

**Estate of Olmedo v Technical Indus. Plastics, Inc.**

2021 NY Slip Op 34265(U)

June 16, 2021

Supreme Court, Kings County

Docket Number: Index No. 506673/20

Judge: Mark I. Partnow

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16<sup>th</sup> day of June, 2021.

P R E S E N T:

HON. MARK I. PARTNOW,  
Justice.

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ESTATE OF RAFAEL REYES OLMEDO, DECEASED  
BY ESTELLA GARCIA, ADMINISTRATOR,

Plaintiff,

**DECISION AND ORDER**

- against -

Index No. 506673/20

TECHNICAL INDUSTRIAL PLASTICS, INC.

Mot. Seq. No. 2

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.<sup>1</sup>

Notice of Cross-Motion, Affirmation In Support,  
and Exhibits Annexed \_\_\_\_\_  
Affirmation (Affidavit) in Opposition and Exhibits Annexed \_\_\_\_\_  
Affirmation (Affidavit) in Reply \_\_\_\_\_

28 - 43  
45 - 46  
48 - 49

Upon the foregoing papers in this personal injury and wrongful death action, defendant, Technical Industrial Plastics, Inc. (Technical Industrial or defendant) cross-moves in motion sequence (mot. seq.) two for an order dismissing this action by the estate of Rafael Reyes Olmedo, deceased by Estella Garcia, administrator (plaintiff or the administrator) in its entirety, pursuant to Workers' Compensation Law (WCL) §§ 11 and 29 (6) on the basis that defendant was a co-employee of Rafael Reyes Olmedo (Olmedo or decedent).

***Background***

This action stems from the injuries and death of Mr. Olmedo while he was working on the premises at 5401 1<sup>st</sup> Avenue in Brooklyn, New York (premises). Technical Industrial owns the premises, and, at the time of the incident, Olmedo was employed by nonparty EG Plastics LLC (EG Plastics).

<sup>1</sup> New York State Courts Electronic Filing Document Numbers

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According to the verified complaint, filed March 17, 2020, Olmedo, on August 2, 2018, and for a period of time before, suffered hyperthermia and heat stroke due to elevated environmental temperatures as a result of dangerous working conditions at the premises. Plaintiff alleges that Olmedo eventually died from these injuries on August 8, 2018.

Plaintiff moved in mot. seq. one for an order, pursuant to CPLR 3126, striking defendant's WCL affirmative defenses, or striking defendant's answer in its entirety, for failing to respond to plaintiff's notice for discovery and inspection and to produce the documents and information sought therein.<sup>2</sup>

According to defendant's cross motion papers, EG Plastics, plaintiff's employer, is a limited liability company comprised of three equal members/shareholders, George Grossberger (Grossberger), Paul Friedman (Friedman) and Murray Mandel (Mandel). Defendant states that Grossberger, Friedman and Mandel are also directors and officers of Technical Industrial. Further, that presently and at the time of the incident, the families of Grossberger, Friedman, and Mandel, and the respective trusts set up by each family, comprise Technical Industrial's shareholders.

Defendant, in support of its cross motion and as evidence of common ownership between EG Plastics and Technical Industrial, proffers its insurance policy declaration showing both entities as insureds with identical mailing addresses. Defendant also proffers a printout from the New York State Department of State website for EG Plastics showing an address of 116 39<sup>th</sup> Street, Brooklyn New York as well as Technical Industrial's 2018 tax filing reflecting the same address as further proof of common ownership.

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<sup>2</sup> By a January 14, 2021 short form order (*see* NYSCEF Doc No. 49), the Hon. Lawrence Knipel decided plaintiff's motion and directed defendant to provide "complete responses, a privilege log, and a Jackson affidavit for discovery demanded . . . to the extent not already provided." Said order also referred defendant's cross motion to the undersigned.

Defendant posits that, because Technical Industrial and EG Plastics are owned by the same three families, Technical Industrial should be considered Olmedo's "co-employee" for purposes of the WCL, and, therefore, plaintiff's complaint must be dismissed as barred.

In opposition to defendant's cross motion, plaintiff contends that, because a corporation owns the property at issue and not an individual or partnership, defendant cannot avail itself of the "co-employee" defense. Rather, plaintiff submits that defendant must prove that it is an "alter ego" of EG Plastics for the WCL bar to apply.

Plaintiff further argues that the fact that the same three families own both Technical Industrial and EG Plastics does not imply alter ego status. In fact, plaintiff contends, based on defendant's own admission and disclosures, that the two companies cannot be alter egos of one another as a matter of law. Specifically, plaintiff notes defendant's admission that the corporate ownership structure of Technical Industrial differs from EG Plastics since Technical Industrial is owned by several individuals and trusts that are not involved in the ownership of EG Plastics.<sup>3</sup> Plaintiff also highlights that Technical Industrial's tax return indicates that it exists only to own real property whereas it is undisputed that EG Plastics operates as a plastics company and an employer of individuals like plaintiff. Plaintiff maintains that, because it is allegedly clear from the current record that Technical Industrial and EG Plastics are two distinct entities, defendant's two affirmative defenses relating to the WCL must be stricken.

### *Discussion*

WCL § 29 (6) pertinently provides that "[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is

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<sup>3</sup> According to Technical Industrial's 2018 Tax Return, there are 16 different shareholders—four trusts and 12 individuals who, defendant states, are the children of Grossberger, Friedman and Mandel.

injured or killed by the negligence or wrong of another in the same employ . . . “ The foregoing WCL provision precludes an injured worker from recovering from a co-employee for tortious conduct if such tortious conduct is committed within the course of employment (*Cusano v Staff*, 191 AD2d 918, 919 [3rd Dept 1993] [internal citations omitted]).

Consistent with the requirement for according co-employees immunity, the Court of Appeals in *Billy v Consolidated Mach. Tool Corp.* (51 NY2d 152, 160 [1980], *rearg denied* 52 NY2d 829 [1980] and *Heritage v Van Patten* (59 NY2d 1017, 1019 [1983]) established the general rule that a plaintiff injured during the course of his employment cannot maintain an action against the owner of the property where the accident occurred when the owner is also an officer of the corporation which employed plaintiff. The court in *Billy v Consolidated Mach. Tool Corp* reasoned:

“Employers are expected to provide their employees with a safe workplace that is reasonably free of hazards. This obligation to provide a safe workplace simply cannot be separated in a logical and orderly fashion from the duties owed by the employer to his employees by reason of his ownership of the premises or his manufacture of the equipment with which the employees must work. Indeed, these duties are merely subcategories within the complex of obligations that arise in connection with the employment relation. We would be seriously undermining the salutary social purposes underlying the existing workers' compensation scheme if we were to permit common-law recovery outside of that scheme on the basis of such illusory distinctions” (51 NY2d at 160).

Thus, regardless of the status of a defendant as an owner of the premises where the accident occurred, the defendant, as an officer of the corporation, is a co-employee of the plaintiff in all matters arising from and connected with their common employment (*see Crowder v*

*Leichter*, 282 AD2d 423, 424 [2d Dept 2001], *lv denied* 96 NY2d 717 [2001]; *see also Blach v Glabman*, 234 AD2d 328, 328 [2d Dept 1996], *lv dismissed* 90 NY2d 839 [1997]).

Notwithstanding the foregoing, it is well established that when an employer and the owner of the premises where a plaintiff is injured are distinct legal entities, there is no basis to dismiss an action against the property owner under the WCL exclusivity provisions (*Richardson v Benoit's Elec.*, 254 AD2d 798, 799 [4th Dept 1998] [citing *Rosenburg v Angiuli Buick, Inc.*, 220 AD2d 654, 655 [2d Dept 1995]; *see Bernardo v Melville Indus. Assoc.*, 148 AD2d 486, 487 [2d Dept 1989] [(“T)he injured plaintiff was employed solely by Dachlar Management Corporation, a separate legal entity from Melville. Although Melville was instrumental in forming Dachlar Management and is the sole shareholder thereof, these facts are insufficient to shield Melville from tort liability”]; *see also Casas v 559 Warren St. Realty Corp.*, 211 AD2d 742, 743 [2d Dept 1995] [“ . . . the record in this case establishes that the plaintiff was employed solely by Lone Star and that the corporate defendants were separate legal entities from Lone Star and could not be considered the co-employees of the plaintiff”]).

As stated in *Buchner v Pines Hotel*:

“[A] business enterprise has a range of choice in controlling its own corporate structure. But reciprocal obligations arise as a result of the choice it makes. The owners may take advantage of the benefits of dividing the business into separate corporate parts, but principles of reciprocity require that courts also recognize the separate identities of the enterprises when sued by an injured employee” (87 AD2d 691, 692 [3d Dept 1982], *affd* 58 NY2d 1019 [1983] [quoting *Boggs v Blue Diamond Coal Co.*, 590 F2d 655, 662 [6th Cir 1979], *cert den* 444 US 836 [1979]).

Here, it is undisputed that EG Plastics, a limited liability company, and Technical Industrial, a corporation, are distinct legal entities. Thus, regardless of the ownership

composition of each entity, which, the court notes is dissimilar, Technical Industrial cannot be deemed plaintiff's co-employee for WCL purposes.

While plaintiff urges the court to further find that Technical Industrial cannot establish itself as the alter ego of EG Plastics as a matter of law and, therefore, to strike defendant's WCL affirmative defenses, the court declines to so act on this limited record. In addition to this issue not being fully briefed, alter ego status is generally a fact-intensive inquiry that examines elements of control by one entity over a sister entity or the ways in which two entities operate as joint venturers (*see Fuller v KFG L and I, LLC*, 189 AD3d 666, 668 [1st Dept 2020]) and discovery, here, is not yet complete. Accordingly, for the foregoing reasons, it is

**ORDERED** that defendant's cross motion, mot. seq. two, to dismiss the complaint on the basis that defendant is immune from liability as the "co-employee" of plaintiff, is denied.

This constitutes the decision and order of the court.

ENTER,



J. S. C.



HON. MARK I PARTNOW  
SUPREME COURT JUSTICE

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