SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 308868/2012**

Ricardo David Benitez,
Plaintiff,

-against- DECISION & ORDER

J.P.L. Realty Corp.,
Colonial Elevator Corporation and
Gotham Elevator Inspection, Inc.,

Defendants.

Present:
Hon. Julia I. Rodriguez
----------X Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant J.P.L Realty Corp.'s motion for summary judgment, Colonial Elevator's motion for summary judgment and Gotham Elevator's motion for summary judgment.

Papers Submitted	Numbered
JPL Notice of Motion, Affirmation & Exhibits	**1**
Pl Affirmation in Opposition	**2**
Reply Affirmation	**3**
Pl. Sur-Reply Affirmation in Opposition	**4**

In the instant action, plaintiff alleges he was injured on January 4, 2010 in the course of his employment when the elevator he was operating began to "shake" and "wobble" causing a pallet jack inside the elevator to strike him. At the time of the accident, plaintiff was employed by Kopper's Chocolate Factory (Kopper) which leased a building owned by defendant J.P.L. Realty Corp. ("JPL Realty"). JPL Realty Corp. had owned the factory building since 1983. Colonial Elevator Corporation ("Colonial") provided monthly maintenance and repair services, responded to emergency calls, and performed annual and five-year inspections of the elevator. Both Kopper and JPL Realty were owned by members of the Alexander family.

Defendant JPL Realty now moves, pursuant to CPLR 3025, to amend its Answer to assert two additional affirmative defenses.

The Court notes that JPL Realty previously moved for summary judgment, dismissing the complaint, on the grounds that: (1) it was an out-of-possession landlord that had no contractual duty to maintain the building; (2) it relinquished control of the entire building to

Kopper; (3) it did not create nor have notice of the alleged dangerous condition; and (4) Kopper retained Colonial to maintain the elevator. By Decision & Order dated March 2018, this Court denied JPL Realty's motion in its entirety finding that triable issues of fact existed as to whether: (1) JPL Realty had actual or constructive notice of the alleged defective condition of the elevator; (2) JPL Realty violated Labor Law §316(2), which imposes a nondelegable duty upon a tenant-factory building owner, like JPL Realty, to comply with Labor Law §255, which requires every elevator used in connection with a factory to be constructed, guarded, equipped, maintained and operated to be safe for all persons; and (3) JPL Realty violated NYC Building Code §27-1005 by not having a designated elevator operator.

Now, eight years after the action was commenced, three years after the completion of discovery, and more than two years after it unsuccessfully moved for summary judgment, JPL Realty seeks to amend its Answer to add the following affirmative defenses: (1) At the time of the accident, plaintiff was a special employee of JPL Realty and (2) Plaintiff is otherwise limited to Workers' Compensation benefits. In her affirmation in support of the motion, counsel for JPL Realty states that since plaintiff's depositions in 2017, there have been many "staffing changes" in her office, and, "[t]hrough no fault of [her] office and due to reorganization and reassignment of cases forced by retirements and other shifts, this matter was reassigned several times." Counsel also states: "As can be observed from a careful read of moving defendant's deposition through Jeff Alexander . . . Plaintiff thoroughly questioned defendant as to the relationship between defendant [JPL Realty] and Koppers which is the entity that officially employed plaintiff." Counsel further states that Jeff Alexander's deposition "shows that plaintiff will not be prejudiced in any shape or form from this simple amendment to defendant's Answer." Notably, counsel failed to address the merits of the proposed affirmative defenses.

While counsel submitted the deposition testimony of plaintiff and Jeffrey Alexander, she did not discuss any deposition testimony in her initial affirmation and, only in her reply affirmation, discussed Jeffrey Alexander's testimony. Of note, Jeffrey Alexander testified that he served as Vice President and shareholder of JPL Realty and also served as Vice President of Business Affairs for Kopper until it went out of business in 2016; his mother Lori Alexander was

Kopper's President and his sister Leslie Alexander was Kopper's only other Vice President; until his death in 1997, his father Harold Alexander had been Kopper's President; JPL Realty and Kopper are distinct and separately-owned corporations; JPL Realty leased the subject building to plaintiff's employer, Kopper, for the purpose of operating a chocolate factory; and Kopper was the sole occupant of the building and was responsible for maintaining the building.

This is insufficient to satisfy JPL Realty's burden, as the movant, to show the merit of its proposed additional affirmative defenses. *Mantilla v. Lutheran Medical Center,* 90 A..D.3d 518, 934 N.Y.S.2d 311.

In any event, in its reply papers, JPL Realty appears to have abandoned its proposed affirmative defense that plaintiff was in the special employ of JPL Realty. Nor is there any evidence that plaintiff worked for JPL Realty or that Kopper surrendered control over plaintiff at any time.

With respect to whether plaintiff is limited to Workers' Compensation benefits, "an action against an owner of premises should not be dismissed based on the exclusivity provisions of the Workers' Compensation Law '[w]hen an employer and an owner of the premises where a plaintiff is injured are distinct legal entities.'" *Palmer v. Dezer Props. II,* 270 A.D.2d 207, 706 N.Y.S.2d 31 (1st Dept. 2000) quoting *Richardson v. Benoit's Elect.,* 254 A.D.2d 798, 677 N.Y.S.2d 855 (4th Dept. 1998). In *Richardson v. Benoit's Elect.*, a waitress sued her employer, Crossroads, and Woodstream, the owner of the property on which the restaurant was located. Harold and Constance Jenkins owned all of the stock of both Woodstream and Crossroads. In that case, Woodstream contended that it was formed solely for the purpose of holding title to the real property, which was leased from it by Crossroads, and thus that it also should be deemed plaintiff's employer. *Richardson v. Benoit's Elect.,* 254 A.D.2d at 799. The Court disagreed finding that "[t]he individual principals in this business enterprise, for their own business and legal advantage, elected to operate that enterprise through separate corporate entities. The structure they created should not lightly be ignored at their behest, in order to shield one of the entities they created from . . . common-law tort liability." *Id.*

The cases cited in JPL Realty's reply papers are distinguishable. In *Heritage v. Van Patten,* 59 N.Y.2d 1017, 466 N.Y.S.2d 958 (1983), *Caceras v. Zorbas,* 74 N.Y.2d 884, 547 N.Y.S.2d 834 (1989) and *Johnson v. Eaton Corp.,* 178 A.D.2d 101, 577 N.Y.S.2d 1 (1st Dept. 1991), the owner of the real property where the plaintiff was injured was an individual, not a corporation. In *Di Rie v. Automotive Realty Corp.,* 199 A.D.2d 98, 605 N.Y.S.2d 60 (1st Dept. 1993), the Court limited its findings to the specific circumstances of that case, in which the property owner and plaintiff's employer were separate legal entities owned by one individual. The *Di Rie* Court determined that the plaintiff was limited to Workers' Compensation benefits because the property owner, which had no employees, was controlled by the individual that controlled plaintiff's employer. *Id.* Here, there is no evidence that JPL Realty controlled Kopper or that the two businesses, each of which had several owners, operated as a single integrated entity. As plaintiff notes, Koppers was established in 1937 while JPL Realty was established 36 years later, in 1983. Jeff Alexander testified that he instructed his accountants to follow the corporate formalities and keep the two corporate entities separate and distinct. There was a written lease agreement between JPL Realty and Kopper. JPL Realty kept its own separate bank account and when receiving rent checks from Koppers, deposited those checks into JPL Realty's account. JPL Realty had its own separated federal tax identification number, and filed its own separate tax returns.

The Court also notes JPL Realty's special status under the Labor Law as the owner of a tenant-factory building with a nondelegable duty to construct, guard, equip, maintain and operate the elevators in its building to be safe for all persons.

Based upon the foregoing, plaintiff was not in the special employ of JPL Realty and is not limited to Workers' Compensation benefits. Accordingly, JPL Realty's motion to amend its Answer is **denied**.

The Clerk is directed to enter Judgment.

Dated: Bronx, New York
September 25, 2020

Hon. Julia I. Rodriguez, J.S.C.