At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of JANUARY, 2021

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.

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BETTY BARON,

Plaintiff,

-against-

SETH TRANSPORTATION INC., JUAN DOMINGA RODRIGUEZ, JR., CAREFUL BUS SERVICE and ALAN LI,

Defendants,

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Index No.: 506894/2016
Decision and Order

The following *papers NYSCEF* Doc #'s 137 to 173 read on this motion:

Papers	*NYSCEF DOC NO.'s*
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	137-153; 155-160
Opposing Affidavits (Affirmations)	161-166; 169-170
Reply Affirmation	167; 172-173

After having heard Oral Argument on JANUARY 11, 2021 and upon review of the foregoing submissions herein the court finds as follows:

Plaintiff moves for an order severing this action from action #2 lifting the stay in this case and setting the matter down for trial. (MS#11). Defendant's CAREFUL BUS SERVICE, INC, and ALAN LI move pursuant to CPLR 2221(a) for reargument and upon reargument granting summary judgment to the defendants dismissing all claims and cross-claims. (MS#12).

First the court shall address motion sequence #11. Plaintiff's request to lift the stay in this matter is hereby granted. The stay in this matter is hereby lifted. It is further ordered that this matter be put on the trial calendar. Any other requests in motion sequence number 11 not specifically addressed are hereby denied. This order renders MS#10 to lift the stay currently pending in CCP, MOOT.

Next the Court shall address motion sequence #12. Defendant's CAREFUL BUS SERVICE, INC, and ALAN LI move pursuant to CPLR 2221(a) for reargument and upon reargument they request the court grant summary judgment to the defendants dismissing all claims and cross-claims. Plaintiff opposes the same.

ANALYSIS

CPLR 2221 in pertinent part states: "(d) A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. CPLR 2221(d)(2) articulates the standards previously outlined in the caselaw. A motion to reargue, it says: "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion. CPLR 2221. Additionally, A court has inherent discretionary power to vacate an order or judgment in the interests of substantial justice. *See Woodson v. Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727, 790 NE2d 1156 (2003).

In the present case, defendant's contend that in deciding the previous motion,

the Court overlooked or misapprehended relevant facts or misapplied controlling principles of law. The Court can find nothing in defendant's renewal which indicates that the Court overlooked or misapprehended relevant facts. Defendant's fail to set forth any facts that the Court overlooked, however, but contend apparently that the Court misapplied controlling principles of law in regard to denying their motion for summary judgment. The Court disagrees. For clarity purposes, with respect to that portion of defendant's motion regarding whether plaintiff is entitled to compensation beyond the Workers Comp benefit already received, the court finds as follows;

The first issue the court will consider is defendants failure to raise Workers Compensation exclusivity as an affirmative defense. While leave to amend is generally freely granted, in the present case the defendant has never made such a request to the court. The defendant contends while prior counsel failed to plead this affirmative defense, now through its present motion and submissions, the waiver of said defense has essentially been retracted and the court should grant its motion, irrespective of the fact that to date such defense has never been pled. Defendant further contends plaintiff should have anticipated this unpled defense based upon the line of questioning during its EBT of the plaintiff. Defendants go on to further argue, that counsel for plaintiff could have requested an EBT of Mr. Hoffman, the CEO of the two entities in question; Careful Bus Services and X-L Escorts. Plaintiff in opposition contends that it is not their burden to decipher Defendants potential affirmative defenses, that have not been pled, based on questioning during an EBT. Additionally, plaintiff contends had defendant properly raised this affirmative defense, prior to present motion for summary judgment, he would have in fact sought the deposition of Mr. Hoffman.

The relevant inquiry for the court to consider in allowing this never pled affirmative defense is whether the plaintiff is prejudiced or surprised with the affirmative defense. In the present case, as no motion to amend has ever been made and the present summary judgment motion relying heavily on the newly submitted affirmation by Mr. Hoffman, who was never deposed, the court finds that plaintiff will be prejudiced and as such, said request is denied.

Moving to merits of case, defendant contends that summary judgment is warranted as plaintiff's work and assignments were controlled and directed by defendant CAREFUL BUS; the equipment, supplies, an uniforms were provided by CAREFUL BUS, hence plaintiff should be considered a "Special Employee" of CAREFUL BUS. Alternatively defendant contends, as defendant CAREFUL BUS and X-L are located in same office, and plaintiff continued receiving its assignments from CAREFUL BUS and, plaintiff was working on Careful bus at time of accident, plaintiff should be considered a dual employee of both entities and is thus unable to maintain her claim against defendant CAREFUL BUS as immunity will extend to all of plaintiffs employers because plaintiff has accepted Workers Compensation benefits.

In opposition, counsel for plaintiff points out that plaintiff was working for defendant CAREFUL BUS from 2001 to 2011, thereafter she was employed by X-L, paid by X-L and in fact put in the union by X-L. At the time of her accident on 2/25/16, plaintiff contends she sustained injuries in the course of her employment for X-L while on a Careful bus. Plaintiff's counsel contends that plaintiff was not defendant CAREFUL BUS's special employee or a dual employee or a lent employee for the purposes of analyzing underlying entitlement to compensation beyond Workers

Compensation.

Defendant's contention that plaintiff has exhausted her remedies against defendant CAREFUL BUS through workers compensation is unavailing. Moreover, an individual's characterization as a special employee, dual employee or lent employee is usually a question of fact for a jury to determine. *See Thompson v. Grumman Aerospace Corp.*, 78 NY2d 553, 556, 585 NE2d 355, 356 (1991). Furthermore, the burden is on the movant to establish, as a matter of law, that the plaintiff falls into any of these categories. Therefore, the court finds that defendant CAREFUL BUS has failed to meet its burden and as such, summary judgment must be denied,

Moving to defendant CAREFUL BUS final argument in the alternative, that summary judgment is appropriate based on the "alter ego" doctrine, the court likewise finds defendant has failed to establish the same as a matter of law. The cases relied on and cited by defendant for this theory of the case usually refer to parent corporations and its subsidiaries, where movants establish that defendants were wholly owned subsidiaries of plaintiff's employer or where the subsidiary functions as an "alter ego" of the parent corporation.

In the present case, although the two entities in question are closely related, there is no or minimal discussion by Mr. Hoffman of the finances of the respective companies; no discussion or evidence submitted as to whether one of the entities was a subsidiary of the other. Further, each entity in the present case were formed for separate corporate purposes. "Where the principal of a business enterprise elects to operate its enterprise through separate corporate entities, the structure created should not lightly be ignored with respect to shielding one of these entities from common law

tort liability." *See Buchner v. Pines Hotel Inc*, 58 N.Y.2d 1019, 448 NE2d 1347, 462 NYS2d 436 (1983). Therefore, defendants request to apply the alter ego doctrine is denied as a matter of law.

Accordingly, plaintiff's motion to lift the stay in this action is hereby granted, the stay in this action is hereby lifted. It is further Ordered that this matter be placed on the trial calendar, all other reliefs not specifically addressed are hereby denied. (MS#11). This order renders Motion sequence #10 MOOT, as the stay in this case is lifted. Defendant's CAREFUL BUS SERVICE, INC, and ALAN LI motion pursuant to CPLR 2221(a) for reargument is hereby granted and upon reargument defendants request for summary judgment is hereby denied in its entirety, for the reasons stated above. (MS#12).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
January 22, 2021

ENTER FORTHWITH:

HON. RICHARD VELASQUEZ