SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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KLEVIS MOCKA

Plaintiff,

- v -

AIMCO 452 EAST 78TH STREET PROPERTY LLC.,

Defendant.

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INDEX NO. 157395/2018

MOTION DATE 09/30/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for SUMMARY JUDGEMENT.

BACKGROUND

This action arises out of personal injuries allegedly sustained by plaintiff, Klevis Mocka, on or about January 11, 2018, at the premises located at 452 East 78th Street, New York, New York (Subject Premises). Plaintiff alleges that he was injured when the basement ceiling of the Subject Premises collapsed onto him. At the time of the accident, plaintiff was employed and carrying out his duties as the superintendent of the Subject Premises.

The parties agree that the issue of whether defendant is an alter ego of plaintiff's employer, and/or whether defendant and plaintiff's non-party employer are both alter egos of their parent company, is dispositive on the issue of whether workers' compensation exclusivity extends and applies to defendant.

PENDING MOTION

Defendant previously moved for summary judgment on January 21, 2021. After the motion was fully briefed, the court (D'Auguste, J) held that " … defendant has submitted

evidence that indicates certain indicia of alter ego status …" but denied the motion without prejudice to permit discovery. Some paper discovery was exchanged, however the parties elected not to conduct depositions.

On April 4, 2022, the action was transferred to this Court.

On August 16, 2022, defendant again moved for summary judgment. The parties have essentially refiled the same motion papers as previously submitted. The motion was fully briefed and marked submitted on September 30, 2022. For the reasons stated below the motion is granted and the action is dismissed.

ALLEGED FACTS

Defendant is a single-purpose entity, established to obtain financing for the Premises. Defendant is a wholly owned subsidiary of AIMCO PROPERTIES. In turn, AIMCO PROPERTIES is a payroll entity and subsidiary of AIMCO.

AIMCO PROPERTIES has a 99% interest in defendant and controls defendant.

Defendant has no employees of its own, does not hold a bank account for the receivables or billable regarding the Subject Premises, and does not manage, operate or maintain the Premises. Rather, all persons responsible for these tasks are employed by AIMCO PROPERTIES

The general liability and property insurance policy concerning the Subject Premises is held by AMICO for the benefit of Defendant and AIMCO PROPERTIES.

The general liability insurance contains a self-insured retention limit of $500,000, which is managed, and where appropriate, paid out by AIMCO and its third-party administrator. Likewise, AIMCO, along with AIMCO PROPERTIES are named insureds and hold an insurance policy for workers' compensation benefits, for the benefit of Defendant.

This policy, too, contained a $500,000 self-insured retention limit, managed and where appropriate, paid out by AIMCO and its third-party administrator.

After suffering injuries in a work-related incident of January 11, 2018, plaintiff sought to recover workers' compensation benefits. Plaintiff's Employee Claim Petition, signed by both him and his counsel states that he was employed by "AIMCO."

Since the date of his alleged accident, plaintiff has been receiving worker's compensation benefits through AIMCO's policy with Chubb, all of which have been paid out pursuant to AIMCO's self-insured retention limit.

Plaintiff now seeks to recover for personal injuries sustained as a result of the accident through the personal injury action asserted against defendant herein. The general liability claim is being defended through AIMCO's self-insured retention limit and any potential award will would be subject to payment by AIMCO under the self-insured retention limit.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007],

citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]).

"On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

Plaintiff's claims are barred as against defendant pursuant to Workers' Compensation Law §§11 and 29(6), since the evidence herein establishes that defendant is an alter ego of plaintiff's direct employer, AIMCO PROPERTIES and that both defendant and AIMCO PROPERTIES were alter egos of AIMCO. The protection against lawsuits brought by injured workers that is afforded to employers by Workers' Compensation Law §§ 11 and 29 (6) also extends to entities that are alter egos of the entity which employs the plaintiff. *Quizhpe v Luvin Constr. Corp*., 103 AD3d 618, 618-619 (2d Dep't 2013). *See also Cappella v. Suresky at Hatfield Lane, LLC*, 55 AD 3d 522 (2d Dep't 2008).

A defendant may meet this burden by presenting proof that the two entities shared corporate officers, "financial management, administrative headquarters, an insurance policy, and a common purpose." *Carty v East 175th St. Hous. Dev. Fund Corp*., 83 AD3d 529, 529 (1st Dep't 2011); *see also Morato-Rodriguez v Riva Constr. Group., Inc*., 88 AD3d 549, 549 (1st Dep't 2011); *Ramnarine v Memorial Ctr. for Cancer & Allied Diseases*, 281 AD2d 218 (1st Dep't 2001).

