SHORT FORM ORDER

INDEX No. 07-18380
CAL. NO. 10 01309 OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 11-17-10 (#002)
MOTION DATE 10-20-10 (#003)

MOTION DATE 1-26-11 (#004)
ADJ. DATE 2-16-11
Mot. Seq. # 002 - MOT D
003 - MD
004 - XMOTG

HAROLD M. GONZALES, as Administrator of the Estate of CIRO A. MATA, deceased, Plaintiff, - against - THE WOODBOURNE ARBORETUM, INC., WOODBOURNE CULTURAL NURSERIES, INC., and GLENWOOD MANAGEMENT CORP., Defendants.	KELNER & KELNER Attorney for Plaintiff 140 Broadway, 37th Floor New York, New York 10005 FLYNN, GIBBONS & DOWD Attorney for Defendants 80 Maiden Lane New York, New York 10038

Upon the following papers numbered 1 to 68 read on these two motions and a cross-motion for summary judgment and to strike affirmative defenses; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 17; (003) 18-32 Notice of Cross Motion and supporting papers (004) 33-42 ; Answering Affidavits and supporting papers 43-46; 47-55 ; Replying Affidavits and supporting papers 56-58; 59-64; 65-68 ; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the Order of this Court dated July 5, 2011 is hereby recalled and vacated in its entirety; and it is further

ORDERED that motion (002) by the defendants, Glenwood Management Corp. (Glenwood), The Woodbourne Arboretum, Inc. (Arboretum) and Woodbourne Cultural Nurseries, Inc. (Nursery), is granted to the extent that the action is dismissed as to the defendant Glenwood only and plaintiff's claims shall be severed and continue against the remaining defendants, and the motion is otherwise determined as set forth herein; and it is further

ORDERED that the separate motion (003) by the plaintiff, Harold M. Gonzales, as Administrator of the Estate of Ciro A. Mata, Deceased, for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability premised upon the defendant`s' alleged violation of Labor Law §240 (1)is denied;

and it is further

ORDERED that the cross-motion (004) by the plaintiff pursuant to CPLR 3212 for an order dismissing the fourth and fifth affirmative defenses asserted by the defendants is granted.

Plaintiff commenced this action to recover damages for personal injuries and wrongful death of decedent, Ciro A. Mata, arising out of an incident which occurred on June 28, 2005, at the premises located at 221 Old East Neck Road, Melville, New York. It is alleged in the complaint that at the time of the accident, decedent was an employee of Leonard Litwin, a non-party to the action, that he was engaged in the repair of a structure elevated with jack stands, and that the structure shifted and fell, striking the decedent and fatally injuring him. Recovery is sought in the first cause of action under Labor Law sections 200, 240 (1) and 241 (6). Plaintiff seeks recovery for wrongful death under a theory of common law negligence in the second cause of action, recovery for pain, suffering and fear of impending death under Labor Law in the third cause of action, and recovery for pain, suffering and fear of impending death under common law in the fourth cause of action.

According to the sworn statement of Roger Newell, the nursery manager employed by the Nursery, on June 28, 2005 he was working with Michael Ambrosio to replace the rear axle on a Hydro Traveler. The Hydro Traveler was described by an investigating police officer as "a large cast iron hose distributor approximately eight feet in height" that ordinarily moved on one front wheel and two rear wheels. With the rear axle removed, it had only the one front wheel attached. Once the axle was removed, the rear was supported by two standing jacks. The jack stands used to hold up the rear axle were 16 inches high, while the floor jack used to jack up the I-beam (referred to in the testimony of Michael Ambrosio as an H-beam) was elevated to 12 inches. The beam was placed under two rails on the Hydro Traveler, and then upon two jack stands. A cable known as a "come-along" was attached at the top of the Hydro Traveler by the impact sprinkler down to the front axle, and then tightened so that it took some of the weight off the rear. To move the Hydro Traveler into the garage, Newell and Ambrosio placed an I-beam (or H-beam) across two rails at the rear of the machine, and Newell used a floor jack to jack up the I-beam. Ambrosio then pushed the front of the Hydro Traveler as Newell guided the jack under the rear. They asked decedent, who was in the garage working on his own car, to help them and decedent positioned himself at the side of the Hydro Traveler. The Hydro Traveler then tipped over toward decedent, striking his head and causing fatal multiple skull fractures.

Roger Newell testified at his deposition that he has been employed by the Nursery, a wholesale grower of ornamental trees and shrubs, for 31 years and presently serves as a manager of the equipment. Approximately 3 or 4 mechanics out of a total of 70 employees reported to Newell. The decedent, who was not employed by the Nursery, did not report to Newell. Newell had never worked with the decedent, and the Nursery had never used him. It was Newell's testimony that it was the practice of the Nursery to use only Nursery employees, that the Nursery had never used the decedent in its work. The Nursery used the services of Ambrosio, however, because he was experienced in the use of the acetylene torch. Moreover, Newell testified that he never worked for the Arboretum.

