

<b>Castro v 612 Wortman Ave. LLC</b>
2021 NY Slip Op 31028(U)
March 24, 2021
Supreme Court, Kings County
Docket Number: 513035/2017
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of March, 2021.

P R E S E N T:

HON. WAYNE SAITTA, Justice.

-----X

SHERRY CASTRO

Plaintiff

Index No. 513035/2017

-against-

ORDER AND JUDGMENT

612 WORTMAN AVENUE LLC, GTJ CO INC.,  
And L & M BUS CORP.,

MS4

Defendants

-----X

The following papers read on this motion:

NYSCEF Doc Nos

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	_____	59-65
Answering Affidavit (Affirmation)	_____	68-71
Reply Affidavit (Affirmation)	_____	73
Supplemental Affidavit (Affirmation)	_____	
Pleadings – Exhibits	_____	
Stipulations – Minutes	_____	
Filed Papers	_____	

Defendants move to reargue an Order of Justice Edgar Walker dated, July 17, 2020, which held their motion for summary judgment in abeyance pending a determination by the Worker’s Compensation Board as to whether defendant L & M Bus Corp. and plaintiff’s employer, 21st Avenue Bus Corp., are alter egos of one another.

Plaintiff alleges that she was injured when she fell on a defective sidewalk located on a property leased by L & M BUS CORP and owned by defendants 612 WORTMAN AVENUE LLC (612 WORTMAN) and GTJ CO INC.

Defendant L & M BUS CORP had moved for summary judgment on the grounds that it was the alter ego of Plaintiff's employer non-party 21<sup>st</sup> Ave Bus Corp and was entitled to dismissal pursuant to Workers Compensation Law §§ 11 & 29.

Defendant 612 WORTMAN had moved for summary judgment on the ground that it was an out of possession landlord.

Defendant GTJ CO INC moved for summary judgment on the ground that alleged that it was a former owner of the property and had sold the property before Plaintiff's accident.

Defendants argue that the Court erred in staying the motion pending a determination by the Workers Compensation Board because the issue of whether Defendant L & M BUS CORP., was an alter ego of Plaintiff's employer was not a question within the Board's sole jurisdiction.

Reargument should be granted because the issue of whether a Defendant is an alter ego of an employer entitled to assert a worker's compensation defense is properly decided by the Court. *Crespo v Pucciarelli*, 21 AD3d 1048 [2<sup>nd</sup> Dept 2005].)

The Workers Compensation Board has the exclusive jurisdiction over whether an injury occurred within the course of employment, whether there was an employment relationship, or the identity of a claimant's employer, in relation to determining a claim for workers' compensation benefits, and the identification of the employer responsible for paying such benefits. (See, e.g. *Monteiro v. Rasraj Foods & Catering, Inc.*, 114 A.D.3d 735 [2<sup>nd</sup> Dept 2014].)

The question of whether a Defendant is the alter ego of an entity found by the Workers Compensation Board to be the Plaintiff's employer has been decided by the Courts without referral to the Board. (see *Haines v. Verazzano of Dutchess, LLC.*, 130

A.D.3d 871, 872, 12 N.Y.S.3d 906, 907 [2nd Dept 2015]; *Anduaga v AHRC NYC New Projects Inc.*, 57 AD3d 925 [2<sup>nd</sup> Dept 2008].)

In the present case the Worker's Compensation Board has already determined that 21<sup>st</sup> Avenue Bus Corp. was Plaintiff's employer and awarded Plaintiff benefits. As L&M BUS CORP. and 21st Avenue Bus Corp. were covered by the same workers compensation insurance policy the Board did not need to determine the relationship between the two in order to make its determination. As the issue in the present case is not the identity of Plaintiff's employer but whether Defendant was the alter ego of the employer, there is no need to stay Defendants' motion pending a determination by the Worker's Compensation Board.

Upon reargument that part of the motion seeking summary judgment dismissing the complaint should be granted.

**L&M BUS CORP.**

A defendant moving for summary judgment based on the exclusivity defense of the Workers' Compensation Law must show, prima facie, that it was the alter ego of the plaintiff's employer (*Gerardi v IJ Litwak Realty*, 177 AD3d 679 [2<sup>nd</sup> Dept 2019]; *Ortega v Noxxen Realty Corp.*, 26 AD3d 361, 362 [2006]; *Crespo v Pucciarelli*, 21 AD3d 1048 [2005]). L & M BUS CORP. has demonstrated that it is the alter ego of Plaintiff's employer.

A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity" (*Haines v Verazzano of Dutchess LLC*, 130 AD3d 871 [2<sup>nd</sup> Dept 2015]; *Quizhpe v Luvin Constr. Corp.*, 103 AD3d 618 [2<sup>nd</sup> Dept 2013]; *Anduaga v AHRC NYC New Projects, Inc.*, 57 AD3d 925, [2<sup>nd</sup> Dept 2008].)

Here, Plaintiff's employer and Defendant L&M Bus Corp., were separate corporations that were both subsidiaries of Total Transportation Corp. Agostino Vona, the President, sole corporate officer and sole owner of Total Transportation, is also the President and sole corporate officer of L & M Bus Corp. and 21st Avenue Bus Corp.

Defendants presented evidence through the testimony of Sal Rashid that Total Transportation Corp. operated all of its subsidiaries, including L&M BUS CORP., and 21<sup>st</sup> Ave Bus Corp., as an integrated entity. Rashid stated in his deposition that Total Transportation employees oversee and administer all business of its subsidiary companies. Further, L & M Bus Corp. and 2nd Avenue Bus Corp., were insured under the same Worker's Compensation policy under which Plaintiff was covered. (*see Clarke v First Student Inc.*, 160 AD3d 921 [2<sup>nd</sup> Dept 2018]; *Crespo v Pucciarelli*, 21 AD3d 1048 [2<sup>nd</sup> Dept 2005].)

In opposition Plaintiff has failed to raise a triable issue of fact. The fact that L & M engaged in a different business, , from the of 21<sup>st</sup> Avenue Bus Corp., that of managing the property, is not inconsistent with Total Transportation's businesses being run as an integrated entity. *Anduaga v AHRC NYC New Projects, Inc.*, 57 AD3d 925, [2<sup>nd</sup> Dept 2008].)

## **612 WORTMAN**

Defendant 612 WORTMAN is entitled to summary judgment as an out of possession landlord. The provision in the lease which reserved to the landlord the right to enter to inspect the premises and post notices is not sufficient to impose a duty to repair upon an out of possession landlord absent a statutory duty. (*Casson v McConnell*, 148 A.D.3d 863 [2<sup>nd</sup> Dept 2017].) Here as the walkway was within the premises, and not a

public sidewalk, there was no statutory or other non-delegable duty on the landlord to maintain it.

**GTJ CO INC**

Defendant GTJ CO INC., is entitled to summary judgment as it as a former owner that transferred the property to 612 WORTMAN some 10 years prior to the accident, and Plaintiff has not submitted any opposition to this portion of Defendants' motion.

WHEREFORE, it is hereby ORDERED that Defendants' motion for reargument is granted and upon reargument it is further

ORDERED, that Defendants are granted summary judgment dismissing the complaint.

E N T E R:



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JSC