

Pacheco v RCPI Landmark Props., LLC
2022 NY Slip Op 33962(U)
November 22, 2022
Supreme Court, New York County
Docket Number: Index No. 157657/2019
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

ANDRE PACHECO,

Plaintiff,

- v -

RCPI LANDMARK PROPERTIES, LLC, TISHMAN SPEYER
PROPERTIES, L.P., and JULIUS ROEHRS COMPANY,

Defendants.

-----X

INDEX NO. 157657/2019

MOTION DATE 08/05/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion to/for AMEND CAPTION/PLEADINGS/DISMISS.

In this action to recover damages for personal injuries, arising from a slip and fall accident, the defendants RCPI Landmark Properties, LLC (Landmark), and Tishman Speyer Properties, L.P. (Tishman) (together the Landmark defendants), move (a) pursuant to CPLR 3025(b) for leave to amend their answer so as to assert, as an affirmative defense, that the action is barred insofar as asserted against them by virtue of the exclusivity provisions of Workers' Compensation Law §§ 11 and 29(6), and thereupon (b) pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them on that ground. Their co-defendant, Julius Roehrs Company (JRC), opposes the motion. The plaintiff also opposes the motion, and cross-moves to compel the Landmark defendants to preserve all items of discovery that have been ascertained and exchanged, and for the imposition of sanctions upon them in the amount of \$10,000.00. The Landmark defendants' motion is granted to the extent that they are granted leave amend their answer to assert the affirmative defense of Workers' Compensation Law exclusivity on behalf of Tishman only and, upon amendment, summary judgment is awarded to Tishman dismissing the complaint and

cross-claims insofar as asserted against it. The motion is otherwise denied. The plaintiff's cross motion is denied.

The plaintiff commenced this action on August 6, 2019. On September 5, 2019, the Landmark defendants served and filed their answer. On January 6, 2020, JRC served and filed its answer. The parties appeared for a preliminary conference on February 4, 2020, and thereafter conducted discovery until the plaintiff filed the note of issue on February 10, 2022. On March 2, 2022, the Landmark defendants filed the instant motion. On May 24, 2022, the cross motion and opposition were filed by the plaintiff and JRC, respectively.

In his complaint, the plaintiff alleged that, on December 18, 2018, the Landmark defendants owned, operated, maintained, and controlled the premises located at 30 Rockefeller Plaza, New York, New York (the premises). The plaintiff also alleged that, prior to and including that date, JRC had been retained by the Landmark defendants and given permission to deliver plants and flowers to the premises. The plaintiff alleged that, since 2001, he was employed by Tishman as a private patrol officer for the premises. He further alleged that, on December 18, 2018, JRC delivered plants and/or flowers to the sub-basement of the premises, that, in the course of the delivery, water spilled from the plants and/or flowers onto the floor, and that he later slipped and fell on that water. The plaintiff asserted that the Landmark defendants had actual and constructive notice of the spill, but failed to remedy it. Finally, the plaintiff alleged that the Landmark defendants failed to display any warning signs referable the dangerous condition, and to place barricades around the spill.

In support of their motion, the Landmark defendants submitted the pleadings and the affidavit of Michael B. Benner, who served as vice president and secretary for Landmark, Tishman, and a related company known as RCPI Holdco, LLC (Holdco). They also submitted Landmark's Limited Liability and Management and Leasing agreements and Tishman's general insurance and workers' compensation policies, as well as the plaintiff's employment forms and paystubs, an incident report, the plaintiff's Workers' Compensation Board records, the

deposition transcripts of the plaintiff and Tishman's security manager, John Tuohy, the note of issue, and a proposed amended answer. The Landmark defendants contended that Tishman was the plaintiff's special employer, and that the exclusivity provisions of the Workers' Compensation Law thus barred his action against Tishman. They further argued that, while Holdco was the plaintiff's general employer, Landmark was the alter ego of both Tishman and Holdco, and, thus, the Workers' Compensation Law barred the plaintiff's claims against Landmark as well. In opposition, the plaintiff submitted the New York State Department of State corporate filings for Landmark, Tishman, and Holdco, his employee identification cards, his own affidavit, and a 2012 affidavit from Benner in another person's prior action against Landmark and Tishman. In its opposition, JRC submitted a copy of the plaintiff's affidavit of service of the summons and complaint referable to service upon Tishman and Landmark, the request for judicial intervention, and a copy of this court's January 26, 2022 status conference order.

Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment, provided that the evidence submitted in support of the motion indicates that the proposed amendment may have merit (see CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755, 757 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552, 553 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809, 811 [1st Dept 2008]). The court must examine the sufficiency of the proposed amendment only to determine whether the proposed amended pleading is "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; see *Hill v 2016 Realty Assoc.*, 42 AD3d 432, 433 [2d Dept 2007]).

Here, the court concludes that no prejudice or surprise would arise from permitting the Landmark defendants to amend their answer so as to assert the Workers' Compensation Law exclusivity bar on behalf of Tishman. Both the plaintiff and JRC were aware that the plaintiff received workers' compensation benefits (see *Caceras v Zorbas*, 74 NY2d 884, 885 [1989]

[plaintiff failed to make a showing of surprise or prejudice, and could not even claim such surprise since he was aware of his own employment status and received workers' compensation benefits]). "While the exclusivity of workers' compensation as a remedy may be waived, such waiver is accomplished only by a defendant ignoring the issue to the point of final disposition itself" (*Burgos v City of NY*, 98 AD2d 788, 788 [2d Dept 1983] [internal quotation marks omitted]), a situation that is not present here. Moreover, the evidence submitted in conjunction with the Landmark defendants' motion demonstrated the potential merit of the amendment with respect to Tishman, as discussed below.

Additionally, while the Landmark defendants sought leave to amend the answer after the note of issue was filed, that fact is not dispositive (*see Chen v 111 Mott LLC*, 200 AD3d 594, 595 [1st Dept 2021]; *Torres v New York City Tr. Auth.*, 78 AD3d 419 [1st Dept 2010]; *Lanpont v Savvas Cab Corp.*, 244 AD2d 208, 210-211 [1st Dept 1997]). Thus, the Landmark defendants are granted leave to amend their answer so as to assert the Workers' Compensation bar on behalf of Tishman.

As discussed below, however, there is no merit to the Landmark defendants' contention that Landmark also is immunized from suit by the Workers' Compensation Law. Hence, their answer may not be amended to permit Landmark to assert the affirmative defense of Workers' Compensation Law exclusivity.

The court now turns to the Landmark defendants' request to award them summary judgment. It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see CPLR* 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega*

v Restani Constr. Corp., 18 NY3d 499, 503 [2012]). In other words, “[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

“The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even ‘arguable’” (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; see *Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet its burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. It must affirmatively demonstrate the merit of his or her defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

Workers' Compensation Law §§ 11 and 29(6) respectively provide, in pertinent part that,

“[t]he liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom ...”

and,

“[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in case of death his or her dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ The limitation of liability of an employer set forth in section eleven of this article for the injury or death of an employee shall be applicable to another in the same employ, the employer's insurer, any collective bargaining agent of the employer's employees or any employee of the employer's insurer or such

collective bargaining agent (while acting within the scope of his or her employment).”

Thus, an injured employee’s sole remedy against his or her employer is the recovery of benefits under the Workers’ Compensation Law (see *Billy v Consol. Mach. Tool Corp.*, 51 NY2d 152, 156 [1980]). The exclusivity provisions, however, also immunize entities such as special employers from tort liability (see *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 358 [2007]). A special employee is defined as “one who is transferred for a limited time of whatever duration to the service of another” (*id.* at 359, quoting *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]).

“Although no one factor is determinative, a significant and weighty feature in deciding whether a special employment relationship exists is who controls and directs the manner, details and ultimate result of the employee’s work – in other words, who determines all essential, locational and commonly recognizable components of the [employee’s] work relationship”

(*Fung v Japan Airlines Co., Ltd.*, 9 NY3d at 359 [internal quotation marks omitted]). Other factors that the court must consider include the identity of the entity that is responsible for the payment of wages, which entity has the right to discharge the employee, and whether the work being performed was in furtherance of the special or general employer’s business (see *Franco v Kaled Mgt. Corp.*, 74 AD3d 1142, 1142-1143 [2d Dept 2010]).