On the day of the incident, the rear "axle" needed to be replaced on the water cannon known as the Hydro Traveler. The Hydro Traveler weighed in excess of a ton. Although the Hydro Traveler was not inoperable, the steel was getting thin and was starting to leak water. The Hydro Traveler was towed to a garage facility used to repair and store equipment for the Arboretum at 221 Old East Neck Road, Melville. Although equipment used at the Nursery was not regularly repaired at the Arboretum garage, a welding machine was there and the garage provided more room within which to make the repairs. Once the rear

axle was removed, the machine was supported by an I-beam with a floor jack and, behind the I-beam, two jack stands. The single wheel in the front was not stabilized. When it came time to move the machine into the garage, Michael Ambrosio was positioned in front of the Hydro Traveler in a skid steer loader, while Newell was in the rear of the machine, holding onto the floor jack. While Newell did not recall who asked the decedent to help out, Newell testified that the decedent "was not touching the machine" and that "he could have been just a spotter" to watch the machine from the side as it was moved. As Ambrosio moved the Hydro Traveler with the skid steer, Newell adjusted the jack stands as necessary, though it was his testimony that they essentially moved themselves as the machine was moved. They finished moving the machine once it was moved into the garage between six inches and a foot. Ambrosio stopped pushing the machine with the skid steer and the jack stands were positioned under the rails. Newell observed the machine as it started to list to his right, toward the decedent, and Newell yelled to the decedent to get out of the way. The decedent "began backing up real quick" but the machine fell and came to rest on a welding machine. Then he saw the decedent lying on the floor. According to Newell, the decedent was not involved in any fashion with moving the Hydro Traveler, nor did he help with the repair.

Michael Charles Ambrosio also testified at a deposition. It was his testimony that he was employed by Leonard Litwin. He was an equipment operator and an experienced welder. He was not involved in moving the Hydro Traveler to the garage where the repairs were to be performed and, although he worked with Roger Newell in the garage, Ambrosio was not given any direction about how to perform the repairs. Decedent was also in the garage, working on his car in a bay. Ambrosio asked decedent to help him and Newell move the equipment into the garage. Ambrosio used a skid steer to push the machine back, while Newell was at the back of the machine and decedent was next to it. Ambrosio saw the decedent standing next to the machine but he did not remember anyone asking the decedent to stand by the machine. He acknowledged, however, that the machine itself was too heavy for a spotter to stop it from falling. While Ambrosio did not see the machine tilt, he did see it hit the welding machine.

Leonard Litwin testified that he is the president of Woodbourne Arboretum, Inc., and that his daughter, Carol Pittelman, is the president of Woodbourne Cultural Nurseries, Inc. While Litwin had no supervisory role in the operation of the Nursery, he would make a recommendation to Roger Newell if he saw something that needed to be done. Litwin and the Nursery, however, had separate staff for payroll purposes. Glenwood Management Corporation is a management company that manages apartment houses, primarily in New York City; it has no ownership interest in the Melville property, it does not manage the property and it serves no role whatsoever in connection with the Melville property. He testified that he personally employed the decedent as well as Ambrosio. The decedent Mata cut grass and trimmed trees and was supervised by Michael McInerny.

In support of their motion, defendants submitted the affidavit of Charles Dorego, General Counsel to the corporate defendants. He avers that the Arboretum and the Nursery "are part of a plan that will eventually result in the entire property of the NURSERY, which presently sells ornamental bushes and trees on a wholesale basis, being totally transferred into the ARBORETUM." Dorego argues that the companies are interrelated "with their joint purpose the eventual creation of the ARBORETUM." In 2005, all of Leonard Litwin employees were paid by check issued by Litwin; in 2007, the LL Farm Trust began issuing payroll checks to Litwin employees. After decedent's accident, a workers' compensation claim was made on behalf of decedent's wife and children under a policy issued to Leonard Litwin in which the Arboretum and the Nursery were named insureds. It was not disclosed, however, whether workers' compensation benefits were paid.

Defendants also submitted the affidavit of Michael McInerny, an employee of Leonard Litwin and

the supervisor of decedent. According to his statement, McInerny knew that the decedent had used his lunch hour to work on the brakes of his car in the garage, and McInerny gave decedent permission to continue to work on the brakes during the afternoon. In addition, McInerny gave permission to Michael Ambrosio to assist Mr. Mata in working on Mata's car.

An affirmation from James C. Wilson, M.D., was submitted concerning the autopsy that he performed on decedent on June 29, 2005. The pathologist found that the decedent's brain sustained multiple lacerations with evidence of multiple skull fractures. He concluded that Mr. Mata died as a result of blunt impact head injury caused "when his head was struck by a significantly large object with extreme force causing multiple bilateral skull fractures and multiple lacerations of the brain demonstrating a crush injury to the head."

The affirmation of Roger Bonomo, M.D., who is Board-certified in Neurology and Internal Medicine, was also submitted. He had reviewed the deposition testimony of Ambrosio and Newell, the autopsy report, and the affirmation of Dr. Wilson concerning the autopsy of decedent. It is his opinion with a reasonable degree of medical certainty that "Mr. Mata instantaneously lost consciousness at the moment of trauma, and did not experience any conscious pain or suffering after the trauma." In his opinion, the lacerations that transected the mid-brain and the disconnecting of the cerebral hemispheres from the brain stem "are incompatible with consciousness after the injury" and "Mr. Mata could not have been aware of anything, including pain, after this trauma to his brain."

To the extent that defendants seek an order dismissing the action against Glenwood Management Corp., such application is granted, as the undisputed evidence before this Court demonstrates that Glenwood has no connection whatsoever to the underlying occurrence and that it bears no liability for the accident involving the decedent.

The defendants Arboretum and Nursery also seek summary judgment dismissing the complaint on the basis that the action is barred under Workers' Compensation Law §§ 11 and 29 by virtue of the decedent's special employment, and plaintiff has cross-moved for an order striking the fourth affirmative defense that the action is barred under the Workers' Compensation Law and the fifth affirmative defense that decedent was a special employee of defendants at the time of the accident.

In general, workers' compensation benefits are the exclusive remedy of an employee against an employer for any damages sustained from injury or death arising out of and in the course of employment (***Hofweber v Soros,*** 57 AD3d 848, 870 NYS2d 98 [2d Dept 2008], citing Workers' Compensation Law § 11; ***Cronin v Perry,*** 244 AD2d 448, 664 NYS2d 123 [1997]). While it is true that an employee, although generally employed by one employer, may be specially employed by another employer, and that a special employer may avail itself of the Workers' Compensation Law to bar negligence claims against it for injuries sustained by a special employee in the course of special employment, special employment will not be found absent a "clear demonstration of surrender of control by the general employer and assumption of control by the special employer" (***Bellamy v Columbia Univ.***, 50 AD3d 160, 851 NYS2d 406, 408 [1st Dept 2008], quoting ***Thompson v Grumman Aerospace Corp.,*** 78 NY2d 553, 557, 585 NE2d 355, 578 NYS2d 106 [1991]). In determining whether a special employment relationship exists, a "significant and weighty feature" is "who controls and directs the manner, details and ultimate result of the employee's work", as well as "who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business" (***Hofweber v Soros***, *supra,* 57 AD3d 848, 849, 870 NYS2d 98 [2d Dept 2008], citing ***Thompson v Grumman Aerospace Corp.***, *supra* at 78 NY2d 558; ***Schramm v***

Cold Spring Harbor Lab., 17 AD3d at 662). Here, there has been no showing that either defendant had assumed exclusive control over the manner, details and ultimate result of the plaintiff's work (*see* ***Persad v Abreu,*** ___ AD3d ___, 923 NYS2d 656 [2d Dept 2011]; *see also* ***Degale-Selier v Preferred Management & Leasing Corp.,*** 57 AD3d 825, 870 NYS2d 94 [2d Dept 2008]). Furthermore, the deposition testimony of each witness shows that the employees of Litwin were a distinct group from the employees of the Nursery, and that the not-for-profit Arboretum was a distinct corporation from the for-profit Nursery. In addition, the individual Litwin testified that he has no relationship with the corporate defendant Nursery. Defendants' claim that Litwin, the Nursery and the Arboretum function as alter egos of each other and as joint venturers is not supported by evidence of "an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the co-venturers to the joint undertaking (*i.e.,* a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses" (***Commander Terms. Holdings, LLC v Poznanski,*** ___ AD3d ___, 923 NYS2d 190, 193 [2d Dept 2011], citing ***Kaufman v Torkan,*** 51 AD3d 977, 979, 859 NYS2d 253, quoting ***Tilden of N.J. v Regency Leasing Sys.,*** 230 AD2d 784, 785-786, 646 NYS2d 700).

The determination of special employment status may be made as a matter of law where the particular, undisputed critical facts present no triable issue of fact (***Thompson v Grumman Aerospace, Inc.***,78 NY2d 553, 557-558, 585 NE2d 355, 578 NYS2d 106 (1991). The evidence before this Court indicates that at the time of the accident, decedent was assisting a co-worker (Ambrosio), who was working with an employee of the Nursery (Newell) on a piece of equipment that was owned and used by the defendant Nursery. The decedent was in the garage at the time, however, with the permission of his supervisor for Litwin. Since the record before this Court establishes that the corporate defendants are legal entities distinct from Litwin, and that the decedent was employed solely by Litwin, the defendants are not exempted from tort liability by the exclusivity provisions of the Workers' Compensation Law (*see* ***Haracz v Cee Jay, Inc.,*** 74 AD3d 1147, 902 NYS2d 429 [2d Dept 2010]; ***Canete v Judlau Contr., Inc.***, 56 AD3d 407, 867 NYS2d 134 [2d Dept 2008]). Furthermore, as there is no evidence before this Court showing that the defendants' actual working relationship with decedent allowed them to control and direct the manner, details and ultimate result of his work, no triable issues of fact have been raised and summary judgment in favor of plaintiff dismissing the fourth and fifth affirmative defenses is granted (*see* ***Voultepsis v Gumley-Haft-Klierer, Inc.,*** 60 AD3d 524, 875 NYS2d 74 [1st Dept 2009]).

Defendants also seek summary judgment dismissing plaintiff's liability claims under Labor Law § 240 (1) and § 241 (6), and plaintiff has moved for partial summary judgment on the issue of liability under Labor Law § 240 (1).

Labor Law § 240 (1) requires all contractors and owners to furnish or erect "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection" to construction workers employed on the premises (***Jiron v China Buddhist Assn.,*** 266 AD2d 347, 349, 698 NYS2d 315 [2d Dept 1999]). The statute imposes a non-delegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for the protection of workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure (***Koch v E.C.H. Holding Corp.,*** 248 AD2d 510, 511, 669 NYS2d 896 [2d Dept 1998]). However, the protection of the statute is limited by its express terms to those situations involving "the erection, demolition, repairing, altering, painting, cleaning or pointing

of a building or structure" (***Koch v E.C.H. Holding Corp.,*** *supra* at 248 AD2d 511, citing ***Smith v Shell Oil Co.,*** 85 NY2d 1000, 1002; ***Jock v Fien,*** 80 NY2d 965).

The protections of Labor Law § 240 (1) are not implicated simply because the injury is caused by the effects of gravity upon an object (***Aloi v Structure-Tone, Inc.,*** 2 AD3d 375, 767 NYS2d 832 [2d Dept 2003], citing ***Melo v Consolidated Edison Co.,*** 92 NY2d 909, 911, 702 NE2d 832, 680 NYS2d 47 [1998]). Furthermore, it is generally agreed that the purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work-site elevation differentials, and, accordingly, that there will be no liability under the statute unless the injury-producing accident is attributable to the latter sort of risk (***Runner v New York Stock Exchange, Inc.,*** 13 NY3d 599, 603, 922 NE2d 865, 895 NYS2d 279 [2009], citing ***Rocovich v Consolidated Edison Co.,*** 78 NY2d 509, 514, 583 NE2d 932, 577 NYS2d 219 [1991]). Here, the accident was not caused by the limited type of elevation-related hazards contemplated under Labor Law § 240 (1) (*see* ***Aloi v Structure-Tone, Inc.,*** *supra* at 2 AD3d 375, 767 NYS2d 832 [2d Dept 2003]; *see also* ***Rubino v Fisher Reese W.P. Assoc.,*** 243 AD2d 620, 663 NYS2d 237 [2d Dept 1997]; ***McGahey v Kimbrow,*** 112 AD2d 203, 491 NYS2d 426 [2d Dept 1985]). Accordingly, to the extent plaintiff seeks to impose liability under Labor Law § 240 (1), such claims are dismissed.

Since the evidence before this Court shows that decedent served as a spotter during movement of equipment, and decedent's accident did not occur in an area in which construction, excavation or demolition work was being performed, Labor Law § 241 (6) does not apply and plaintiff's claims for recovery under that statute are also dismissed (*see* ***Nagel v D & R Realty Corp.,*** 99 NY2d 98, 782 NE2d 558, 752 NYS2d 581 [2002]).

Defendants have demonstrated through the submission of deposition testimony, the affirmation of Dr. Bonomo and the affidavit of Dr. Wilson that the decedent died instantaneously as a result of the accident and did not experience conscious pain or suffering. No triable issue of fact in opposition to defendants' proof has been raised. Accordingly, plaintiff's claims under the third and fourth causes of action for recovery of damages for conscious pain and suffering are dismissed.

This Court has considered the parties' remaining contentions and finds them to be without merit.

Dated: 28 July 2011

HON. JOHN J. L. JONES, JR., J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION