at 557-558). "A finding of a special employment is justified only where the special employer exerts complete and exclusive control over the purported special employee, as to

whom the general employer has relinquished all control" (*Fox v Brozman-Archer Realty Servs., Inc.*, 266 AD2d 97, 99 [1st Dept 1999] [internal citation omitted]).

Additionally, an agreement between a building employer and a managing agent indicating that the building's employees are the employees of the building owner and not the management company is not determinative on the issue of whether the building employee is also a special employee of the management company, since the employee was not a party to the contract and such contract did not purport to define the issue of the employee's special employee status (*Villanueva v Southeast Grand St. Hous. Dev. Fund Co.*, 37 AD3d 155 [1st Dept 2007] and *Thompson*, 78 NY2d at 559-560).

The determination of an employee's status is usually a question of fact (*Suarez v Food Emporium, Inc.*, 16 AD3d 152, 153 [1st Dept 2005]). However, "the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact" (*Thompson*, 78 NY2d at 557-558).

Courts have granted summary judgment dismissal to managing agents as special employers of building employees in many cases with similar facts to those in the instant matter. In *Ramirez v. Miller*, the court granted summary judgment dismissal and found that an injured doorman was the property manager's special employee, even though he was paid by the general employer, supervised by the general employer's superintendent, the superintendent received his instructions from the property manager's employee, and despite the fact that the general employer retained the ultimate power to hire and fire the building employees *(Ramirez v. Miller*, 41 AD3d 298, 298-299 [1st Dept 2007]). Additionally, the members of the building's board had the authority to instruct its workers, but it did not appear that any such instructions were given (*id.* at 299). The court determined that the managing agent was the injured employee's special

employer controlled the daily operation of the building and the manner and details of the injured doorman's work (*id.*; *see Erazo v 136 E. Mgmt.*, 302 AD2d 282 [1st Dept 2003] [injured building handyman was management company's special employee because the management company, through an on-site agent, exercised virtually complete and exclusive supervisory control over the injured employee and his supervisor and it did not appear that the general employer exercised any supervision or control over either worker]; *Ayala v Mutual Hous. Assn., Inc.*, 33 AD3d 343, 344 [1st Dept 2006] [injured porter was special employee of managing agent, whose employee directed, supervised and controlled the daily work of the injured porter and his immediate supervisor and the employer was deemed to have surrendered control of the premises]; *Ugijanin v 2 W. 45th St. Joint Venture*, 43 AD3d 911 [2d Dept 2007] [injured porter was managing agent's special employee, however his immediate supervisor, the building's superintendent, was an employee of the managing agent]; *Moreno v MSMC Residential Realty LLC*, 2016 NY Slip Op 31422[U] [Sup Ct, New York County 2016]; *but see Bautista v Frankel Realty, Inc.*, 54 AD3d 549, 554-556 [1st Dept 2008] [court denied summary judgment to a managing agent in a case where the superintendent controlled the injured porter's work, including the injury producing work, and it was found that the managing agent did not control or direct the manner and details of the injured porter's work. The court determined that the superintendent had autonomy in performing his job and supervising the other workers in the building and the managing agent failed to demonstrate that it had assumed complete and exclusive control over the superintendent and in turn, that it assumed complete and exclusive control over the injured porter]).

In applying these legal principles to the facts in the instant matter, based on the admissible evidence submitted, the court finds that it is undisputed that Plaintiff was employed by the Condo Association as his general employer. He was injured when he hit his head on a

steel bar attached to the top of a misleveled elevator cab while he was about to take the elevator to a location to change into his uniform at the beginning of his shift. Plaintiff elected to receive Workers' Compensation benefits from his general employer. At the time of the accident, Defendant was the managing agent for the Condo Association, pursuant to the terms of a Condominium Management Agreement. Generally, the Agreement stated in substance that Defendant was responsible for supervising the building's service employees, hiring such employees, purchasing supplies, entering into contracts and handling the maintenance and daily operations of the building on behalf of the Condo Association. However, the Board of Managers of the Condo Association maintained the right to approve all decisions and made all final decisions in the hiring, firing, disciplining and in the terms and conditions of employment of the building's workers.

However, notwithstanding the terms of the Agreement, based on the deposition testimony of Plaintiff, the superintendent of the building and Defendant's employee, who was the property manager of the building, it is clear that Defendant controlled and directed the manner, details and ultimate result of Plaintiff's work on a daily basis either directly or through the superintendent of the building.

Based on the facts presented, it appears that the building's superintendent took his instructions from the Defendant and did not appear to have sufficient autonomy over his work or Plaintiff's work to defeat the determination that Plaintiff was Defendant's special employee. Additionally, since Plaintiff was injured when he was about to change into his uniform to start his shift, the consideration of who instructed Plaintiff to complete the injury producing work is irrelevant in this case.

Here, Plaintiff contacted Defendant when he needed a job, Defendant hired Plaintiff and Defendant was responsible for hiring, firing, disciplining and supervising the building's employees on behalf of the Condo Association. Defendant handled the complaints and problems on a daily basis, handled all of the daily maintenance and operations of the building, delivered the employees' paychecks, procured workers' compensation, unemployment insurance and withheld taxes all on behalf of the Condo Association. Although the contract may have indicated that the Condo Association did not surrender complete control and supervision of the daily operations of the building, such contract is not determinative of the issue of whether Plaintiff was a special employee of Defendant and such terms in the contract appear to be contrary to the actual daily practices of the building's property manager, superintendent and Plaintiff. As such, Defendant's motion for summary judgment is granted.

Accordingly, it is hereby

ORDERED that Defendant Maxwell-Kates, Inc.'s motion for summary judgment in its favor as against Plaintiff Michael Lyons is granted, Plaintiff Michael Lyons' complaint is dismissed against Defendant Maxwell-Kates, Inc. with prejudice and without costs and the Clerk is directed to enter judgment accordingly in favor of Defendant Maxwell-Kates, Inc. as against Plaintiff Michael Lyons.

This constitutes the decision and order of the court.

Date: May 3, 2017

HON. ERIKA M. EDWARDS, JSC