Moreover, the exclusivity provisions not only apply to employers and special employers, but also to their agents that exercise control over an employee (see *Clifford v Plaza Hous. Dev. Fund Co., Inc.*, 105 AD3d 609, 610 [1st Dept 2013]), and to entities that are alter egos of the employer (see *Moses v B & E Lorge Family Trust*, 147 AD3d 1045, 1046 [2d Dept 2017]; *Haines v Verazzano of Dutchess, LLC*, 130 AD3d 871, 872 [2d Dept 2015]; *Batts v IBEX Constr., LLC*, 112 AD3d 765, 766 [2d Dept 2013]). “A defendant moving for summary judgment based on the exclusivity defense of the Workers’ Compensation Law under this theory must show, prima facie, that it was the alter ego of the plaintiff’s employer” (*Quizhpe v Luvin Constr. Corp.*, 103 AD3d 618, 619 [2d Dept 2013]). To establish itself as the alter ego of the plaintiff’s

employer, a moving defendant must demonstrate that one of the relevant entities controls the other or that the two operate as a single integrated entity (see *id.*). “A mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other” (*Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 595 [2d Dept 2010]).

Through its submissions, Tishman has established, prima facie, that it is the plaintiff's special employer. Tishman has demonstrated that it is the employer named on both the plaintiff's employment application forms and the Workers' Compensation Board records. Tishman has also shown that its insurance carrier issued the workers' compensation payments to the plaintiff and that the plaintiff was supervised by a Tishman employee, Tuohy, at the time of the alleged accident. In addition, the plaintiff testified at his deposition that, notwithstanding the fact that he was paid by Holdco, and that his paystubs revealed that he was paid by Holdco, he actually worked for Tishman Speyer Properties, L.P., at the time of the alleged accident.

Consequently, in opposition to the Landmark defendants' showing as to Tishman, the plaintiff failed to raise a triable issue of fact. In fact, the plaintiff submitted employee identification cards from 2017 and 2018 that listed Tishman as his employer. Furthermore, he submitted an affidavit attesting that he has been employed by Tishman for 19 years, and that he checks in for each workday with Tishman. He attested that he wore a uniform and used equipment provided by Tishman to carry out his duties, and that Tishman supervisors met with him at the beginning of his shifts to provide him with his daily assignments. He further attested that the same Tishman supervisors had the power to discipline him and issue warnings, if necessary. Finally, he averred that he received overtime work assignments from a Tishman employee in its control center. Thus, the plaintiff essentially has conceded that Tishman directed and controlled the manner and details of his work. In opposition, JRC also failed to raise triable issues of fact regarding Tishman's role as the plaintiff's special employer.

Accordingly, upon amendment of the Landmark defendants' answer, Tishman must be awarded

summary judgment dismissing the complaint and cross-claims insofar as asserted against it on the grounds that it was the plaintiff's special employer and that his claims against it thus are barred by the exclusivity provisions of the Workers' Compensation Law.

The Landmark defendants, however, failed to make a prima facie showing that Landmark is the alter ego of either Tishman or Holdco. To be an alter ego for the purposes of the exclusivity defense of the Workers' Compensation Law, Landmark was required to show that either it, Tishman, or Holdco controlled the day-to-day activities of any of the other entities, or that they operated as a single integrated entity. Landmark admitted that it has no independent employees, but averred that it was exclusively "managed" by officers and staff employed by Holdco and Tishman. Under this dynamic, Landmark did not direct or control any employees or daily activities. Moreover, Landmark could have hired its own employees, but chose not to. While Holdco and Tishman officers and staff may exclusively have "managed" Landmark, Benner did not describe any "management" activities that these officers or employees performed on behalf of Landmark. The premises are managed by Tishman, rather than by Landmark itself, while payroll and benefits of Tishman's employees at the premises are overseen by Holdco, rather than by Landmark itself. In fact, Landmark's submissions show that its only function, as it were, was passively to own the premises at issue, while Tishman actively managed the property, including hiring and controlling employees such as the plaintiff, and Holdco paid those employees. In other words, Landmark did not have any day-to-day operations that could be managed by anyone, let alone by Tishman or Holdco. Each of the three related entities had and has a different purpose, and each was created to exist as a separate corporate entity for a particular purpose and reason. Thus, this structure "should not lightly be ignored at their behest, in order to shield one of the entities they created from . . . common-law tort liability" (*Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1220 [2d Dept 2019], quoting *Buchner v Pines Hotel*, 87 AD2d 691, 692, [3d Dept 1982]).

In his affidavit, Benner asserted that Landmark, Holdco, and Tishman have the same corporate officers, including himself, as well as common management, a common human resources department, and a common payroll department. He also asserted that the three entities share common general insurance policies and workers' compensation insurance, and that Holdco pays all taxes for Landmark. The only documentary proof provided to further show these commonalities, however, consisted of the general insurance and workers' compensation insurance policies. In any event, those additional proofs would not be sufficient to establish that Landmark was an alter ego of either Tishman or Holdco, since it would remain an owner without any employees under its control or day-to-day operations to conduct. The court recognizes that the three entities are no doubt related, but this relatedness is insufficient, as the Landmark defendants have not demonstrated that one of the entities controls the day-to-day operations of any other (see *Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d at 595), as opposed to providing services under contract to one of the other entities.

Landmark also asserted and established that it is a wholly owned subsidiary of Holdco, but this fact, in and of itself, does not make Landmark an alter ego of Holdco. As a general rule, a parent corporation is not liable for the acts of a subsidiary (see *McCloud v Bettcher Indus., Inc.*, 90 AD3d 1680, 1681 [4th Dept 2011]). Indeed, liability can never be predicated solely upon the fact that a parent corporation owns a controlling interest in the shares of its subsidiary (see *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d at 163; *McCloud v Bettcher Indus., Inc.*, 90 AD3d at 1681; *Lowendahl v Baltimore & O.R.C.*, 247 App Div 144, 155 [1st Dept 1936], *affd* 272 NY 360 [1936]). Even complete ownership of a subsidiary's stock is insufficient, by itself, to pierce the corporate veil (see *Oxbow Calcining USA, Inc. v American Indus. Partners*, 96 AD3d 646, 649 [1st Dept 2014]). Thus, the parent-subsidary relationship between Holdco and Landmark is insufficient to impute the liability of one to the other.

In fact, the relationship between Landmark and Holdco does not even seem to be one approaching privity; rather, it appears that a contractual relationship existed between Landmark,

as a property owner without any employees or any additional function, and Tishman, as the manager of the subject premises, while Tishman had a separate contractual relationship with Holdco, pursuant to which Holdco calculated, passed through, oversaw, and paid the salary and benefits of Tishman's employees. Hence, for the purposes of the exclusivity defense of the Workers' Compensation Law, Landmark, Tishman, and Holdco are independent entities and, thus, the Landmark defendants may not amend their answer to assert Workers' Compensation exclusivity as an affirmative defendant on behalf of Landmark. As a consequence, Landmark also may not be awarded summary judgment dismissing the complaint and cross-claims insofar as asserted against it on that ground, regardless of the sufficiency of the opposing papers (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503).

Inasmuch as the court has already deemed that the Landmark defendants' motion for leave to amend their answer, to the extent limited by this order, is not prejudicial to the plaintiff or JRC, the court must deny that branch of the plaintiff's cross motion seeking sanctions against the Landmark defendants for moving for such relief at this stage of the litigation. That branch of the plaintiff's cross motion directing the Landmark defendants to preserve all discovery that has been ascertained and exchanged also is denied, as the plaintiff has not established that the Landmark defendants have destroyed or plan to destroy any of the discovery materials already obtained in the course of this litigation (see *Duluc v AC & L Food Corp.*, 119 AD3d 450, 451-452 [1st Dept 2014]; CPLR 3126).

Accordingly, it is

ORDERED that the motion of the defendants RCPI Landmark Properties, LLC, and Tishman Speyer Properties, L.P., is granted to the extent that they may serve an amended answer asserting the defense of Workers' Compensation Law exclusivity on behalf of the defendant Tishman Speyer Properties, L.P., and, upon amendment, the defendant Tishman Speyer Properties, L.P., is awarded summary judgement dismissing the complaint and all cross-claims insofar as asserted against it, and the motion is otherwise denied; and it is further,

ORDERED that the plaintiff’s cross motion is denied; and it is further,

ORDERED that, on the court’s own motion, the action is severed as against the defendant Tishman Speyer Properties, L.P.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint and all cross-claims insofar as asserted against the defendant Tishman Speyer Properties, L.P.

This constitutes the Decision and Order of the court.

11/22/2022
DATE



JOHN J. KELLEY, J.S.C.

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