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

**PRESENT:** **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

***Justice***

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ALEJO RAMOS,

Plaintiff,

- v -

110 BENNETT AVENUE, LLC, and ROSE ASSOCIATES, INC.

Defendants.

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**INDEX NO.** 152665/2013

**MOTION DATE** 02/26/2018

**MOTION SEQ. NO.** 001

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57

were read on this motion to/for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents, it is

ORDERED that the defendants' motion for summary judgment is granted to the extent that the complaint is dismissed against Rose Associates, Inc. with costs and disbursements to that defendant as taxed by the Clerk upon the submission of an appropriate bill of costs and is otherwise denied; and it is further

ORDERED that the action is severed as to defendant Rose Associates, Inc., and is continued as to the remaining defendant; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DECISION

Plaintiff seeks compensation for injuries that he alleges he incurred when he tripped and fell at the premises owned by 110 Bennett Avenue, LLC (Owner).

Defendants now move for an order granting summary judgment in their favor, dismissing the complaint, on the ground that Ramos was a general or special employee of defendant Rose Associates, Inc. (Rose) and a special employee of Owner, and, consequently, barred from recovery under New York State Workers' Compensation Law.

Background

Plaintiff was the building superintendent for Owner's building and premises located at 110 Bennett Avenue in Manhattan (Building). Rose managed the Building pursuant to a comprehensive property management services contract with Owner (the Services Contract).

In his complaint, plaintiff alleges that, on January 30, 2012, he was injured, while performing work at his job, on broken and mis-leveled concrete in a Building courtyard. There is no dispute that plaintiff received workers' compensation benefits based upon this accident.

Pursuant to the Services Contract, Rose was obligated to run the Building's maintenance on a day-to-day basis. Such services included collecting the apartment rents, ensuring basic

cleaning and maintenance of the premises, and hiring all of the employees who were to work at the Building. The Services Contract required Owner to reimburse Rose for Rose's expenditures for running the Building, including the cost of salary and workers' compensation premiums, as well as other employee payroll costs, such as social security contributions. The Services Contract indicates that Owner hired or contracted with an entity (RREEF America, L.L.C.), which had the responsibility to oversee the Services Contract for Owner.

Rose claims to have performed day-to-day supervision of Ramos. Rose's associate director testified that Rose was responsible for running the building on a day-to-day basis, that Owner had nothing to do with this, and that Rose hired the employees for the running of the Building. The associate director avers that Rose, through Rose's subsidiary, nonparty Paybrook Corp. (Paybrook), was plaintiff's employer, supervised plaintiff, and that plaintiff submitted his time sheets every week and also came to Rose's office to pick up his check and meet with Rose's property managers. The record contains Ramos' employment application with Rose.

Rose's associate director also testified that building services employees, like plaintiff, were employed by Paybrook, which was established by Rose, but that Rose considered Paybrook as interchangeable with Rose. In his supporting affidavit,

Rose's associate director avers that Paybrook is Rose's wholly owned entity and a paper company without employees or a physical office. It is undisputed, and Secretary of State records show, that Paybrook's service address was Rose's address. Rose's associate director testified that Paybrook and Rose shared officers, both with the last name of Rose, and that Paybrook handled payroll management for building workers that worked at various buildings managed by Rose. Rose's associate director also testified that Rose's human resources employees would have, under Paybrook's name, submitted a required (C-2) form to the workers' compensation board concerning plaintiff's accident and that Paybrook had no written contract with Owner.

Plaintiff submits an affidavit in which he states that his employer was Paybrook and that Paybrook was deemed his employer by the workers' compensation board. Plaintiff states that when he required instruction, on an as needed basis, such instruction was provided by Rose managers, and that these managers were the only people who gave him instructions as to what to do at the building. Plaintiff states that he was not paid by Owner and never met anyone from Owner.

Discussion

On a motion for summary judgment, the movant must, through admissible evidence, make a prima facie showing of entitlement to judgment as a matter of law (Zuckerman v City of New York, 49

NY2d 557, 562 [1980]), and it must be clear that no material or triable issues of fact are presented (see Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). Once the movant has demonstrated entitlement, the burden shifts to the opposing party to produce evidence sufficient to raise an issue of fact warranting a trial "or [to] tender an acceptable excuse for [the] failure to do so" (Zuckerman, 49 NY2d at 560).

Under Workers' Compensation Law § 29(6), a worker is barred by the exclusive remedy under the statute from bringing an action against his or her allegedly negligent employer (McMahon v Cohen Brothers Realty Corp., 150 AD3d 480, 480 [1st Dept 2017]; see Gannon v JWP Forest Elec. Corp., 275 AD2d 231, 231 [1st Dept 2000]). A special employee is also shielded by the workers' compensation bar (Kramer v NAB Construction Corp., 282 AD2d 714, 714 [2d Dept 2001]).

"A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer" (Thompson v Grumman Aerospace Corp., 78 NY2d 553, 557 [1991] [citations omitted]).

"While the mere transfer does not compel the conclusion that a special employment relationship exists, a court is most likely to find that it does where the transferee 'controls and directs the manner, details and ultimate result of the employee's work'" (Grilikhes v International Tile & Stone Show Expos, 90 AD3d 480,

482 [1st Dept 2011], quoting Thompson, 78 NY2d at 558). Thus, although many employment factors may be considered, and the issue of special employment usually presents as a fact issue, the Court of Appeals has described control and direction over the employees work as "a significant and weighty feature" in the determination (Thompson, 78 NY2d at 558). In fact, the First Department has stated that:

> "[o]nly where the defendant is able to demonstrate conclusively that it has assumed exclusive control over 'the manner, details and ultimate result of the employee's work' is summary adjudication of special employment status and consequent dismissal of an action proper" (Bellamy v Columbia Univ., 50 AD3d 160, 162 [1st Dept 2008] [internal citation omitted]).

As Paybrook had no employees, and, as Rose's associate director testified, was run by Rose employees, there is no dispute that it did not control or supervise plaintiff's work. The admissible record evidence demonstrates that Rose controlled Paybrook, its wholly owned subsidiary, which functioned as a payroll processing company issuing paychecks and performing certain employee payroll functions for various employees placed with building owners. To the extent that plaintiff's work was supervised and controlled, it was by Rose, which had responsibility for the building's day-to-day maintenance through its contract with Owner. The record reveals that Ramos reported to Rose, which met with and supervised plaintiff, provided plaintiff with his paycheck, made the arrangements to terminate

plaintiff, and also dealt with his union matters. In addition, plaintiff had a Rose work email address.

While plaintiff avers that Paybrook was deemed his employer by the workers' compensation board, this is not dispositive of whether another entity is a special employer (Gomez v Penmark Realty Corp., 50 AD3d 607, 608 [1st Dept 2008]). Based upon the foregoing evidence, Rose is entitled to summary judgment.

As movants for summary judgment on their defense, defendants carried the burden to demonstrate that Owner was plaintiff's special employer. There is no question that plaintiff was provided with an apartment in Owner's building, at no expense to him, presumably so that Owner would have the Building's superintendent, on behalf of the management company, at the premises. In that plaintiff received an apartment for which he was not required to pay rent, an inference may be drawn of a benefit that plaintiff received from Owner. Plaintiff also worked at Owner's premises for years. However, nothing in the record demonstrates Owner's control or direction over the day-to-day aspects of plaintiff's job, or supervision over plaintiff's work, which lack of evidence alone is sufficient to deny summary judgment (see Thompson, 78 NY2d at 557-558; Bellamy, 50 AD3d at 162). Rose's associate director testified

that he had no recollection of Owner ever actually instructing Rose to instruct plaintiff to perform work at the Building.

