

**Hammond v Spoilers & Sundries Promotions, Inc.**

2022 NY Slip Op 34771(U)

January 27, 2022

Supreme Court, Queens County

Docket Number: Index No. 717462/20

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DARRELL L. GAVRIN
Justice

IA PART 27

MICHAEL HAMMOND and THERESA HAMMOND,

Index No. 717462/20

Plaintiffs,

Motion

- against-

Date

August 17, 2021

SPOILERS & SUNDRIES PROMOTIONS, INC. and
LOGAN BUS CO., INC.,

Motion

Cal. No. 6 & 7

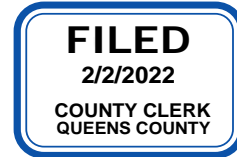
Defendants.

Motion

Seq. No. 1 & 2

SPOILERS & SUNDRIES PROMOTIONS, INC.,

Third-Party Plaintiff,



- against -

LOGAN BUS CO., INC.,

Third-Party Defendant.

The following papers numbered below read on the motion (Seq. 1) by defendant, Spoilers and Sundries Promotions, Inc. for summary judgment dismissing the complaint and all cross claims against it; and motion (Seq. 2) by defendant, Logan Bus Co. for summary judgment dismissing the complaint and cross claims against it.

Notice of Motion (Seq. 1) - Affirmation - Exhibits -

Papers

Numbered

Memorandum of Law .....

EF 5-17, 43

Affirmation in Opposition - Exhibits .....

EF 49-56

Reply Affirmation - Exhibit .....

EF 57-58

Notice of Motion (Seq. 2) - Affirmation - Exhibits.....

EF 18-42

Affirmation in Opposition - Exhibits .....

EF 49-56

Reply Affirmation .....

EF 59-61

Upon the foregoing papers, it is ordered that the motions are determined as follows:

## I. Motion by Spoilers & Sundries Promotions, Inc

### A. Facts and Allegations

Defendant, Spoilers & Sundries Promotions, Inc. (Spoilers) owned a large yard located at 153-82 Conduit Avenue, Jamaica, Queens, which Spoilers leased to defendant, Logan Bus Company (Logan) by an oral agreement with Richard Logan made in 2003. Spoilers alleges that the agreement obligated Logan to pay rent and to make any repairs or maintenance required at the property. Spoilers alleges that it did not make repairs or otherwise maintain the property. The yard is a dirt parcel of property that allegedly required no maintenance.

In the yard, Spoilers erected a large billboard sign on a pole approximately fifty feet tall with a circumference of three to four feet. A wooden four by four, eight foot long railroad tie protected the base of the pole. The wooden four by four was once part of a square that prevented bus drivers from hitting the pole, but by the relevant time, only two pieces of the square remained. Spoilers maintained possession of the pole and billboard which generated it revenue.

Spoilers did not visit the property. Mohammed Malik, the sole principal of Spoilers, received no complaints about the pole or anything near it. Malik never saw the wooden four by four that protected the base of the pole, nor did he know the purpose of the wood, which Spoilers allegedly did not place around the pole at the time of its installation, completion, or any time thereafter.

The yard held hundreds of full-sized school buses for which there were no assigned parking spots. Plaintiff, Michael Hammond (“plaintiff”) was employed as a bus driver for Lorissa Bus Co. At the end of his shift on November 12, 2014, plaintiff returned to the yard and received directions about where to park the bus. Plaintiff allegedly had never parked at the location and allegedly had no knowledge that it was near the wooden four by four that protected the base of the pole. After completing his post-route check of the bus, he used the steps of the bus to leave it, looking straight out of the bus. As he stepped to the ground, his foot landed on the wooden four by four, causing his foot to twist and fracture.

### B. Discussion

“[T]he 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 \*\*\*.” (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986].) The opponent of a motion for summary judgment has the burden of producing evidence showing that there is an issue of fact which must be

tried or of demonstrating the existence of a defense warranting the denial of summary judgment. (*See id.*) An out-of-possession landlord that (1) retained no control over a premises where the plaintiff sustained injury, (2) is not obligated to maintain or repair the premises, and (3) and has no liability toward the plaintiff. (*See, Mitaras v. Pickman Realty Corp.*, 60 AD3d 827 [2d Dept 2009]; *O'Connell v. L.B. Realty Co.*, 50 AD3d 752 [2d Dept 2008].) In the case at bar, defendant, Spoilers did not transfer control over the pole itself to defendant, Logan, and there are issues of fact concerning whether defendant, Spoilers transferred control over the wood enclosure around the pole.

Further, “a landlord may be subject to liability for injuries resulting from the condition of premises, even though such injuries were sustained after the landlord had divested himself or herself of possession and control, where prior to the transfer of possession and control the landlord had created or maintained the dangerous condition or defect that caused the injuries \*\*\*.” (85 NY Jur 2d, Premises Liability, § 161). An exception to the general rule that an out-of-possession landlord has no liability for injuries occurring on the premises exists where the landlord has affirmatively created a dangerous condition. In the case at bar, there is an issue of fact concerning whether defendant, Spoilers placed the low wooden barrier around the pole. There are conflicting inferences that can be drawn as to who placed the railroad ties around the pole. The railroad ties benefitted defendant, Spoilers by protecting the pole, but the railroad ties also benefitted defendant, Logan by protecting the buses. “It is well settled that where the facts permit conflicting inferences to be drawn, summary judgment must be denied\*\*\*.” (*Myers v. Fir Cab Corp.*, 64 NY2d 806 [1985]; *Collado v. Jiacono*, 126 AD3d 927 [2d Dept 2015].)

“A landowner has a duty to maintain his or her premises in a reasonably safe manner; however, there is no duty to protect or warn against an open and obvious condition that is not inherently dangerous \*\*\*.” (*McGrath v. Oyster Bay Visiting Nurse Ass'n, Inc.*, 84 AD3d 894, 895 [2d Dept 2011]; *Capasso v. Vill. of Goshen*, 84 AD3d 998 [2d Dept 2011].) “While generally a question of fact, [f]or a condition to be open and obvious as a matter of law, it must be one that could not be overlooked by any observer reasonably using his or her ordinary senses.” “A defendant has constructive notice of a dangerous condition when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it \*\*\*.” (*Fortune v. W. Beef, Inc.*, 178 AD3d 671, 672 [2d Dept 2019]; *Skerrett v. LIC Site B2 Owner, LLC*, 199 AD3d 956 [2d Dept. 2021].)

In the case at bar, plaintiff was directed to park in a spot that was unfamiliar to him, he allegedly had no knowledge of the wood placed in the middle of the large lot, and he allegedly did not expect to encounter a low, wooden barrier in the middle of the parking lot. It is true that “[g]enerally a wheel stop or concrete parking lot divider which is clearly visible presents no unreasonable risk of harm \*\*\*.” (*Miller v. Costco Wholesale*

*Corp.*, 125 AD3d 828, 829 [2d Dept 2015] [internal quotation marks and citations omitted].) However, the instant case involves an allegedly unexpected structure in the middle of a large yard that may not have been clearly visible to plaintiff as he stepped out of the bus looking straight ahead. Therefore, there is an issue of fact concerning whether plaintiff sustained an injury because of his own conduct in failing to avoid an open and obvious defect. (See, *Adsmond v. City of Poughkeepsie*, 283 AD2d 598 [2d Dept 2001].) Further, an issue of fact exists as to whether defendant, Spoilers had actual or constructive notice of the allegedly dangerous condition created by the low wooden barrier.

## II. Motion by Logan Bus Co.

### A. Facts and Allegations

Defendant, Logan moves for summary judgment and contends that Lorissa Bus Company, plaintiff's employer is its alter ego, and that, as a result, Workers' Compensation Law bars plaintiff from bringing the action against it.

In support, defendant, Logan submitted deposition testimony and affidavit of Corey Muirhead, its Vice-President, Workers' Compensation policy from Hartford Insurance company. Muirhead testified that there were several companies or corporations under the Logan Transportation umbrella and that the business structure had been created because of the nature of the work and contracts with the Department of Education. Special education or general education students potentially required different types of buses, and the unions would cause bus companies to get different contracts. Defendant, Logan would file one tax return for employee taxes based upon its existence as a Professional Employment Organization (PEO). There was one payroll tax payment made on behalf of all of the entities under the PEO. A central entity, Logan Payroll Systems issued the checks, although the checks had individual company names on them.

Muirhead, in his affidavit, stated that Logan Bus Company, owned by the Logan family, which also owned the Lorissa Bus Company, has its primary place of business at 97-14 Atlantic Avenue, Ozone Park, New York; that employees at that location service all of the companies in the Logan group; and that Logan Payroll Services is the parent of the bus companies. Muirhead further stated that there is one General Manager, one Chief Financial Officer and common Vice Presidents for all of the Logan Transportation entities; that the Logan Companies operate as a PEO, which provides human resources, tax services, administrative services, and regulatory compliance services for all of the Logan entities; and that common healthcare coverage is provided for all of the Logan companies. Muirhead also stated that at the yard where plaintiff sustained his injury, are employees of Lorissa Bus Company, Logan Bus Company, Grandpa's Bus Company and Bobby's Bus Company— all Logan companies; that the various Logan companies at the

yard use the same dispatchers, and the drivers are given common training; and that vehicles are used interchangeably among the companies and maintained by common employees. Muirhead concluded that “there is no distinction made between Lorissa and Logan other than for the union under which Lorissa would operate and the nature of the students who would be transported.”

### B. Discussion

As a general rule, the only remedy available to an employee injured in the course of employment against his employer is recovery under the Workers’ Compensation Law. (*See*, Workers’ Compensation Law §§ 11, 29 [6]; *Billy v. Consolidated Mach. Tool Corp.*, 51 NY2d 152 [1980]; *Clarke v. First Student, Inc.*, 160 AD3d 921 [2d Dept 2018].) Workers’ Compensation Law § 29 (6) states that “[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee.” (*See. Isabella v. Hallock*, 22 NY3d 788 [2014]; *Weiner v. City of New York*, 84 AD3d 140 [2d Dept 2011].) “The exclusive remedy provisions also bar employees from seeking damages from ‘alter egos’ of their employers. The alter ego rule applies when one of the entities in question controls the other or when the two entities operate as a single integrated entity .” (*Clarke v. First Student, Inc.*, 160 AD3d at 922 [citations omitted].)

In the case at bar, defendant, Logan has established, *prima facie* that it and Lorissa Bus Company are alter egos of each other and that the two companies “operate as a single integrated entity.” (*See, Clarke v. First Student, Inc.*, 160 AD3d at 922.) Defendant, Logan submitted evidence that it was the only owner and manager of the limited liability company that employed plaintiff, that plaintiff’s employer was formed to provide bus drivers for defendant’s pupil transportation business, and that the two entities shared the same Workers’ Compensation insurance policy (*See, Crespo v. Pucciarelli*, 21 AD3d 1048 [2d Dept 2005] [both companies had common offices and employees, the vehicles used in their bus businesses were shared by their common employees, and the same individual served as president of both companies and president and chief executive officer of their common parent corporation].) Defendant, Logan demonstrated that it, Lorissa Bus Co., and other entities in the Logan group have the following in common: ownership, management, general liability insurance, Workers’ Compensation insurance, health insurance, payroll, payroll tax, dispatchers, and maintenance workers. In opposition, plaintiff failed to submit evidence sufficient to raise a triable issue of fact concerning whether the alter ego doctrine is available to defendant, Logan. Therefore, defendant, Logan is entitled to summary judgment dismissing the plaintiffs’ complaint against it.

Defendant, Spoilers commenced a third-party action against defendant, Logan for (1) contribution and/or indemnity as the first cause of action, (2) breach of contract to procure insurance as the second cause of action, and (3) contribution and indemnity based

on the failure to maintain the yard as the third cause of action. Defendant, Logan moves to dismiss the causes of action raised against it.

In regard to the first cause of action, third-party claims for indemnification and contribution against employers are prohibited by Workers' Compensation Law § 11 unless a third-party plaintiff can show that the employee sustained a "grave injury" or that a written agreement provides for the right to contribution and indemnification. (*See, Maxwell v. Rockland Cty. Cmty. Coll.*, 78 AD3d 793 [2d Dept 2010]; *05 Bedford Ave. Dev. Corp. v. New Metro Const., Ltd.*, 26 AD3d 408 [2d Dept 2006].) In the case at bar, defendant, Logan has asserted without contradiction that plaintiff's bill of particulars does not allege a grave injury. Therefore, defendant, Logan is entitled to summary judgment dismissing the first cause of action for contribution and/or indemnity asserted against it.

A cause of action for breach of contract to procure insurance differs from causes of action for contractual and common-law indemnification. (*See, Kinney v. G. W. Lisk Co., Inc.*, 76 NY2d 215 [1990].) Defendant, Logan failed to make a *prima facie* showing that it is entitled to summary judgment dismissing the second cause of action for breach of contract asserted against it.

The third cause of action is the same in nature as one for contribution and indemnity, possibly intended to be contractual in nature. To the extent that the third cause of action was intended to be for common-law contribution and indemnity arising from a failure to maintain the yard, the third cause of action is barred by the provisions of the Workers' Compensation Law. Therefore, defendant, Logan is entitled to summary judgment dismissing the third cause of action.

In conclusion, the motion by defendant, Spoilers for summary judgment, is denied. The branch of the motion by defendant, Logan for summary judgment dismissing the complaint as against it, is granted. The branch of the motion by defendant, Logan for summary judgment dismissing the claims asserted against it by defendant, Spoilers is granted to the extent that the first and third causes of action asserted in the third-party complaint are dismissed.

Dated: January 27, 2022

  
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DARRELL L. GAVRIN, J.S.C.

