SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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DAIDRE MCKENZIE,

Plaintiff,

-against-

CROTHALL HEALTHCARE INC., NYC HEALTH & HOSPITALS CORPORATION, and CITY OF NEW YORK,

Defendants.

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Index # 528300/2021

**Decision and Order**

Motion Seq. #s 2 and 3

**HON. LISA S. OTTLEY**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of these Notice of Motions for Summary Judgment submitted on November 18, 2024.

| Papers | Numbered |
|---|---|
| Notice of Motion and Affirmation | 1, 2 [Exh. A-D]; 7, 8 [Exh. A-D] |
| Affirmation/Affidavit in Opposition | 4, 5 [Exh. A-B]; 10, 11 [Exh. A-B] |
| Reply Affirmation | 6; 12 |
| Memoranda of Law | 3, 9 |

Plaintiff, Daidre Mckenzie, commenced this action due to a slip and fall that occurred on November 1, 2020, while she was working as a temperature taker at the New York City Health + Hospitals Corporation's Kings County Hospital (hereinafter, "Hospital" or "HHC"). The action against the City of New York was discontinued without prejudice by stipulation, dated February 9, 2022. Prior to this accident, plaintiff was a former direct employee of HHC, working as a patient transporter. During the Covid-19 pandemic, plaintiff was transferred to a staffing agency, Access Staffing, LLC (hereinafter, Access), and assigned to work back at the Hospital as a temperature taker. Plaintiff alleges she slipped and fell on an unidentified white liquid in a hallway. Plaintiff observed a hospital housekeeper operating a floor-cleaning machine further down the hallway without any wet floor signs on display and inferred the unidentified liquid came from the housekeeper's machine. Plaintiff received workers' compensation benefits related to this accident from Access, and brought this action against defendant, Crothall Healthcare, Inc. ("hereinafter Crothall"), HHC, and the City of New York. Crothall contracted with HHC to provide housekeeping management services at the hospital.

**Crothall's Motion**

Defendant, Crothall, moves pursuant to CPLR § 3212 for an order granting summary judgment dismissing plaintiff's complaint (Motion seq. no. 2), on the grounds that plaintiff's claims are based entirely on Crothall's contractual management relationship with HHC, which did not give rise to a separate tort duty. Crothall's managers had no direct contact with plaintiff or the alleged wet floor and did not employ the HHC housekeeper cleaning the floor. Crothall further argues that the "Espinal" exceptions do not apply to Crothall. The "launching of a force or instrument of harm" exception does not apply since plaintiff alleges that she slipped and fell on a wet floor that was actively being cleaned by an HHC housekeeper, not a Crothall manager. Crothall managers did not perform the floor cleaning, and therefore did not launch this alleged instrument of harm. The "detrimental reliance" exception does not apply since the plaintiff testified that she had not heard of Crothall, did not know of anyone who worked for Crothall at Kings County Hospital, and did not know of any contracts between Crothall and HHC. Plaintiff cannot claim the "detrimental reliance" exception in relation to Crothall's contractual duties, which did not include Crothall managers cleaning the floors. Lastly, Crothall did not entirely displace HHC's duty to maintain the premises safely as the person seen cleaning the floor where plaintiff fell was a HHC employee, not a Crothall manager. Crothall's contract with HHC is specifically limited to housekeeping management services which did not entirely displace HHC, even with regard to housekeeping. HHC employees still performed the actual cleaning, and HHC still provided training and oversight for its housekeeping department, in addition to Crothall.

In opposition, plaintiff argues that the law firm of Shook, Hardy & Bacon, LLP should be disqualified as counsel for the defendants since it represents both Crothall and HHC and there is a conflict of interest pursuant to Rule 1.7 of the New York Rules of Professional Conduct. Crothall and HHC have competing positions in that Crothall is claiming that it had no duty and/or liability pursuant to a housekeeping management contract with HHC, while HHC is claiming that the plaintiff was a special employee under the workers' compensation law.

The court finds that defendants' counsel should not be disqualified. In determining the disqualification of an attorney, it is the court's responsibility to balance the competing interests, and the disqualification of an attorney is a matter that rests within the sound discretion of the court. See, *Gordon v Ifeanyichukwu Chuba Orakwue Obiakor*, 117 A.D.3d 681, 984 N.Y.S.2d 421 (2nd Dept., 2014). Here, the court finds no inherent conflict of interest in Crothall maintaining that its contractual duties did not give rise to a separate tort duty and HHC maintaining that the plaintiff was its special employee. These defenses are not diametrically opposed to each other and can co-exist without conflict since one defense is based on the contractual duties and actions of Crothall, HHC, and the subject housekeeper, while the other defense is based on plaintiff's purported status of a special employee of HHC. The plaintiff has not made a prima facie showing that the representation of Crothall will be directly averse to HHC or that there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client.

In further opposition, plaintiff argues that questions of fact exist regarding the liability and duties of Crothall. Despite Crothall employees not directly performing the cleaning services, they were in charge of ensuring that the hospital was properly staffed, that the staff and management

were properly trained, and that the cleaning services were performed adequately and to the standards set forth by Crothall. In addition, Crothall was contracted to supply equipment for the hospital, such as the ride-on auto scrubber (T-300 machine) used by the housekeeper in this incident. Crothall's lack of, or improper hiring, recruiting, training, screening and oversight of the staff and cleaning services led to the floor being improperly cleaned with a machine that was possibly owned by Crothall and filled with cleaning solutions, also supplied by Crothall. Crothall had notice that the T-300 machine that was used would leave a wet residue that needed to be cleaned. The housekeeper who operated the T-300 machine reported directly to Crothall employees and was trained by Crothall employees. The housekeeper should have been trained to place a wet floor sign before beginning to clean the floors. He also should have been trained to mop or squeegee the residue that the machine left behind.

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. *See,* *Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996), "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action." *See also,* *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The papers submitted in the context of the summary judgment motion are viewed in the light most favorable to the party opposing the motion. *See,* *Marine Midland Bank, N.A. v. Dino v. Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2nd Dept., 1990). If the *prima facie* showing has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. *See, CPLR 3212[b]; Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986].*

It is fundamental that, in order to be held liable in tort, the alleged tortfeasor must have owed the injured party a duty of care. See, *Forbes v Aaron*, 81 A.D.3d 876, 918 N.Y.S.2d 118 (2nd Dept., 2011). As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property. See, *Kydd v Daarta Realty Corp.*, 60 A.D.3d 997, 877 N.Y.S.2d 352 (2nd Dept., 2009). Where none of these factors is present, a party cannot be held liable for injuries caused by a dangerous or a defective condition. See, *Sanchez v 1710 Broadway, Inc.*, 79 A.D.3d 845, 915 N.Y.S.2d 272 (2nd Dept., 2010). As a general rule, a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party unless: (1) in failing to exercise reasonable care in the performance of its duties, the contracting party launched a force or instrument of harm (2) the plaintiff detrimentally relied upon the continued performance of the contracting party's duties, or (3) the contracting party has entirely displaced the property owner's duty to maintain the premises safely. See, *Espinal v Melville Snow Contrs.*, 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 (2002).

In the case at bar, notwithstanding Crothall entering into a contract with HHC to provide housekeeping management services at the hospital, none of the above "Espinal" exceptions have been satisfied. See, *Espinal v Melville Snow Contrs.*, 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 (2002). Crothall has demonstrated that it did not launch a force or instrument of harm in failing to exercise reasonable care in the performance of its duties under the contract, to which the plaintiff was not a party, that the plaintiff did not detrimentally rely on its performance of its duties under the contract, or that it entirely displaced HHC's duty to maintain the hospital in

a safe manner. See, *Perkins v Crothall Healthcare, Inc.*, 148 A.D.3d 1189, 51 N.Y.S.3d 118 (2nd Dept., 2017). While Crothall entered into a contract to render management services relating to HHC's housekeeping employees, none of Crothall's managers cleaned the hospital themselves and therefore could not have launched any force or instrument of harm. The plaintiff has not shown that she detrimentally relied on upon Crothall's performance of its duties under the contract with HHC, since she testified that she was not aware of the contract. Crothall did not displace HHC in the duty to maintain the premises safely as Crothall's contract related solely to the management of cleaning services provided by HHC employees. Crothall did not wholly absorb HHC's duty to maintain the premises safely since Crothall did not provide security or maintenance services, and did not entirely take over housekeeping services. See, *Collado v Crothall Healthcare Inc.*, 2017 WL 6502230 (S.D.N.Y., Dec. 15, 2017). Therefore, Crothall has demonstrated, as a matter of law, that it did not assume a duty of care to the plaintiff with respect to the actions of the housekeeper by entering into a management agreement with HHC. In opposition, the plaintiff failed to raise a triable issue of fact.

Accordingly, the defendant, Crothall's motion for summary judgment dismissing the complaint against the defendant, Crothall, is hereby granted in its entirety.

**HHC's Motion**

Defendant, HHC, moves pursuant to CPLR § 3212 for an order granting summary judgment dismissing plaintiff's complaint (Motion seq. no. 3), on the grounds that plaintiff was allegedly injured in the course and scope of employment with HHC and was a special employee of HHC who received workers' compensation benefits and, therefore is statutorily barred by New York Workers Compensation Law from pursuing these claims against the HHC. HHC argues that its control over plaintiff's work was comprehensive and exclusive that it amounts to a finding of special employment. In support, HHC argues that at the time of the accident, plaintiff worked exclusively on hospital property as a temperature taker, on behalf of the hospital, and under the exclusive supervision of hospital personnel; plaintiff received no daily instruction or supervision from anyone at Access but rather, hospital supervisors assigned plaintiff all of her job duties and locations as a temperature taker; hospital supervisors trained plaintiff on how to perform her work, provided plaintiff the equipment used in performing her work, and controlled plaintiff's security access, uniform, credentialing, and all other aspects of her assigned work; and plaintiff's only interaction with Access during the time she worked as a temperature taker at the hospital was to submit timesheets to Access.

In opposition, plaintiff argues that she was not a special employee of HHC but instead only an employee of Access. In support, plaintiff has offered a letter from the Workers' Compensation Board showing that plaintiff's employer is Access and workers' compensation benefits were provided through Access and its insurance carrier. Plaintiff further argues that HHC's argument regarding HHC's comprehensive and exclusive control over plaintiff's work is solely based on the deposition testimony of the plaintiff, without any deposition testimony from an HHC witness. Plaintiff's testimony does not point to direct control or oversight by HHC in that she testified that she believed there to be a supervisor from Access at the hospital. Plaintiff never testified that she reported directly to any HHC employees. Plaintiff testified that she was told by the hospital to purchase her scrubs and given an ID badge in February 2020 when she was an actual employee of

the hospital. The ID badge and uniform simply afforded the plaintiff access through the hospital in a limited capacity. Plaintiff also argues that her job description and duties of temperature taking was not specific to hospitals, since at the time of this accident during the Covid-19 pandemic, virtually every business in the United States required some sort of temperature taker to enter the premises. Plaintiff was assigned to Kings County Hospital by her employer, Access Staffing, for the sole purpose of taking temperatures and there was nothing further for the hospital to direct her to do that she was not already required to do by her employer. Lastly, there are triable questions of fact as to who can hire/fire the plaintiff; who can transfer the plaintiff, who can change the plaintiff's duties/responsibilities; and was she ever asked by the hospital to do anything other than take temperatures.

An employee who is entitled to receive workers' compensation benefits may not sue his or her general employer or special employer for injuries occurring during the course of employment. A special employee is "one who is transferred for a limited time of whatever duration to the service of another." See, *Workers' Compensation Law 11 and 29[6]*. The determination as to whether a special employment relationship exists is generally an issue of fact requiring consideration of many factors, including who controls and directs the manner of the employee's work, who is responsible for payment of wages and benefits, who furnishes equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or general employer's business. See, *Thompson v Grumman Aerospace Corp.*, 78 N.Y.2d 553, 585, 578 N.Y.S.2d 106 (1991); *Schramm v Cold Spring Harbor Lab.*, 17 A.D.3d 661, 793 N.Y.S.2d 530 (2nd Dept., 2005). However, special employment status may be made as a mater of law where the particular undisputed critical facts compel that conclusion and present no triable issues of fact. See, *Munion v Trustees of Columbia Univ. in City of N.Y.*, 120 A.D.3d 779, 991 N.Y.S.2d 460 (2nd Dept., 2014). The most significant factor is who controls and directs the manner, details, and ultimate result of the employee's work. See, *Schramm v Cold Spring Harbor Lab.*, 17 A.D.3d 661, 793 N.Y.S.2d 530 (2nd Dept., 2005).

After careful review of the moving papers, opposition, and further arguments in support of the motion, the court finds that HHC has established as a matter of law that the plaintiff was a special employee of HHC and is entitled to summary judgment. The record has established that although Access was responsible for plaintiff's timesheets, payment of wages, and workers' compensation benefits, "all essential, locational, and commonly recognizable components of the work relationship were between the plaintiff and HHC as hospital temperature taker. See, *Thompson v Grumman Aerospace Corp.* supra. It is a significant factor that Access as a staffing agency assigned plaintiff to the hospital as a temperature taker and that plaintiff was previously a direct employee of the hospital that was transferred by the hospital to Access when the hospital sought to assign plaintiff from patient transport to a different department. The record further established that HHC controlled, directed, assigned, and supervised the manner, details, and ultimate result of plaintiff's work as a temperature taker and said work was in furtherance of the special employer's business as a hospital, not the general employer's business as a staffing agency. As such, Access surrendered direction and control over the plaintiff to HHC to perform HHC's work, and HHC assumed and exercised that exclusive control. See, *Id.* Plaintiff's receipt of workers compensation benefits as a general employee of Access was his exclusive remedy and he is barred from bringing a negligence action against HHC as his special employer. In opposition,

plaintiff has not submitted an affidavit from Access regarding its control and direction of the plaintiff's work and has otherwise failed to raise a triable issue of fact.

Accordingly, the defendant, HHC's motion for summary judgment dismissing the complaint against the defendant, HHC, is hereby granted in its entirety.

Based on the foregoing, it is hereby

ORDERED, that the defendant, Crothall's motion for summary judgment dismissing the complaint against the defendant, Crothall, is hereby granted in its entirety; and it is further

ORDERED, the defendant, HHC's motion for summary judgment dismissing the complaint against the defendant, HHC, is hereby granted in its entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
August 28, 2025

KINGS COUNTY CLERK FILED SEP 16 2025

HON. LISA S. OTTLEY, J.S.C.
HON. LISA S. OTTLEY