The record also is not clear as to why some of Paybrook's documentation for the Department of Labor states that it was doing business as Owner, while other documents, of the same type, merely list Owner as providing plaintiff's physical work location. Such documents do not establish employment by Owner as they do not definitively demonstrate the requisite surrender of control over plaintiff by Paybrook or Rose, or, certainly, Owner's assumption of such control (see Thompson, 78 NY2d at 557).

To the extent that defendants argue that Owner directed the day-to-day work, the only evidence presented is the testimony of Rose's associate director that Owner requested that the Building's garbage be taken out and its floors cleaned daily, addressing only the frequency of these tasks. The Services Contract states that the relationship between Rose and Owner was that Rose, an entity, was an independent contractor. While the record reveals that Owner may have communicated to Rose its desired standards for the Building's care, defendants have not established, as a matter of law, that this amounted to Owner's supervision of plaintiff, or Rose, which then, in turn, supervised plaintiff.

In Vincente v Silverstein Props., Inc. (83 AD3d 586, 586 [1st Dept 2011]), upon which defendants rely, the "evidence established that both the owner and property manager . . . supervised, directed and controlled plaintiff's work." In addition, in Vincente, the property management contract established that the plaintiff was the employee of the owner. Such is not the case here.

Defendants argue that Owner had control over plaintiff's termination, and Rose's associate director testified that Owner had control over firing employees and that Rose needed to and received Owner's permission to terminate plaintiff's employment. The Services Contract, upon which Rose's associate director relies, does provide that Owner could approve a hiring for the Building, and was required to provide notice of its disapproval of same within a short time period. However, as to termination, that contract specifies only that Rose was required to provide to Owner notification of a termination, after the fact. Accordingly, even if Rose received approval from Owner to terminate plaintiff, defendants do not demonstrate the basis for Owner's right to terminate plaintiff's employment. Essentially, the Services Contract and Rose's testimony evidence conflict. While defendants offer a conclusory statement that it is "normal" for an owner to be deemed a general employer for a building superintendent, they ignore the testimony of Rose's

associate director that building owners also hire superintendents as their own employees.

While there is testimony about workers' compensation insurance or benefits, it is not definitive as to whether there was a workers' compensation policy that covered Owner, or a joint policy covering Owner (compare Kramer v NAB Construction Corp., 282 AD2d 714, 715 [2d Dept 2001]; Gherghinoiu v ATCO Props. & Mgt., Inc., 32 AD3d 314, 315 [1st Dept 2006]). No such policy, or documentation demonstrating the existence of such a policy, has been provided here. Rose's associate director avers that insurance was obtained for Owner, and that all costs of such insurance, including workers' compensation insurance, were paid for through the Services Contract. The Services Contract, which is set up as a contract that reimburses Rose's costs, and adds fees, states that Owner was to reimburse Rose's cost for Workers' Compensation insurance for Rose's employees, not that Owner was to pay it directly or was on the policy. Rose's associate director testified that there would have been no reason to send any workers' compensation form to owner, and that Paybrook paid the premiums.

McMahon (150 AD3d at 481), upon which defendants rely, provides that the plaintiff-engineer's work was in furtherance of the building, as may be said for plaintiff's work here. Nevertheless, the Court in McMahon deemed the plaintiff the

property management company's special employee, noting that the management agreement provided for the property manager's exclusive maintenance and repair of the building, and also that the other employment relationship factors were shown, and not rebutted. In this case, the property management agreement (the Services Contract) also provides for Rose's exclusive maintenance and repair of the Building, but, in contrast to McMahon, the agreement provides that Rose, or its affiliate is the employer.

Certainly, the record is not devoid of indicia of plaintiff's possible employment relationship with Owner, through the testimony of Rose's associate director, such as the apartment provided to plaintiff, and reimbursements made by Owner to Rose, including for materials used in or for the Building. However, it is established law that a trial court's mandate on summary judgment is not issue determination (Sillman, 3 NY2d at 404), and this court shall not do so here.

4/12/2019
DATE

DEBRA A. JAMES, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |