Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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EDGARDO PAGAN,

Plaintiff(s),

- and -

3 LISPENARD STREET COMPANY LLC,

Defendant(s).

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Index No.:710115/18

Motion Date:7/6/21

Motion Cal. No.: 12

Motion Seq. No: 2

The following papers numbered 1 - 10 read on this motion by the defendant for summary judgment dismissing the complaint pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Reply Affirmation-Exhibits-Service.....	8 - 10

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

This is an action for personal injuries allegedly sustained by the plaintiff on November 22, 2017 when he fell at the premises located at 3 Lispenard Street in the County, City and State of New York. This action was commenced July 2, 2018 by the filing of a summons and complaint.

Plaintiff in this labor law action, seeks damages for personal injuries which he sustained when he slipped while descending a metal ladder to the basement of a building owned by defendant 3 Lispenard Company LLC ("Lispenard"). Plaintiff worked as a superintendent/supervisor at the building, and fell from a ladder while escorting a plumber to the location of the boiler down in the basement of the building. Plaintiff testified, upon examination before trial, that the metal ladder that was permanently affixed to the wall of the basement, was slippery from the rain when he descended it. Plaintiff further testified that he had opened the hatch to the basement approximately two and a half hours prior to descending the ladder and that it was raining "slightly" at that

time. Finally, plaintiff testified that non-party Electric Trading Company ("ETC"), retained plaintiff, paid his wages by its own company checks, gave direction to him with respect to his daily work duties; provided for his Workers' Compensation insurance and that his daily work duties were not directed and controlled exclusively by Defendant. Lispenard submits that plaintiff was its special employee based upon evidence that plaintiff sometimes performed tasks for Lispenard at other buildings.

The complaint sets forth causes of action alleging violations of Labor Law §§ 200, 240(1) and 241(6), and common-law negligence against the defendant-owner of the building. Defendant moves for summary judgment dismissing the complaint on the ground that, inter alia, plaintiff was defendant Lispenard's special employee who received workers' compensation benefits from his general employer, non-party ETC, and thus this action is barred by the exclusive remedy provisions of the Workers' Compensation Law. Plaintiff opposes the motion.

Workers' Compensation Law §§ 11 and 29 (6) provide that an employee who is entitled to receive compensation benefits may not sue his or her employer in an action at law for the injuries sustained. These exclusivity provisions also have been applied to shield from suit persons or entities other than the injured plaintiff's direct employer *(see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 358-359 [2007]; *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]). In this regard, a general employee of one employer may also be a special employee of another employer (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557; *Spencer v Crothall Healthcare, Inc.*, 38 AD3d 527, 528 [2d Dept 2007]). The receipt of Workers' Compensation benefits from a general employer precludes an employee from commencing a negligence action against a special employer (*see Hofweber v Soros*, 57 AD3d 848, 849 [2008]; *Croche v Wyckoff Park Assoc.*, 274 AD2d 542 [2d Dept 2000]).

"A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. 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 v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991] [citations omitted]). Essential to a special employment relationship "is a working relationship with the injured plaintiff sufficient in kind and degree so that the [putative special employer] may be deemed plaintiff's employer" (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 359 [2007]). Notably, "while no single factor is determinative, "a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d at 558). Other factors include "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" (*Schramm v Cold Spring Harbor Lab.*, 17 AD3d at 662; *see Balamos v Elmhurst Realty Co. I, LLC*, 56 AD3d 705 [Dept 2008]; *Ugijanin v 2 W. 45th St. Joint Venture*, 43 AD3d 911, 913 [Dept 2007]).

Here, defendant Lispenard failed to meet its prima facie burden of establishing the defense sufficiently to warrant the court directing judgment in its favor as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In support of its motion, defendant relies primarily on the testimony of Eileen Hecht. Hecht testified as to her part ownership of Lispenard and other buildings, and that plaintiff sometimes performed work at Lispenard and other buildings. However, Hecht's testimony did not eliminate all material issues of fact as to whether ETC relinquished control to Lispenard (*see Marrero v Akam Assoc. LLC*, 39 AD3d at 717-718; *cf. Balamos v Elmhurst Realty Co. I., LLC*, 56 AD3d at 706). Hecht's testimony was evasive on the question of who controlled plaintiff's work assignments at any given time. At the very least, the record suggests that control and direction may have been shared between ETC and Lispenard.

Significantly, the question of whether a special employment relationship exists is fact-laden and generally presents an issue for the trier of fact (*see Thompson*, 78 NY2d at 557; *Bellamy v Columbia Univ.*, 50 AD3d 160 [1st Dept 2008]). "The determination of special employment status may be made as a matter of law where the particular *undisputed* critical facts compel that conclusion and present no triable issue of fact" (*Thompson, supra)* (emphasis added)."[A]bsent a clear showing of the surrender of control by the general employer and the assumption of sufficient control by the special employer, general employment is presumed to continue...." (*see, Thompson*, 78 NY2d at 557; *Sanfilippo v City of New York*, 239 AD2d 296 [1st Dept 1997]; *Bautista v David Frankel Realty, Inc.*, 54 AD3d 549 [1st Dept 2008]).

The court's function at this juncture is not to decide an issue of fact but to determine whether one exists (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] ["issue-finding, rather than issue-determination, is the key to (reviewing a motion for summary judgment)" (internal quotation marks and citation omitted)]). Where, as here, elements of the employment bespeak both general and special employment, a person's categorization as a special employee is a question of fact for the jury to determine (*Pena v Automatic Data Processing, Inc.*, 105 AD3d 924, 924-25 [2d Dept 2013]; *Schramm v Cold Spring Harbor Lab.*, 17 AD3d at 662; *see Matter of Johnson v New York City Health & Hosps. Corp.*, 214 AD2d 895, 896 [1995]).

Accordingly, the motion for summary dismissal of plaintiff's labor law claims, is denied.

In light of the court's determination, it need not reach the merits of defendant's remaining contentions.

Dated: November 18, 2021

JANICE A. TAYLOR, J.S.C.

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