

<b>Tavares v Toll Bros., Inc.</b>
2022 NY Slip Op 31512(U)
May 11, 2022
Supreme Court, New York County
Docket Number: Index No. 159625/2016
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LOUIS L. NOCK PART 38M**

*Justice*

-----X

DANIEL TAVARES, and LAURA TAVARES,  
  
Plaintiffs,

**INDEX NO.** 159625/2016

**MOTION DATE** N/A

**MOTION SEQ. NO.** 003

- v -

TOLL BROTHERS, INC. A/K/A TOLL GC, LLC A/K/A TOLL GC II, LLC, NAGAN EX, INC., MILDRED CASTANON AND/OR CIVETTA COUSINS JV, LLC, ABC CORPORATION I-X (said names being fictitious, true names presently unknown), DEF GENERAL CONTRACTORS I-X (said names being fictitious, true names presently unknown), JKL PROJECT MANAGER I-X (said names being fictitious, true names presently unknown), XYZ SITE SAFETY MANAGER I-X (said names being fictitious, true names presently unknown), and JOHN DOES I-X (said names being fictitious, true names presently unknown),

**DECISION + ORDER ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, and 97

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

This action arises out of a construction site accident that occurred on November 15, 2013, at 1110 Park Avenue, New York, New York (the premises). Plaintiff Daniel Tavares (plaintiff) was allegedly injured after falling from a ladder at the premises. Plaintiff Laura Tavares is alleged to be his wife.

Defendant Civetta-Cousins JV, LLC (CCJV) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it with prejudice.

Defendant Toll Brothers, Inc., sued herein as Toll Brothers, Inc. a/k/a Toll GC, LLC a/k/a Toll GC II, LLC cross-moves for summary judgment dismissing the complaint.

Plaintiffs cross-move, pursuant to CPLR 203 (b), 3025 (b), and 2001, for leave to amend the summons and complaint to add Toll GC, LLC and Toll GC II, LLC, as defendants.

### BACKGROUND

On November 15, 2016, plaintiffs filed a summons and verified complaint, seeking recovery for common-law negligence and violations of Labor Law §§ 200, 202, 240 (1), 241 (1)-(5), and 241 (6), and asserting derivative causes of action for loss of services, society, and companionship (NYSCEF Doc No. 68, ¶¶ 5-84). The complaint alleges that plaintiff, an employee of nonparty Concrete Courses Corp., was injured when a ladder he was standing on slipped out from underneath him, causing him to fall and sustain serious injuries (*id.*, ¶¶ 7-8). According to the complaint, Toll Brothers, Inc. a/k/a Toll GC, LLC a/k/a Toll GC II, LLC was the owner, general contractor and/or manager of the project, and supervised and controlled the construction of the building (*id.*, ¶¶ 5-6). Plaintiffs allege that CCJV was the site safety manager for the project (*id.*, ¶ 4).

Toll Brothers, Inc.'s Form 10-K annual report for the year ending 2013 indicates that Toll Brothers, Inc. was the parent corporation of Toll GC, LLC and Toll GC II, LLC on the date of the accident (NYSCEF Doc No. 82 at 5). Jonathan Margolis ("Margolis"), vice president and counsel for Toll Brothers, Inc., avers that Toll Brothers, Inc. is a publicly traded Delaware corporation (NYSCEF Doc No. 71, ¶¶ 1, 10; NYSCEF Doc No. 74). According to Margolis, Toll GC, LLC and Toll GC II, LLC are distinct domestic limited liability companies (NYSCEF Doc No. 71, ¶¶ 8-9; NYSCEF Doc Nos. 72, 73). Toll Brothers, Inc. is a holding company that did not have any active involvement in the work performed at the premises (NYSCEF Doc No. 71, ¶¶ 13-19). Margolis states that Toll Brothers, Inc. does not have any employees (*id.*, ¶ 14).

Toll Brothers, Inc. was not an owner or a general contractor, and did not exercise any control over any contractor performing work on the project (*id.*, ¶¶ 15-18).

## DISCUSSION

### A. CCJV's Motion for Summary Judgment

CCJV moves for summary judgment dismissing the complaint and all cross-claims against it. After CCJV made its motion, the parties filed a stipulation of discontinuance, discontinuing all claims and cross claims against it with prejudice (NYSCEF Doc No. 77). Accordingly, CCJV's motion is denied as moot.

### B. Plaintiffs' Cross-Motion for Leave to Amend the Summons and Complaint

Plaintiffs move for leave to amend the summons and complaint to add Toll GC, LLC and Toll GC II, LLC as defendants, arguing that their claims against these entities arise out of the same occurrence as against Toll Brothers, Inc. Plaintiffs also contend that Toll GC, LLC and Toll GC II, LLC are "united in interest" with Toll Brothers, Inc.; to wit, that Toll Brothers, Inc. is the parent corporation of Toll GC, LLC and Toll GC II, LLC. According to plaintiffs, Toll GC, LLC and Toll GC II, LLC "were formed for the purpose of performing construction work in New York on behalf of and in the financial interest of" Toll Brothers, Inc. (NYSCEF Doc No. 82, ¶ 28). Further, plaintiffs argue that Toll GC, LLC and Toll GC II, LLC should have known that this action would have been brought against them, but for a mistake by plaintiffs as to the identity of the proper parties. As a result, plaintiffs contend that Toll GC, LLC and Toll GC II, LLC cannot claim any prejudice.

Toll Brothers, Inc. asserts that it is not united in interest with its subsidiaries.

CPLR 203 (f) provides that a "claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the

original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.”

The relation-back doctrine also “allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are ‘united in interest’” (*Buran v Coupal*, 87 NY2d 173, 177 [1995], quoting CPLR 203 [b]). “The sine qua non of the relation[ ]back doctrine is notice, and the requisite notice must be contained in the original pleading” to which relation back is sought (*Lawyers’ Fund for Client Protection of the State of N.Y. v JP Morgan Chase Bank, N.A.*, 80 AD3d 1129, 1130 [3d Dept 2011] [internal quotation marks and citations omitted; brackets in original]).

Under the relation-back doctrine, new parties may be joined as parties after the statute of limitations has expired against them if the plaintiff establishes the following three elements: (1) “the claims against the new defendants arise from the same conduct, transaction, or occurrence as the claims against the original defendants”; (2) “the new defendants are ‘united in interest’ with the original defendants, and will not suffer prejudice due to lack of notice”; and (3) “the new defendants knew or should have known that, but for the plaintiff’s mistake, they would have been included as defendants” (*Higgins v City of New York*, 144 AD3d 511, 512–513 [1st Dept 2016], quoting CPLR 203 [b], [c]).

With respect to the second element – unity of interest – “[t]he classic test” is that “that they stand or fall together and that judgment against one will similarly affect the other” (*Vanderburg v Brodman*, 231 AD2d 146, 147–148 [1st Dept 1997] [internal quotation marks and citation omitted]). “[T]he question of unity of interest is to be determined from an examination of (1) the jural relationship of the parties whose interests are said to be united and (2) the nature

of the claim asserted against them by the plaintiff” (*LeBlanc v Skinner*, 103 AD3d 202, 210 [2d Dept 2012] [internal quotation marks and citation omitted]).

Here, plaintiffs have failed to establish that Toll Brothers, Inc. is united in interest with Toll GC, LLC or Toll GC II, LLC. “The mere existence of a parent-subsidary corporate relationship is insufficient to establish a unity of interest between the two corporations” (*Achtziger v Fuji Copian Corp.*, 299 AD2d 946, 948 [4th Dept 2002], *lv dismissed in part and denied in part* 100 NY2d 548 [2003], *accord Ward v Cross County Multiplex Cinemas, Inc.*, 62 AD3d 466, 467 [1st Dept 2009]). “Related corporations are united in interest only where one corporation is vicariously liable for the acts of the other” (*Scoma v Doe*, 2 AD3d 432, 433 [2d Dept 2003]). “In order for vicarious liability to exist, [t]he parent corporation must exercise complete dominion and control [over] the subsidiary’s daily operations” (*Feschyszyn*, 248 AD2d at 940 [internal quotation marks and citation omitted]). Plaintiffs have not offered any evidence that Toll Brothers, Inc. exercises complete control over Toll GC, LLC and Toll GC II, LLC’s operations, or that the companies “intentionally or not, often blurred the distinction between them” (*Donovon v All-Weld Prods. Corp.*, 34 AD3d 257, 257 [1st Dept 2006]). Although plaintiffs argue that Toll Brothers, Inc. has not provided any corporate governance documents, to support a motion to amend, the “plaintiff must submit evidentiary proof of the kind that would be admissible on a motion for summary judgment” (*Velarde v City of New York*, 149 AD3d 457, 457 [1st Dept 2017]). Plaintiffs have not done so here. Furthermore, plaintiffs only speculate that Toll Brothers, Inc. “maintains control over how [Toll GC, LLC and Toll GC II, LLC] manage their daily business, hire subcontractors, and engage in work at jobsites” (NYSCEF Doc No. 82 ¶ 41), which is insufficient (*see Lisi v Coco*, 31 AD3d 615, 616 [2d Dept 2006] [plaintiffs were not entitled to amend complaint based upon “mere speculation”]).

