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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

Index Number : 105816/2009
OUMENTSEVA, TATIANA
VS.
CROTHALL FACILITIES
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

motion and cross-motion are decided in accordance with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/13/13

Saliann Scarpulla, J.S.C.

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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TATIANA OUMENTSEVA,

Plaintiff,

- against-

CROTHALL FACILITIES MANAGEMENT, INC., PROFESSIONAL SERVICES, INC., and MORRISON MANAGEMENT SPECIALISTS, INC., and JOHN DOE (INTENDED TO BE THE MAINTENANCE PERSONNEL PERSON WHO APPLIED THE WAX TO THE FLOOR),

Defendants.

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Index No.: 105816/2009
Submission Date: 1/30/13

DECISION AND ORDER

For Plaintiff:
Rosato & Lucciola, PC
233 Broadway, 5th Floor
New York, NY 10279

For Defendants:
Gordon & Silber, P.C.
355 Lexington Avenue, 7th Floor
New York, NY 10017

Papers considered in review of this motion for leave to reargue:

Notice of Motion 1
Aff in Support 2
Aff in Opp 3
Reply Aff 4

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Crothall Facilities Management, Inc. ("Crothall"), Professional Service, Inc., d/b/a Propoco ("Propoco"), and Morrison Management Specialists ("Morrison") (collectively "defendants") move pursuant to CPLR 2221(d) for leave to reargue the Court's decision

and order dated September 6, 2012, which denied defendants' motion for summary judgment, and upon the granting of reargument, for an order granting summary judgment dismissing plaintiff Tatiana Oumentseva's ("plaintiff" or "Oumentseva") complaint and all cross claims.

Background[1]

Plaintiff works as a nurse at Isabella Geriatric Center ("Isabella"). She was working on May 4, 2008, when she slipped and fell in liquid on the hallway floor. Plaintiff received workers compensation benefits for her lost wages. Plaintiff also commenced this action seeking to recover from defendants and alleging that the housekeeping staff either caused or failed to remedy the condition (the liquid in the hallway) which caused her to fall.

On the motion for summary judgment, the defendants submitted plaintiff's deposition testimony. Plaintiff testified that at the time of her fall, there was an auto-scrubber machine located in the corridor, operated by Tyrone Williams ("Williams") and Curtis Wallace ("Wallace"). Williams' deposition testimony was also submitted. Williams testified that he was employed by Isabella as part of the environmental services group, and referred to his pay stub from Isabella.[2] Williams further testified that Angel

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[1] I refer to the September 6, 2012 decision and order for a complete recitation of the facts.

[2] Counsel for defendants, when questioning Williams at his deposition, referred to a document marked "Exhibit A," which Williams stated was his pay stub from Isabella. However, no deposition exhibits were annexed to the transcripts submitted on the motion.

Lugo, a Crothall employee ("Lugo"), was his supervisor, and John Cuva, Isabella's Director of Environmental Services ("Cuva"), was in charge of his department. Williams testified that he usually dealt with Crothall, not Isabella, and that while Isabella hired him and the other environmental services workers, Crothall provided the majority of his training.

In addition, defendants submitted Cuva's deposition testimony. Cuva testified that the environmental services workers reported to managers and supervisors, all of whom were Crothall employees. Cuva stated that no supervisors worked for Isabella, and that there was no manager on duty on the weekend. Cuva also testified that environmental services provided its own weekly training or "huddles," as well as monthly training. He also explained that Crothall/Propoco supervised environmental services workers by giving them assignments and conducting their reviews.

Lugo's deposition testimony was also before the court. Lugo testified that on the day of plaintiff's accident he managed the custodial workers at Isabella. Lugo testified at length about the evaluations conducted of Wallace and Williams, as to both their cleaning and floor care work. Lugo testified that he set the priorities for Williams: "[t]he priorities are written by me alone, what I want the employee to concentrate on for the next period."

Defendants also submitted a copy of the contract between Propoco and Isabella, pursuant to which Propoco supervised the environmental services staff, conducted

instructional programs and provided management staff.[3] The contract also provided that all Propoco and Isabella employees would follow Isabella polices and procedures. Under the contract, Isabella retained the right to remove and/or replace employees.

In the September 6, 2012 decision and order I found that defendants failed to make a *prima facie* showing that they were entitled to judgment as a matter of law. I found that defendants failed to establish that Wallace and Williams were not their special employees. I held that defendants failed to establish that Isabella controlled, assigned, supervised and directed their work. I also found that there were questions of fact which prevented summary judgment on plaintiff's claims for negligent supervision, training and retention. As to Morrison, I denied the motion because defendants offered only on conclusory allegation that Morrison was not involved in floor care.

Defendants now move for leave to reargue the motion for summary judgement, and on reargument to grant summary judgment dismissing plaintiff's complaint, arguing that the Court overlooked and/or misapprehended certain points of law and fact. Specifically, defendants assert that the court erred in concluding there were questions of fact as to whether Williams and Wallace were Crothall's special employees. Defendants argue that Williams and Wallace remained Isabella's general employees, and were therefore plaintiff's co-workers, limiting plaintiff's recovery to the exclusive provisions of Workers Compensation law ("WCL") §29(6). Defendants also argue that the Court

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[3] Crothall is successor in interest to Propoco.

applied the wrong standard in finding a question of fact as to the negligent supervision, training and retention claims. Lastly, defendants argue that reargument should also be granted as to denial of the motion as to Morrison. Defendants assert that the record revealed that Morrison was only responsible for food service at Isabella.

Plaintiff opposes the motion, arguing that the court did not overlook or misapprehend any points of law or fact. Plaintiff maintains that there is an issue of fact whether Williams and Wallace were, at the time of plaintiff's accident, her co-workers or special employees of the defendants.

Discussion

Pursuant to CPLR § 2221(d)(2), a motion to reargue must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." *Mangine v. Keller*, 182 A.D.2d 476, 477 (1st Dep't 1992). Absent mistake on the Court's part, the Court must adhere to its original decision. *William P. Pahl Equipment Corp. v Henry Kassis*, 182 A.D.2d 22, 27-28 (1st Dep't 1992).

There is no question that if defendant can establish that Williams and Wallace are general employees of Isabella, that the exclusivity provision of WCL §29(6) will bar any further recovery by plaintiff. As noted in the September 6, 2012 decision, "Workers' Compensation Law § 29 (6) provides that Workers' Compensation benefits shall be the exclusive remedy when an employee is 'injured or killed by the negligence or wrong of another in the same employ.'" *Marange v. Slivinski*, 257 A.D.2d 427, 428 (1st Dep't

1999) (quoting WCL §29(6)). This is true "whether such injury is sustained in the course of general or special employment." *Cruickshank v. Dukes*, 188 Misc. 2d 514, 515 (App. Term. 2d Dep't 2001) (citations omitted).

In addition, it is well established that, as stated in the September 6, 2012 decision, "a general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits." *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557 (1991).

In the September 6, 2012 decision, I held that there are questions of fact as to whether Wallace and Williams are Crothall's special employees. However, upon review of the law and facts at issue, I find that the more pertinent question, which was overlooked in the September 6, 2012 decision, is whether Wallace and Williams remained general employees of Isabella, because if they did – regardless of whether they were also Crothall's special employees – plaintiff is bound by the exclusivity provision of the Workers Compensation Law.

"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." *Thompson*, 78 N.Y. 2d at 557.

Upon review of the submission in the underlying motion, I find that defendants satisfied their burden to establish *prima facie* entitlement to judgment, based upon a

showing that Isabella maintained control of the environmental services workers as its general employees. Defendants presented Williams' deposition testimony, in which he testified that he was employed by Isabella as part of the environmental services group, and referred to his pay stub from Isabella, although that pay stub was not submitted as part of the record. Williams testified he was hired by Isabella, although trained by Crothall employees. Williams also testified that he received Worker's Compensation benefits from Isabella.[4]

The contract between Propoco and Isabella also offers support that Isabella did not surrender its environmental services staff. The contract provided that all Propoco and Isabella employees would follow Isabella polices and procedures, and that Isabella retained the right to remove and/or replace employees.

In support of their motion, defendants relied on *Spencer v. Crothall Healthcare, Inc.*, 38 A.D.3d 527 (2d Dep't 2007). The underlying facts in *Spencer* are similar to those here – plaintiff, a hospital employee, was delivering food to a patient when she slipped and fell, injuring herself. While she lay on the floor, plaintiff noticed a "puddle of water and a 'wet floor' sign behind a door leaning against the wall." *Spencer*, 38 A.D.3d at 527-528. As a result, plaintiff collected Workers' Compensation benefits from the

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[4] At his deposition, Williams testified that in 2000 he was injured on the job and collected Worker's Compensation benefits. When asked who provided that insurance, he stated "I guess Isabella."

hospital, and then brought suit against, among others, Crothall, which managed the hospital's housekeeping department. *Id.*, at 528.

The court in *Spencer* found that "the hospital did not surrender control of the employees as it paid their wages, provided them with workers' compensation insurance, and made the final decision to hire, discipline, or fire them. Since the members of the housekeeping staff are general employees of the hospital, the plaintiff is precluded by the exclusivity provision of the Workers' Compensation Law from bringing this action against the defendants." *Spencer*, 38 A.D.3d at 528.

As in *Spencer,* defendants have submitted evidence that Isabella did not surrender control of its employees, as it paid their wages, provided them with workers' compensation insurance and made the final decision to hire, discipline, or fire them.

In reviewing the parties' submission on the underlying motion for summary judgment, I find that plaintiff has not met its burden to show the existence of issue of material fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In the record on the underlying motion, as submitted by defendants herein, plaintiff submitted only an attorney affidavit. Plaintiff submits nothing in opposition, nor does she point to anything in the record, to suggest that Isabella has surrendered control of its environmental services workers. In her opposition to the motion for summary judgment, plaintiff maintains that it is defendants' burden to prove that the environmental services workers were not their special employees, and that

defendants' have not met this burden. Ignoring Williams' testimony that he was paid by Isabella and received Workers' Compensation from Isabella, plaintiff asserts that defendants have not submitted evidence of who paid the environmental services workers or who was responsible for their workers' compensation coverage.

Accordingly, I grant defendants' request for leave to reargue, and upon reargument, I find that defendants have established an entitlement to summary judgement dismissing the claims against them, as they have established that the environmental services workers were plaintiff's co-workers, and plaintiff is therefore limited to the exclusivity provision of WCL §29(6). As such, there is no need to review plaintiff's claims for negligent training, supervision and retention, as those claims would also be barred by WCL §29(6).

As to defendant Morrison, defendants argue here, as they did on the underlying motion, that plaintiff fails to oppose the motion as to defendant Morrison, and for that reason leave to reargue, and upon reargument summary judgment should be granted as to Morrison on default.

Upon review of the underlying motion papers. I maintain that defendants offered no argument in support of the motion on behalf of Morrison, and stated only one allegation – that Morrison operates food services at Isabella, and had nothing to do with floor care – in support of its motion. In support of this motion, defendants argue that the Court overlooked Cuva's testimony that Morrison was involved with food service and not

floor care. In support, defendants refer to the moving attorney affirmation, which in turn refers to page 73 of Cuva's deposition transcript. A review of page 73, however, shows testimony about trainings conducted by environmental services. When asked about Morrison later during the deposition, Cuva stated that he "believe[s] they're a food services company," and that he was not aware of any role Morrison has ever had in floor care.

In light of this testimony, and plaintiff's lack of opposition to leave to reargue as to Morrison, I grant leave to reargue, and on reargument grant summary judgment as against Morrison.

In accordance with the foregoing, it is hereby

ORDERED that the motion by defendants Crothall Facilities Management, Inc., Professional Service, Inc., d/b/a Propoco, and Morrison Management Specialists for leave to reargue Court's decision and order dated September 6, 2012; and it is further

ORDERED that, upon reargument, defendants' motion for summary judgment dismissing plaintiff Tatiana Oumentseva's complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: New York, New York
May 13, 2013

ENTER:

Saliann Scarpulla, J.S.C.