

Donoso v 787 Madison, LLC
2020 NY Slip Op 34011(U)
October 26, 2020
Supreme Court, Queens County
Docket Number: 721211/2019
Judge: Cheree A. Buggs
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Short Form Order

FILED

NEW YORK SUPREME COURT - QUEENS COUNTY

**10/27/2020
12:08 PM**

Present: HONORABLE CHEREÉ A. BUGGS
Justice

IA Part 30

**COUNTY CLERK
QUEENS COUNTY**

ANA MARIA DONOSO, X

Index Number 721211/2019

Plaintiff,

Motion
Date October 7, 2020

Motion Calendar No. 7

-against-

Motion Seq. No. 1

787 MADISON, LLC, LARSTRAND
CORPORATION, JM HOLDINGS LLC, JM
HOLDINGS 1 LLC, JM HOLDINGS 2 LLC,
J. MENDEL INC., J. MENDEL LLC,

Defendants.

X

The following efile papers numbered 13-22 submitted and considered on this motion by defendant J. Mendel Inc. seeking an Order pursuant to CPLR 3211 (a)(7) dismissing plaintiff Ana Maria Donoso’s complaint on the ground that plaintiff has failed to state a cause of action for which relief can be granted due to the claim being barred by the Workers’ Compensation Law.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF 13-17
Answering Affidavits - Exhibits	EF 18-21
Reply Affirmation.....	EF 22

Upon the foregoing papers it is ordered that the motion is determined as follows:

In this personal injury litigation arising from plaintiff Ana Maria Donoso’s accident which occurred on October 18, 2017 at 787 Madison Avenue, County and State of New York, defendant J. Mendel, Inc. (hereinafter “corporation”) makes this application pursuant to CPLR 3211(a)(7) to

dismiss this action against it. Corporation alleged that plaintiff cannot maintain this action because she was corporation's employee, therefore, her exclusive remedy lies under the Workers' Compensation Law.

In support of the motion, corporation submitted the affidavit of its Manager of Operations, Kyracos Piliias (hereinafter "Piliias"). In his sworn affidavit dated July 7, 2020, Piliias attested that corporation is wholly owned by "JM Holding Group LLC". He has been Manager of Operations since September 2015 to the present. He alleged that he was fully familiar with the workings of corporation, its employees and is also familiar with any worker's compensation claims that were filed by its employees. According to Piliias, corporation operated its business within a portion of the premises located at 787 Madison Avenue, County and State of New York. Plaintiff was employed by corporation as a seamstress. According to Piliias, plaintiff is claiming that she was involved in a work related accident in October 2017, and as a result of same, she filed a worker's compensation claim. Piliias attested that the corporation provided workers' compensation benefits to Donoso under the workers' compensation policy issued to it. A copy of a decision of the Workers' Compensation Board made after a hearing before Judge Barry Mandel, relevant to Plaintiff's accident on October 18, 2017 and indicating that the corporation was her employer at the time of the accident was annexed. The document stated that plaintiff was entitled to and receiving certain Workers' Compensation benefits as a result of an accident, dated October 18, 2017.

Discussion

"On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the [plaintiff] must be accorded the benefit of every favorable inference" (*Leon v Martinez*, 84 NY2d 83 [1994]; *see also Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]). Corporation maintained that the plaintiff's complaint should be dismissed pursuant to CPLR 3211 (a) (7) because the facts alleged by plaintiff against it do not fit within any cognizable legal theory and lacked merit (*see generally Hecht v Andover Assocs. Mgmt. Corp., et al.*, 114 AD3d 638 [2d Dept 2014]; *Salvatore v Bd. of Educ. of Mineola Union Free School Dist.*, 89 AD3d 1078 [2d Dept 2011]; *Treeline 1 OCR, LLC v Nassau County Indus. Dev. Agency*, 82 AD3d 748 [2d Dept 2011]).

Pursuant to Workers' Compensation Law sections 11 and 29(6), an employee entitled to receive workers' compensation benefits cannot sue his or her employer, and a person may be deemed to have more than one employer, a general employer as well as a special employer (*see Bostick v Penske Truck Leasing Co.*, 140 AD3d 999 [2d Dept 2016]). "[A] general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits... a special employee is described as one who is transferred for a limited time of whatever duration to the service of another" (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 [1991]; *D'Alessandro v Aviation Constructors, Inc.*, 83 AD3d 769 [2d Dept 2011]). Determination of special employment status can be determined by the Court as a matter of law, "where the particular, undisputed, critical facts compel that conclusion and present no triable issues of fact." (*Id.*).

Generally, the issue of whether a general employee of one employer is the special employee of another employer is generally a question of fact (*Bostick v Penske Truck Leasing Co.*, 140 AD3d 999 [2d Dept 2016] *D'Amato v Access Mfg., Inc.*, 305 AD2d 447 [2d Dept 2003]). Also, the employee must have knowledge of, and consented to the special employee relationship (*Zupan v Irwin Contr. Inc.*, 145 AD3d 715 [2d Dept 2016]).

In opposition, plaintiff alleged that the motion must be denied. Plaintiff alleged that the accident occurred on October 18, 2017 between 4 P.M. and 5 P.M. at the subject location, including the carpeted area of the staircase at or near the fitting room on the main floor leading to the basement. Plaintiff alleged that defendants' were negligent, *inter alia*, in their ownership, operation, maintenance, construction of the subject premises. Plaintiff claimed that this motion was premature, because the corporation had not filed an answer and no depositions were held. The Court finds that this application is a pre-answer motion which has been made by corporation to dismiss so that it will not be required to serve an answer. Plaintiff also claimed that Pilias' affidavit was self-serving, and the workers' compensation records it submitted were not certified, therefore, corporation failed to set forth a prima facie entitlement to its relief citing a case where the movant filed for summary judgment not a pre-answer motion, *Scansarole v Madison Square Garden*, 33 AD3d 517 (1st Dept 2006), which this Court finds is not applicable.

In the reply, defense counsel now alleged that he represented corporation and "JM Holdings LLC". Pilias affidavit refers to the corporation being wholly owned by "JM Holdings Group LLC", not "JM Holdings LLC". Defense counsel now claimed that both of these defendants should be dismissed from the case because plaintiff was either its general or special employee, however, the Notice of Motion also failed to request any relief on behalf of defendant JM Holdings LLC. and it is not clear whether the corporation is wholly owned by "JM Holdings Group LLC", not a named defendant in the case, or "JM Holdings LLC".

Based upon the documentary evidence submitted in support of the motion, the finds that plaintiff was employed by corporation, and as a result she cannot maintain a direct claim against it as she is barred by the exclusive remedy provision of the Workers' Compensation Law. Although corporation, by Pilias alleged that it is wholly owned by "JM Holding Group LLC" and that plaintiff was its special employee, this entity is not a defendant in the lawsuit. Therefore, the Court grants the requested relief only to defendant J. Mendel Inc. To the extent that JM Holding Group LLC would be required to appear on behalf of itself or other defendants in this case, the Court will grant it leave to do so.

ORDERED, that the motion is granted as to defendant J. Mendel Inc. only; and it is further

ORDERED, that the remaining defendants and/or JM Holding Group LLC are granted leave to appear in this matter by filing an answer within **thirty (30)** days of the date of this Order served with Notice of Entry.

The foregoing constitutes the decision and Order of the Court.

Dated: October 26, 2020



Hon. Chereé A. Buggs, JSC

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