

Guerrero v 2120 Tiebout LLC.
2022 NY Slip Op 35150(U)
March 15, 2022
Supreme Court, Bronx County
Docket Number: Index No. 21881/2019E
Judge: Kenneth L. Thompson, Jr.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 _____ X

PLATON ORTEGA GUERRERO,

Index No: 21881/2019E

Plaintiff,

-against-

DECISION AND ORDER

2120 TIEBOUT LLC., and "JOHN DOE", the name
being fictitious, the person intended being the
superintendent,

Present:

HON. KENNETH L. THOMPSON, JR.

Defendants

_____ X

The following papers numbered 1 to read on this motion for summary judgment

No On Calendar of January 31, 2022

PAPERS

Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----motion sequence #1 NYSCEF

Answering Affidavit and Exhibits-----motion sequence #1 NYSCEF

Replying Affidavit and Exhibits-----motion sequence #1 NYSCEF

Memorandum of Law-----motion sequence #1 NYSCEF

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, Tiebout LLC, (Tiebout), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. This action arose as a result of personal injuries sustained by plaintiff when he was bitten by a dog owned by the superintendent's daughter.

Tiebout seeks to dismiss this action on grounds that Worker's Compensation is the exclusive remedy for plaintiff's injuries. It is undisputed that plaintiff received Worker's Compensation benefits under a policy maintained by both Tiebout and City Skyline Realty Inc., (City Skyline).

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 (see *Quizhpe v Luvin Constr. Corp.*, 103 AD3d at 619; *Cappella v Suresky at Hatfield Lane, LLC*, 55 AD3d at 522-523; *Ortega v Noxxen Realty Corp.*, 26 AD3d 361, 362 [2006]). A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two

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operate as a single integrated entity (*see Quizhpe v Luvin Constr. Corp.*, 103 AD3d at 619; *Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d at 595; *Cappella v Suresky at Hatfield Lane, LLC*, 55 AD3d at 523).

“A parent corporation may be deemed to be an employer of an employee of a subsidiary corporation for Workers' Compensation purposes if the subsidiary functions as the alter ego of the parent” (*Dennihi v Episcopal Health Servs.*, 283 AD2d 542, 543 [2001]; *see Ploszaj v Cooper Tank & Welding Corp.*, 213 AD2d 385 [1995]). However, 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 (*see Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d at 595; *Constantine v Premier Cab Corp.*, 295 AD2d 303, 304 [2002]; *Dennihi v Episcopal Health Servs.*, 283 AD2d at 543).

(*Batts v. IBEX Const., LLC*, 112 A.D.3d 765, 766–67 [2nd Dept 2013]).

Plaintiff was supervised by the superintendent of the building, and both were employed by nonparty, City Skyline. City Skyline managed the apartment building owned by Tiebout. Pursuant to an operation and management agreement between City Skyline and Tiebout, the “Owner [Tiebout] hereby grants the Manager [City Skyline] the exclusive right to rent, lease, operate, manage and improve the value of the property known as 2120 Tiebout Avenue, New York, New York.” The operation and management agreement, was signed by Doug Peterson, (Peterson), on behalf of both Tiebout and City Skyline. Peterson is the president of City Skyline and the managing member of Tiebout. Peterson avers that Tiebout does not have any employees and that City Skyline created Tiebout for the sole purpose of ownership of the subject apartment building. Peterson further avers that City Skyline controls Tiebout, and City Skyline controls the day-to-day operations of the subject apartment building. The affidavit of Peterson is consistent with the operation and management agreement. Under the evidence submitted by defendant, City Skyline and Tiebout were alter egos and City Skyline

controlled the day to day operation at Tiebout's property. Tiebout had no employees with which to control the day to day operation.

Plaintiff argues that the motion is premature pursuant to 3212 (f) as depositions and other discovery has not been conducted.

We disagree with the defendant that the failure to present evidentiary facts should be excused pursuant to CPLR 3212(f) on the ground that the facts needed are exclusively within the knowledge of the plaintiff. Here, the action was pending for over a year before the motion for summary judgment was made, and the defendant failed to avail itself of any opportunities to obtain disclosure of such facts (see, *Stevens v Hilmy*, 185 A.D. 2d 840; *Yu v Forero*, 184 A.D. 2d 506; 4 *Weinstein-Korn-Miller*, NY Civ Prac ¶ 3212.18)."

(*Hanneford Circus, Inc., v Cabar Circus*, 201 A.D.2d 456 [2nd Dept. 1994]).

Plaintiff not only did not demand discovery until July 2, 2020, two years and four months after the commencement of this action, plaintiff did not respond to defendant's discovery demands until two years and two months after defendant demanded the discovery. While the pandemic provides a reasonable excuse for a cessation of discovery for a limited period of time, the executive orders of the Governor tolled deadlines due to the pandemic from March 20, 2020, to November 3, 2020, for a total of 228 days. Subtracting the tolling time from plaintiff's delay in pursuing discovery still leaves plaintiff with over a year of delay. Moreover, plaintiff has failed to show that some of the discovery it seeks, such as whether there were other employees in the building, is exclusively within the knowledge of defendant and not within plaintiff's knowledge.

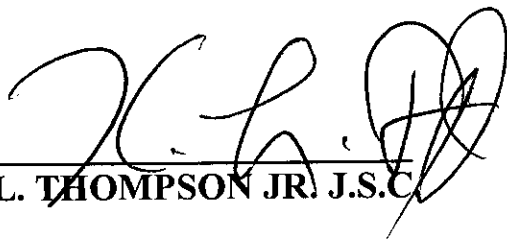
Accordingly, defendant's motion is granted and the plaintiff's complaint is

hereby dismissed.

The foregoing constitutes the decision and order of the Court.

The Clerk is directed to enter judgment accordingly.

Dated: 3/15/2022



KENNETH L. THOMPSON JR. J.S.C.