The evidence must demonstrate that one entity essentially "controls the day-to-day operations of the other" or that the two operate as a single integrated entity. *See Batts v. IBEX Constr., LLC*, 112 AD3d 765, 766-767 (2d Dep't 2013). *See also Quizhpe,* 103 AD3d at 619; *Haines v. Verazzano of Dutchess, LLC*, 130 AD3d 871, 872, 12 NYS3d 906 (2d Dep't 2015).

For example, in *Cappella v Suresky at Hatfield Lane, LLC*, 24 Misc 3d 1225[A], *aff'd* 55 AD 3d 522 (2d Dep't 2008), the Court found that the defendant met its burden of establishing a *prima facie* defense under Workers' Compensation Law §11, by showing: that defendant was formed solely for the purpose of owning the premises; that defendant's sole member, was also the Chairman of the Board of plaintiff's employer; that defendant had no employees and did not have a separate bank account; that there was no written lease agreement between the two entities; that the two entities shared the same liability policy; and that all bills for service and maintenance contracts benefitting defendant were paid by plaintiff's employer.

Similar to the facts and circumstances herein, in *Vasquez v 301 W. 111 Owners LLP*, 2010 NY Slip Op 33195[U], the Court found that the defendant, who owned of the premises where Plaintiff was injured during the course of his employment as a superintendent, was the alter ego of the direct employer of plaintiff and, therefore, entitled to summary judgment pursuant to Workers' Compensation Law §11. In *Vasquez*, as here, the owners did not retain responsibility for any aspects of the day-today operations of the premises and had no functions regarding the premises other than being the title owner of the building. All expenses for the premises were paid by the management company, including the taxes and insurance. The premises had property, general liability, umbrella, and machinery coverage that was obtained by the management company, who was the certificate holder on all insurance policies regarding the premises. Furthermore, the management company had the authority to hire and supervise

employees required for the maintenance of the premises. The Court held the reasoning of *Cappella*, *supra*, that an alter ego relationship existed between an employer and property owner for workers' compensation purposes, was applicable and granted defendant summary judgment.

Likewise, in *Ortega v Noxxen Realty Corp*., 26 AD3d 361, 361-362 (2d Dep't 2006) plaintiff was injured when he fell from a ladder while engaged in the reconstruction of a car wash located next to Gaseteria gas station, plaintiff's employer. Plaintiff commenced an action against the owner of the premises, Noxxen, containing the gas station buildings, which was a wholly owned subsidiary of Gaseteria. The Appellate Division, Second Department found that the owners of the buildings propounded sufficient documentary evidence showing that Noxxen was the alter ego of Gasteria, and that since plaintiff was engaged in the work of Gaseteria at the time of his accident, and had collected workers' compensation benefits, he was barred by the exclusivity provision of Workers' Compensation Law to seek recovery against the property owner.

The evidence herein shows that defendant is a wholly owned subsidiary of AIMCO PROPERTIES, which in turn is a subsidiary of AIMCO. Defendant had no employees of its own, and as a result could not perform any day-to-day operations for the Subject Premises; it had no functions regarding the operation of the Subject Premises, other than being the title owner. AIMCO PROPERTIES operated, maintained, and managed the Subject Premises through its employees, including the plaintiff. Further, the general liability and worker's compensation policies were obtained for the benefit of all three entities.

AIMCO, AIMCO PROPERTIES and defendant shared both insurance policies regarding the Subject Premises. Similarly, the self-insured retention limits of each policy were also shared by the three entities.

Plaintiff's worker's compensation action is currently pending under the caption *Klevis Mocka v. Apartment Investment And Management Company WCB* Case No: G2100773. The funds for both claims are being paid by AIMCO, on behalf of all three entities, and pursuant to its self-insured limits with respect to each policy. The above facts establish that defendant is an alter ego of AIMCO PROPERTIES, and that both entities were alter egos of AIMCO. Funds for the defense and indemnity for each claim are being paid by the same entity: AIMCO.

The Worker's Compensation bar to recovery was specifically intended to prevent the kind of double-dipping sought by the plaintiff here. Accordingly, and pursuant to Workers' Compensation Law §11, plaintiff cannot sustain an independent cause of action for recovery for personal injuries and damages against defendant and collect workers' compensation benefits for his alleged injuries.

WHEREFORE it is hereby:

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, within 20 days from entry of this order, defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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);]; and it is further

ORDERED that this constitutes the decision and order of this court.

11/18/2022
DATE

SABRINA KRAUS, J.S.C.

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