Accordingly, plaintiffs' motion for leave to amend the summons and complaint to add Toll GC, LLC and Toll GC II, LLC as defendants is denied.

### **C. Toll Brothers, Inc.'s Cross-Motion for Summary Judgment**

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553–554 [1st Dept 2010]). On a motion for summary judgment, "facts must be viewed in the light most favorable to the non-moving party" (*Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 428 [1st Dept 2017] [internal quotation marks and citation omitted]).

Toll Brothers, Inc. moves for summary judgment on the grounds that it was not an owner or general contractor and did not exercise control over any contractor working on the project. Therefore, Toll Brothers, Inc. contends that it cannot be held liable to plaintiffs for common-law negligence or for violations of the Labor Law.

In response, plaintiffs contend that there is a triable issue of fact as to whether Toll Brothers, Inc. exercised sufficient domination and control over Toll GC, LLC and Toll GC II, LLC's daily operations, such that Toll Brothers, Inc. may be held responsible for plaintiff's accident. Plaintiffs maintain that, even if Toll Brothers, Inc. was not listed as the owner or

general contractor, it may be held liable based upon its relationship with its subsidiaries.

Additionally, plaintiffs assert that discovery has not yet commenced, and Toll Brothers, Inc. has not provided any corporate governance documents addressing the relationship between the entities.

Labor Law §§ 240 (1) and 241 (6) impose a nondelegable duty on owners and general contractors (*see Toussaint v Port Auth. of N.Y. & N.J.*, -- NY3d --, 2022 NY Slip Op 01955, \*1 [2022]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]). Liability may also be imposed on those parties who have been delegated the authority to supervise and control the work such that that they become statutory “agents” of the owner and general contractor (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192–193 [1st Dept 2011]).

“When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory ‘agent’ of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an ‘agent’ under sections 240 and 241”

(*Russin*, 54 NY2d at 318.)<sup>1</sup>

Labor Law § 200 is merely a codification of the common-law duty imposed on owners and general contractors to maintain a safe work site (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]). “[A]n implicit precondition to this duty is that the party to be charged with that obligation ‘have the authority to control the activity bringing about

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<sup>1</sup> Plaintiffs only cite Labor Law §§ 200, 240 (1), and 241 (6) in opposition to Toll Brothers, Inc.’s motion for summary judgment (NYSCEF Doc No. 82 at 20).

the injury to enable it to avoid or correct an unsafe condition” (*Rizzuto*, 91 NY2d at 352, quoting *Russin*, 54 NY2d 311, 317 [1981] [emphasis omitted]).

In this case, Toll Brothers, Inc. has submitted uncontroverted evidence that it was not the owner or general contractor on the project. Margolis states that Toll Brothers, Inc. was not the owner or the general contractor on the project (NYSCEF Doc No. 71, ¶¶ 15-16). In addition, Toll Brothers, Inc. has demonstrated that it was not a statutory agent of either an owner or general contractor. Indeed, Margolis states that Toll Brothers, Inc. was not actively involved in any work at the premises (*id.*, ¶ 13). Additionally, Margolis states that Toll Brothers, Inc. did not enter into any agreements for the project and did not control any contractor’s work (*id.*, ¶¶ 14, 17, 19).

Plaintiffs’ argument that Toll Brothers, Inc. exercised sufficient domination and control Toll GC, LLC and Toll GC II, LLC’s daily operations is without merit. It is well settled that a parent corporation’s liability for the conduct of its subsidiary “can never be predicated solely upon the fact of a parent corporation’s ownership of a controlling interest in the shares of its subsidiary” (*Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 163 [1980]).<sup>2</sup> Rather, “there must be direct intervention by the parent in the management of the subsidiary to such an extent that ‘the subsidiary’s paraphernalia of incorporation, directors and officers’ are completely ignored” (*id.* [citation omitted]). Generally, a party seeking to pierce the corporate veil must show: (1) complete domination and control of the subsidiary by the parent with respect to the

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<sup>2</sup> As pointed out by plaintiffs, Toll Brothers, Inc. is a Delaware corporation. Generally, “veil-piercing claims are governed by the law of the company’s state of incorporation” (*Harvardsky Prumyslovy Holding, AS. - V Likvidaci v Kozeny*, 117 AD3d 77, 83 [1st Dept 2014]; *see also Fletcher v AteX, Inc.*, 68 F3d 1451, 1456 [2d Cir 1995]). The First Department has held that “the [veil-piercing] standard is not materially different under Delaware law” (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]; *see also Spinnell v JP Morgan Chase Bank, N.A.*, 59 AD3d 361, 361 [1st Dept 2009], *lv denied* 13 NY3d 713 [2009]). Accordingly, the court applies New York law.

transaction at issue; and (2) that such domination was used to commit a fraud or wrong against the plaintiff that resulted in the plaintiff's injury (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). "A parent company will not be held liable for the torts of its subsidiary unless it can be shown that the parent exercises complete dominion and control over the subsidiary" (*Serrano v New York Times Co., Inc.*, 19 AD3d 577, 578 [2d Dept 2005]). "Factors to be considered in determining whether the owner has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 452 [1st Dept 2013] [internal quotation marks and citation omitted]).

Contrary to plaintiffs' contention, Toll Brothers, Inc.'s 10-K annual report does not show that it abused the privilege of doing business in the corporate form by dominating and controlling Toll GC, LLC and Toll GC II, LLC (*see* NYSCEF Doc No. 82 at 5, 18). Moreover, plaintiffs' speculation is insufficient to raise an issue of fact (*see Potash v Port Auth. of N.Y. & N.J.*, 279 AD2d 562, 563 [2d Dept 2001]).

*Goodspeed v Hudson Sharp Mach. Co.* (105 AD3d 1204 [3d Dept 2013]), relied upon by plaintiffs, is distinguishable. There, the plaintiff was injured while using a "pouch maker" machine manufactured by a parent company's subsidiary, and sued the parent and subsidiary for negligence, strict products liability, breach of warranty and loss of consortium (*id.* at 1204-1205). The Third Department held that there were "issues of fact . . . as to [the parent's] level of control over [its subsidiary]," where the plaintiffs' submissions included deposition testimony, inter-company correspondence, cash-flow guidelines, and performance reviews (*id.* at 1205). Here, by contrast, there is no such evidence.

To the extent that plaintiffs argue that the motion is premature, the court also finds this argument to be unpersuasive. CPLR 3212 (f) provides that “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.” “A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence” (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]; *see also Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614, 615 [2d Dept 1999], *lv dismissed and denied in part* 93 NY2d 956 [1999]).

“In order to avail oneself of CPLR 3212(f) to defeat or delay summary judgment, ‘a party must demonstrate that the needed proof is within the exclusive knowledge of the moving party, that the claims in opposition are supported by something other than mere hope or conjecture, and that the party has at least made some attempt to discover facts at variance with the moving party’s proof.’”

(*River Park Assoc. (1972) L.P. v Richman Plaza Garage Corp.*, 178 AD3d 422, 423 [1st Dept 2019], quoting *Voluto Ventures, LLC v Jenkins & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 [1st Dept 2007]; *see also Leichter v Cambridge Dev., LLC*, 90 AD3d 557, 559 [1st Dept 2011]; *Cruz v Otis El. Co.*, 238 AD2d 540, 540 [2d Dept 2003] [“A party who claims ignorance of critical facts to defeat a motion for summary judgment must first demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover the facts which would give rise to a triable issue”] [internal citation omitted].) Plaintiffs merely speculate as to what discovery might reveal, and do not indicate that they made any attempt to discover whether Toll Brothers, Inc. exercises control over its subsidiaries’ daily operations. Accordingly, summary judgment is not premature.

In light of the above, Toll Brothers, Inc. is entitled to summary judgment dismissing the complaint.

### CONCLUSION

Accordingly, it is

**ORDERED** that the motion (sequence number 003) of defendant Civetta-Cousins JV, LLC for summary judgment dismissing the complaint and all cross-claims against it is denied as moot; and it is further

**ORDERED** that the cross-motion of defendant Toll Brothers, Inc. sued herein as Toll Brothers, Inc. a/k/a Toll GC, LLC a/k/a Toll GC II, LLC for summary judgment dismissing the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

**ORDERED** that the cross-motion of plaintiffs for leave to amend the summons and complaint is denied; and it is further

**ORDERED** that the action is severed and continued against the remaining defendants; and it is further

**ORDERED** that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

**ORDERED** that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the court.

ENTER:



5/11/2022  
DATE

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LOUIS L. NOCK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE