SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

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TROY ROSSI.

Plaintiff,

- against -

FLYING HORSE FARM, INC.,

Defendant.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 5767/2012

DECISION AND ORDER

Motion Dates: April 19, 2013, and June 10, 2013

The following papers numbered 1 to 10 were read and considered on: (1) A motion by Defendant, pursuant to CPLR §3025, to amend its answer to add an affirmative defense; and (2) a cross motion by Plaintiff, pursuant to CPLR §3212, for summary judgment dismissing Plaintiff's eighth and proposed tenth affirmative defenses, and, in effect, its ninth affirmative defense.

Notice of Motion- Palmiotto Affirmation - Exhibits A-E	1-3
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Upon the foregoing papers, it is hereby,

ORDERED, that Defendant's motion is granted; and it is further,

ORDERED, that the branches of the cross motion which seek to dismiss the ninth and proposed tenth affirmative defenses are granted, and the motion is otherwise denied.

Introduction

Plaintiff Troy Rossi was allegedly injured while using a ladder to perform repair work on a barn owned by Defendant Flying Horse Farm, Inc. (hereinafter "Flying Horse"). The barn was on a larger property owned by Flying Horse that is used to stable horses. At the time of the accident, Plaintiff was employed as a groom and handyman by non-party Grey Thunder Stable II (hereinafter "Grey Thunder"), which stabled horses at Flying Horse. Non-parties Murray Bassen and Patricia Savino are the owners/officers of both entities. Plaintiff commenced this action, *inter alia*, to recover damages for violations of Labor Law sections 240 and 241.

In its answer, Flying Horse alleges as affirmative defenses, *inter alia*, that Plaintiff was its "special employee" at the time of the accident and, therefore, his sole remedy as against Flying Horse is Workers' Compensation benefits (Defendant's eighth affirmative defense), and that this action is barred because Plaintiff was a "recalcitrant worker" (Defendant's ninth affirmative defense).

Flying Horse now moves to amend its answer to assert a tenth affirmative defense alleging that the barn at issue was subject to the homeowners exemption in the Labor Law because it also housed an apartment used by Bassen.

Plaintiff cross moves for summary judgment dismissing the above three affirmative defenses. The motion is granted. The cross motion is granted as to the ninth and tenth affirmative defenses only, and otherwise denied.

Factual/Procedural Background

Plaintiff commenced this action, *inter alia*, to recover damages for violations of Labor Law sections 240 and 241. Plaintiff alleges that, on June 3, 2012, he was injured while using a ladder to repair siding on a barn owned by Flying Horse, located on a larger property owned by Flying Horse

at 524 Howells Turnpike in Middletown, New York. At the time, he alleges, he was employed as a groom and handyman for non-party Grey Thunder, who had a business address at the property.

Flying Horse denies the material allegations of the complaint and interposes nine affirmative defenses. As an eighth affirmative defense,[1] Flying Horse alleges that Plaintiff's claims are barred by the exclusivity provisions of the Workers' Compensation Law. As a ninth affirmative defense, Flying Horse alleges that Plaintiff's claims are barred by the "recalcitrant worker" defense.

At an examination before trial, Murray Bassen, appearing on behalf of Flying Horse, testified that he and his girlfriend, Patricia Savino, were the partners/officers of both Flying Horse and Grey Thunder *(Motion, Exhibit A, page 5)*. Grey Thunder had offices and a billing address in New Rochelle, New York, and operated a stable on the property at issue, which is owned by Flying Horse (T 6-8, 20). On the date in question (June 3, 2012), Plaintiff was employed by Grey Thunder as "a groom and doing part-time work." (T-6). He also performed various "additional work," including "sheetrock, carpentry, you know, different kind of handyman stuff." There were two barns on the property– a large barn with eight stalls and a smaller barn with three stalls (T-32). There was an "office apartment" in the larger barn. Bassen stayed at the office/apartment on a part-time basis, that is, a couple of days a week, depending on the season (T-23). The office/apartment did not have a certificate of occupancy, but did not require one because the property as a whole was granted an agricultural exemption due to its use to stable horses (T-33). The size of the office/apartment approximates 1000 square feet and is located on both floors of the barn (T-40). The first floor has a bathroom, kitchen and living room, and the second floor a bedroom and bathroom (T-41). Bassen

[1] Due to a typographical error, Flying Horse's answer lists two "seventh" affirmative defenses, but no eighth affirmative defense. For purposes of this decision, the second, seventh affirmative defense will be referred to as the eighth affirmative defense.

also stored personal items in the hayloft to the large barn. Plaintiff's main responsibility was the caring for the horses (T-45-52). On the morning of the accident, Plaintiff arrived at approximately between 8 or 9 a.m. (T-54). His first assigned task was to exercise and tend to the horses (T-55-56); he finished that work at approximately 1 p.m. (T-56). Just prior to lunch, Plaintiff was asked to finish painting some trim on the large barn (T-62) and was provided with an "A" frame ladder, paint, and a brush and roller (T-63). Bassen denied that Plaintiff was asked to repair any siding on the large barn, although there were many "malunions" of the T1-11 siding due to improper installation of the same (T-63). When Bassen returned from getting lunch, he saw Plaintiff standing at the end of the barn holding his arm, and an extension ladder and broken drill lying on the ground (T 79). Plaintiff told Bassen that he had fallen. Bassen was mad because no one had told Plaintiff to use an extension ladder or to repair siding (T-80-81). The extension ladder belonged to "Dick," who lived in a trailer on the property (T-82). When Plaintiff worked for Grey Thunder, he used his own equipment (T-65). In the main, Plaintiff used Bassen's "A" frame ladders. Bassen only saw Plaintiff use the extension ladder *supra* on about three prior occasions (T-73). Plaintiff used the extension ladder once to do repairs to the roof of the barn for Flying Horse (T-74). Grey Thunder "lent" Plaintiff to Flying Horse for that job (T-74). Plaintiff was paid cash by Flying Horse for this type of work (T-87). When Plaintiff was finished with his horse-related work for Grey Thunder, he was free to work on the property for Flying Horse– *e.g.*, painting and doing repairs to the structures (T-87-89). Bassen never asked Plaintiff to perform any work more than 10 feet off of the ground, with the exception of the roofing work *supra*. (T-95-96).

At an examination before trial, Patricia Savino, also appearing on behalf of Flying Horse, testified that Flying Horse owned the subject property and had no employees (*Motion, Exhibit G,* T-

21-24). On the day in question, Plaintiff was an employee of Grey Thunder. He received a regular salary from Grey Thunder. Savino also personally gave Plaintiff cash on five or six occasions "extra to his daily pay for maybe doing something extra for us" (T-19-20). Savino denied that the office/apartment in the large barn was never used as an office (T-27). The office/apartment was always liveable, but did not have a certificate of occupancy. Plaintiff sometimes did work on the apartment (T-27-28). Lastly, Savino testified that she arrived on the scene with Bassen just after the accident and observed Plaintiff standing in the barn holding his arm (T-31-32).

The Motion and Cross Motion

Based upon the foregoing, Flying Horse now moves for leave to amend its answer to add a tenth affirmative defense; a defense which alleges that the barn at issue is subject to the homeowners exemption under the Labor Law because it contained an apartment.

In response, Plaintiff cross moves for summary judgment seeking dismissal of Flying Horse's eighth and proposed tenth affirmative defenses, and, in effect, its ninth affirmative defense. In so moving, Plaintiff argues that Workers' Compensation benefits are not his exclusive remedy as against Flying Horse because he was not an employee of Flying Horse at the time of his fall. Rather, he notes, not only did Bassen and Savino both testify that he was an employee of Grey Thunder, but also, he was awarded Workers' Compensation benefits from Grey Thunder arising from the fall. Similarly, he argues, the homeowners exemption in the Labor Law for one- and two-family residences is not applicable because the barn at issue was primarily used for the commercial purpose of boarding horses, not for residential occupancy.

In his affidavit, Plaintiff avers that he was employed by Grey Thunder and received Workers' Compensation benefits through Grey Thunder's carrier for the accident at issue. Plaintiff also asserts

that, because he worked as a carpenter for Flying Horse prior to being hired by Grey Thunder, Bassen would sometimes instruct him to work on the building and structures owned by Flying Horse. However, he avers, his primary job was being a groom for Grey Thunder. Plaintiff asserts that, except for a "small apartment in a walled off, segregated portion of the large barn," the property at issue was used for the commercial purpose of stabling horses. He notes that the apartment was separated from the hayloft by a firewall, and that there was no direct access between the second floor of the apartment and the hayloft. On the day in question, Plaintiff avers that, Bassen asked him to repair the T1-11 siding above the hayloft door to the large barn. He was only able to reach that area by use of an extension ladder. Plaintiff avers that the extension ladder and tools he used "were on the Defendant's premises and provided for my use by Murray Bassen." Plaintiff asserts that he fell to the ground when the ladder slipped out from under him.

Appended to Plaintiff's motion papers are, *inter alia*, documents and a decision of the Workers' Compensation Board concerning his entitlement to benefits for the accident at issue. Plaintiff's employer is identified as "Patricia Savino & Murray Bassen d/b/a Gray Thunder II" at the New Rochelle address (*supra*).

In opposition to Plaintiff's cross motion, and in reply, Flying Horse argues that Plaintiff was a recalcitrant worker because, rather than perform the work he was assigned to do– painting the trim on the barn– he decided, of his own volition, to perform repair work which required the use of an extension ladder, which was not even owned by Flying Horse. Further, Flying Horse asserts, contrary to Plaintiff's characterization of the apartment as "small," it is clear that it occupied a considerable portion of the large barn. Moreover, Flying Horse notes, the work being performed by Plaintiff improved the barn as a whole, including the apartment. In addition, Flying Horse argues,

at the time of the accident, Plaintiff was a "special employee" of Flying Horse , *i.e.*, Flying Horse provided all the materials and equipment, and benefitted from the work. Thus, Flying Horse asserts, it was also entitled to the exclusivity protections of the Worker's Compensation Law. Accordingly, Flying Horse argues, its motion should be granted and Plaintiff cross motion denied.

In his affidavit, Bassen avers that he was living in the apartment at issue at the time of the accident, and that he stored personal belongings in the hayloft. Further, he asserts, although Plaintiff was employed by Grey Thunder on a regular basis, he did "side work" for Flying Horse. At the time in question, Bassen avers, Plaintiff was "leant [sic] to Flying Horse Farm to perform painting work on the barn." Bassen further asserts that Plaintiff was not instructed to repair any siding to the barn on the day in question, although the work did improve the barn and protects its contents.

Finally, he avers, although Flying Horse owned the drill being used by Plaintiff at the time of his fall, neither Flying Horse nor Grey Thunder owned the extension ladder.

Legal Analysis/Discussion

Leave to Amend the Answer

Flying Horse moves for leave to amend its answer to add a tenth affirmative defense interposing the homeowner exemption to liability under the Labor Law. Leave is granted.

Leave to amend pleadings should be freely granted absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. CPLR §3025(b); *Sinistaj v Maier, 82 A.D.3d 868, 918 N.Y.S.2d 196 (2nd Dept. 2011).* It is the movant's burden to demonstrate the latter. *Zeleznik v. MSI Const., Inc., 50 A.D.3d 1024, 854 N.Y.S.2d 897 (2nd Dept. 2008).*

Here, there is no evidence of prejudice or surprise, or that the proposed amendment is either

palpably insufficient or patently devoid of merit. Thus, leave to amend is granted. However, as discussed *infra*, Plaintiff nevertheless demonstrated his entitlement to dismissal of the affirmative defense added by the amendment.

Homeowners Exemption

Plaintiff moves for summary judgment dismissing Flying Horse's tenth affirmative defense interposing the homeowners exemption to liability under the Labor Law. That relief is granted.

It is well settled that a grant of summary judgment is appropriate only where the court determines, after a "search of the record", that there are no material issues of fact. Issue identification, not issue determination is controlling. Therefore, it is incumbent upon the moving party to make a *prima facie* showing of his entitlement to judgment, as a matter of law, tendering sufficient evidence to remove any material issues of fact from the case. Failure to do so requires denial of the motion, regardless of the sufficiency of the opposing papers. *Weingard v. New York University Center, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1987); Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980).* Correspondingly, in order to defeat such a motion, it is incumbent upon the opposing party to submit competent evidence, in admissible form, sufficient to raise a triable issue of fact. *Alvarez v. Prospect Hospital, 68 N.Y.2d320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986).*

In 1980, the Legislature amended Labor Law §§ 240 and 241 to exempt "owners of one and two-family dwellings who contract for but do not direct or control the work" from the absolute liability imposed by these statutory provisions. The amendments, intended by the Legislature to shield homeowners from the harsh consequences of strict liability under the provisions of the Labor Law, reflect the legislative determination that the typical homeowner is no better situated than the

hired worker to furnish appropriate safety devices and to procure suitable insurance protection. *Bartoo v. Buell*, 87 N.Y.2d 362, 662 N.E.2d 1068 (1996).

The exemption has been extended to structures appurtenant to the residence. *Bartoo v. Buell*, 87 N.Y.2d 362, 662 N.E.2d 1068 (1996); *Milan v. Goldman*, 254 A.D.2d 263, 678 N.Y.S.2d 129 (2nd Dept. 1998).

Mindful of this history and remedial purpose, the courts have avoided an overly rigid interpretation of the homeowner exemption and have employed a flexible "site and purpose" test to determine whether the exemption applies. *Bartoo v. Buell*, 87 N.Y.2d 362, 662 N.E.2d 1068 (1996). Thus, for example, where the building was a three family dwelling, the exemption was nonetheless found applicable when the site and purpose of work that gave rise to the injury was connected solely with remodeling the building into a residential and single tenant space, not creating or enhancing a commercial usage. *Khela v. Neiger*, 85 N.Y.2d 333, 648 N.E.2d 1329 (1995). Similarly, the exemption was found applicable in a case where the property at issue was being used, in part, for a commercial purpose, because the site and purpose of the work (*i.e.*, the installation of an outdoor lighting fixture) was connected solely to the owner's residential use of the property, and was not intended to benefit the commercial use of the property. *Cannon v. Putnam*, 76 N.Y.2d 644, 564 N.E.2d 626 (1990). In general, as long as the commercial benefit obtained from the work is ancillary to the substantial residential purpose of the work, the homeowner exemption applies. *Bartoo v. Buell*, 87 N.Y.2d 362, 662 N.E.2d 1068 (1996).

By contrast, the homeowner exemption does not apply where a building, though structurally a one- or two-family dwelling, is being used by its owner exclusively for commercial purposes. Such homeowners are not lacking in sophistication or business acumen such that they would fail to

recognize the necessity to insure against the strict liability imposed by the statute. *Bartoo v. Buell*, 87 N.Y.2d 362, 662 N.E.2d 1068 (1996).

Here, Plaintiff demonstrated, *prima facie*, that the homeowner exemption does not apply.

First, the barn at issue is neither a one- or two -family residence with an ancillary commercial use as a stable, nor a building appurtenant to such a residence. Rather, it is large barn used primarily to house horses with an ancillary residential use as a part-time apartment.

Second, there is no evidence that the site and purpose of the work (whether painting or repairing) was intended to benefit solely or even primarily the apartment. Rather, the work benefitted the entire barn, which was used primarily for the commercial purpose of boarding horses.

Finally, Bassen cannot be properly characterized as a typical homeowner no better situated than Plaintiff to furnish appropriate safety devices and procure suitable insurance protection, or as lacking in the sophistication or business acumen needed to recognize the necessity of insuring against the strict liability imposed by the statute. Rather, by his own testimony, Bassen, at the time of the accident, was acting in his capacity as an officer of a corporation that owned commercial property.

In sum, Plaintiff demonstrated, *prima facie*, that the homeowner exemption does not apply. In opposition, Flying Horse failed to raise a triable issue of fact. *Alvarez v. Prospect Hospital, supra.* Thus, that branch of Plaintiff's motion which is for summary judgment dismissing Flying Horse's tenth affirmative defense is granted.

Exclusivity of the Workers' Compensation Law

Plaintiff also moves for summary judgment dismissing Flying Horse's eighth affirmative defense alleging the exclusivity of Workers' Compensation Law benefits. That relief is denied due

to issues of fact.

In general, Workers' Compensation benefits are the exclusive remedy that a worker may obtain against an employer for losses suffered as a result of an injury sustained in the course of employment. *Workers' Compensation Law §11 & §29(6); Slikas v. Cyclone Realty, LLC*, 78 A.D.3d 144, 908 N.Y.S.2d 117 [2nd Dept.2010]. An employer may be held liable for contribution or indemnification only if the employee has sustained a "grave injury" as defined by the Workers' Compensation Law (which is not here alleged) or when there is a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution or indemnification of the claimant. *New York Hosp. Medical Center of Queens v. Microtech Contracting Corp.*, 98 A.D.3d 1096, 951 N.Y.S.2d 546 [2nd Dept.2012]; *Workers' Compensation Law § 11.*

A worker may be deemed to have more than one employer for purposes of the Workers' Compensation Law, *e.g.*, a general employer and a special employer. *Abreu v. Wel–Made Enterprises, Inc.*, 105 A.D.3d 878, 964 N.Y.S.2d 198 [2nd Dept.2013]; *Alfonso v. Pacific Classon Realty, LLC*, 101 A.D.3d 768, 956 N.Y.S.2d 111 [2nd Dept.2012]. Where the facts demonstrate a plaintiff's dual employment status, whether the relationship between two corporate entities is that of joint venturers, parent and subsidiary, corporate affiliates, or general and special employers, immunity will be extended to all employers. *Abreu v. Wel–Made Enterprises, Inc.*, 105 A.D.3d 878, 964 N.Y.S.2d 198 [2nd Dept.2013]; *Alfonso v. Pacific Classon Realty, LLC*, 101 A.D.3d 768, 956 N.Y.S.2d 111 [2nd Dept.2012]. An injured worker who elects to receive Workers' Compensation benefits from his or her general employer is barred from maintaining a personal injury action against a special employer. *Abreu v. Wel–Made Enterprises, Inc.*, 105 A.D.3d 878, 964 N.Y.S.2d 198

[2ndDept.2013].

A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. *Abreu v. Wel–Made Enterprises, Inc.*, 105 A.D.3d 878, 964 N.Y.S.2d 198 [2ndDept.2013]. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer. *Abreu v. Wel–Made Enterprises, Inc.*, 105 A.D.3d 878, 964 N.Y.S.2d 198 [2ndDept.2013]. The determination of special employment status is usually a question of fact and may only be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact. Although no one factor is decisive, the question of who controls and directs the manner, details and ultimate result of the employee's work is a significant and weighty feature of the analysis. *Abreu v. Wel–Made Enterprises, Inc.*, 105 A.D.3d 878, 964 N.Y.S.2d 198 [2ndDept. 2013].

Here, there is no dispute that, at the time of the accident, Plaintiff was a general employee of Grey Thunder. However, there is a question of fact as to whether Plaintiff was also a special employee of Flying Horse at that time. Moreover, it does not appear disputed that, in general, Plaintiff's work was under the direction and control of Bassen, who is a principal of both Flying Horse and Grey Thunder. Further, it would appear that the work at issue (whether painting or repairing) benefitted both Flying Horse (which owned the barn) and Grey Thunder (which used the barn to board horses). Therefore, it is for the jury to decide in what capacity Bassen and Plaintiff were acting at the time of the accident. Thus, that branch of Plaintiff's motion which seeks summary judgment and dismissal of Flying Horse's eighth affirmative defense must be, and is hereby, denied.

The Recalcitrant Worker Defense

Finally, Plaintiff moves for summary judgment and dismissal of Flying Horse's ninth affirmative defense which alleges that Plaintiff was a recalcitrant worker. That relief is granted.

Liability under the Labor Law may be avoided if a defendant proves that the injured plaintiff was a "recalcitrant worker." A recalcitrant worker is one who refuses to obey immediate specific instructions to use an actually available safety device or to avoid using a particular unsafe device. *Ortiz v. 164 Atlantic Avenue, LLC*, 77 A.D.3d 807, 909 N.Y.S.2d 745 [2nd Dept. 2010]; *Zong Mou Zou v. Hai Ming Const. Corp.*, 74 A.D.3d 800, 902 N.Y.S.2d 610 [2nd Dept. 2010].

Here, regardless of which allegations are credited, Plaintiff did engage in the type of conduct encompassed by the recalcitrant worker defense. The gist of Flying Horse's recalcitrant worker argument appears to be that it did, in fact, provide Plaintiff with appropriate safety equipment (*i.e.*, an "A" frame ladder) for his assigned work (painting), and that it cannot be held liable for his decision to use an extension ladder (owned by a tenant on the property) to perform work (siding repair) he was not assigned (albeit within the parameters of his general handyman job duties).

However, even taking the factual basis of this argument as true, Flying Horse did not demonstrate that Plaintiff's injuries arose from his refusal to obey immediate specific instructions to use an actually available safety device (*i.e.*, the "A" frame ladder) and to avoid using a particular unsafe device (*i.e.*, the extension ladder). Indeed, Bassen testified that he had observed Plaintiff using the extension ladder on prior occasions. Finally, that, according to Bassen, Plaintiff was performing work other than his assigned task, did not render Plaintiff a recalcitrant worker. *See, Magee v. 438 East 117th Street LLC*, 56 A.D.3d 376, 868 N.Y.S.2d 35 [1st Dept. 2008].

Accordingly, and for the reasons stated herein, it is hereby,

ORDERED, that Defendant's motion which seeks leave to amend its answer, to add a tenth affirmative defense, is granted; and it is further,

ORDERED, that the branches of Plaintiff's cross motion which seek the dismissal of Defendant's ninth and proposed tenth affirmative defenses are granted, and the motion is otherwise denied.

The foregoing constitutes the decision and order of the court.

Dated: October 3, 2013
Goshen, New York

ENTER

HON. ROBERT A. ONOFRY, A.J.S.C.

TO: Steven F. Goldstein, LLP
Attorney for Defendant
Office & P.O. Address
One Old Country Road
Carle Place, New York 11514

Jeffrey S. Altbach, Esq.
Attorney for Plaintiff
Office & P.O. Address
Liberty Professional Plaza
111 Sullivan Avenue, P.O. Box 554
Ferndale, New York 12734