NEW YORK SUPREME COURT——COUNTY OF BRONX

PART IA - 5

Public Administrator of Bronx County as the Administrator of the Goods, Chattels and Credits of FERREL CARINO a/k/a JOSE CARINO,

Plaintiffs,

-against-

485 EAST 188TH STREET REALTY CORP., NEW NEW PLAZA PAINTERS SUPPLY CO., INC. and T.C. DUNHAM PAINT COMPANY, INC.,

Defendants.

INDEX NUMBER: **305442/2008**

Present:
HON. ALISON Y. TUITT
Justice

---

485 EAST 188TH STREET REALTY CORP.,

Third-Party Plaintiff,

-against-

APPULA MANAGEMENT CORP.,

Third-Party Defendant.

T.C. DUNHAM PAINT COMPANY, INC.,

Second Third-Party Plaintiff,

-against-

APPULA MANAGEMENT CORP.,

Second Third-Party Defendant.

T.C. DUNHAM PAINT COMPANY, INC.,

Third Third-Party Plaintiff,

-against-

APPULA MANAGEMENT CORP.,

Third Third-Party Defendant.

The following papers numbered 1 to 5,

Read on this Defendant and Third-Party Defendant's Motion and Defendant/Third-Party Plaintiff's Cross-Motion for Summary Judgment

On Calendar of **1/20/10**

Notices of Motion/Cross-Motion-Exhibits, Affirmations 1, 2

Affirmations in Opposition 3, 4

Reply Affirmation 5

Upon the foregoing papers, third-party defendant Appula Management Corp.'s motion (hereinafter "Appula" for dismissal of plaintiff's action against 485 East 188th Street Realty Corp. (hereinafter 485") and dismissal of the third-party action brought by third-party plaintiff 485 against defendant/third-party defendant Appula and the cross-motion by 485 to dismiss plaintiff's action and all cross-claims and counter-claims against it are consolidated for purposes of this decision. For the reasons set forth herein the motion an cross-motion are granted in accordance with this decision and Order.

The within action involves personal injury claims asserted by plaintiff's decedent which were sustained on July 26, 2006 during the course of his employment. At the time of the accident, decedent Ferrel

Carino was working for Appula with a crew of two other Appula employees, Victor Marache and his nephew Daniel Carino, refinishing floors in an apartment located within the 485 premises. 485 was owned by Vito Manginelli who was the President, Sole Office and Shareholder. 485 had no employees and no payroll. All individuals that worked at 485 were employed by Appula which was also owed by Mr. Manginelli. Appula was a residential realty management corporation of which Mr. Manginelli was the President, Sole Office and Shareholder. Mr. Manginelli states that he was an employee of Appula.

Accordingly to Mr. Manginelli, Appula purchased the polyurethane and sealer from defendant/third-third party plaintiff New Palace Painters Supply Co., Inc. and the Appula crew picked up the materials from the Appula warehouse. While the crew was working in the aforementioned apartment applying those materials to the floors, an explosion/fire occurred in which decedent suffered severe burns which ultimately resulted in his death on September 29, 2006.

Mr. Manginelli conducted business on behalf of both 485 and Appula, each of which had two separate certificates of incorporation and were two separate legal entities. They were both directed by common management and owned by solely by Mr. Manginelli. 485 and Appula did not have a management agreement but they functioned under a combined budget. Both were also insured under the same general liability policy of insurance issued by insurance carrier QBE. Appula argues that it has an interest in seeing that 485, an insured on its general liability policy has its liability eliminated in the Carino actions so that the limits are not exhausted and insurance remains for Appula in another related action of Victor Marache, as well as any other action that might be brought for which that coverage applies. Alternatively, Appula argues that it has an interest in seeing that it is not being subrogated by its own co-insured, 485.

Appula now seeks dismissal of the plaintiff's action against 485 and Appula on the grounds that the actions against them violate the exclusivity provisions of the Workers' Compensation Law and the third-party action by 485 violates the rule against anti-subrogation. 485 cross-moves to dismiss the plaintiff's action and all cross-claims and counter-claims against it arguing that plaintiff's exclusive remedy against 485 and Appula is Workers' Compensation. Appula argues that an application was made for Workers' Compensation for decedent and he did receive compensation benefits as a result of the accident. A Notice of Decision dated April 3, 2007 from the Workers' Compensation Board sets forth that a hearing was held on March 28, 2007 involving the claim of Ferrel Carino and Judge Scott Avidon directed that the employer, "Appula Mgmt Corp." pay certain

monetary awards for a disability period from "7/26/2006 to 8/16/2006" and from "8/16/2006 to 9/19/2006". Furthermore, the decision of Judge Avidon provides that "[t]here is unconfirmed information that the Claimant died on 9/16/06. Claimant's survivors or estate [are] to file a claim for Workers' Compensation death benefits if [the] death was causally related to this accident."

Plaintiff opposes the motion and cross-motion arguing, in essence, that there exists material questions of fact as to whether the two separate corporations are in fact one in the same. Plaintiff argues that notwithstanding that in certain situations the Courts have found two separate entities to be one in the same and, therefore, entitled to the affirmative defense of Workers' Compensation, such is not the case here. Plaintiff further argues that Mr. Manginelli, for his own purposes and legal advantage, created and operated two separate and distinct legal entities, and as such "... the structure they created will not lightly be ignored at their behest, nor shield one of the entities they created from common-law tort liability." Bucher v. Pines Hotel, Inc., 448 N.Y.S.2d 870 (3d Dept. 1982), aff'd, 58 N.Y.2d 436 (1983).

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

485 and Appula argue that plaintiff's claims against them are barred by the exclusive remedy of the Workers' Compensation Law §11. It is well-settled that once the Workers' Compensation Board has exercised jurisdiction over a claim, the Courts are precluded from entertaining an action against the employer arising out of the same incident. See, Cunningham v. State of New York, 60 N.Y.2d 248 (1983); O'Connor v. Midiria, 55 N.Y.2d 538 (1982). Where a plaintiff has recovered Workers' Compensation benefits from the defendant, or third-party defendant, that is plaintiff's exclusive remedy. DiRie v. Automotive Realty Corp., 605 N.Y.S.2d 60 (1st Dept. 1993). In DiRie, both the defendant and the third-party defendant were separate legal entities owner and controlled by one individual. The First Department held that, notwithstanding that defendant and third-party defendant were separate legal entities, it was not a basis for not limiting plaintiff to Workers' Compensation. The Court stated that, defendant, which had no employees, was controlled by the individual that controled plaintiff's employer. The fact that two legal entities existed was an insufficient basis to deny summary judgment and the complaint was dismissed. Moreover, in Heritage v. Van Patten, 59 N.Y.2d 1017 (1983), the Court of Appeals refused to impose liability upon a defendant landowner, finding Van Patten, the property owner, was a co-employee of the plaintiff. The Court of Appeals further held that the statute imposing a nondelegable duty upon a property owner to protect against injuries to person employed in construction work on the premises did not apply to the landowner who was a co-employee of the injured plaintiff in light of the exclusivity provision of the Workers' Compensation Law making that compensation the exclusive remedy of the employee plaintiff who was injured by the negligence of another in the same employ.

The Court of Appeals held in Caceras v. Zorbas, 74 N.Y.2d 884 (1989) that the plaintiff's complaint was properly dismissed because the defendant building owner and the president and sole stockholder of plaintiff's corporate employer were one and the same person. The failure of defendant to include Workers' Compensation as a defense in its answer was neither prejudicial to, nor a surprise to the plaintiff who was aware of his employment status from the outset and received Workers' Compensation benefits. The Appellate Division, First Department also modified the Order of the Court below, and dismissed plaintiff's claims against the defendant property owner who was also president and chief executive officer of plaintiff's employer, finding that both were in the same employ for which Workers' Compensation was the sole remedy. Johnson v. Eaton Corp., 577 N.Y.S.2d 1 (1st Dept. 1991).

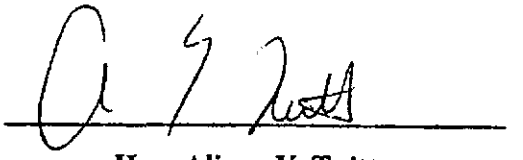
In the instant action, plaintiff's exclusive remedy against 485 and Appula is Workers'

Compensation and, therefore, plaintiff's complaint must be dismissed as to these defendants. Appula asserted the Workers' Compensation defense in its answers. 485 had no employees and was controlled by the same individual that controlled decedent's employer, Vito Manginelli. The affidavit and deposition testimony of Mr. Manginelli establishes that he instructed the workers and supervised their work and was a co-employee of the decedent. Mr. Manginelli was employed by Appula as the president of the residential realty management company. Appula had no other officers or shareholders. 485 owned the building where the accident took place and it had no employees and no written management agreement. Mr. Manginelli was the sole stockholder of the corporation that owned 485. Since 485 had no employees it was therefore incapable of acting through its own employees, and instead acted through Appula's employees. In the instant case, Appula has demonstrated its over the day to day operations of 485 and has shown the applicability of the exclusivity provisions of the Workers' Compensation Law.

Accordingly, plaintiff's complaint against 485 and Appula must be dismissed and, thus, the third-party complaint by 485 against Appula must also be dismissed. However, the cross-claims of New Palace against 485 are not dismissed, and the Court hereby directs that New Palace's cross-claims against 485 is converted into a third-party action.

This constitutes the decision and order of this Court.

Dated: March 17, 2010



Hon. Alison Y. Tuitt