

<b>D'Amato v Clifford Group, Inc.</b>
2022 NY Slip Op 33260(U)
September 28, 2022
Supreme Court, New York County
Docket Number: Index No. 154592/2017
Judge: Frank P. Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. FRANK P. NERVO PART 04

*Justice*

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ANTHONY D'AMATO,

Plaintiff,

- v -

CLIFFORD GROUP, INC., ERST 112 WEST 34TH STREET,  
LP,

Defendant.

INDEX NO. 154592/2017

03/22/2021,  
05/24/2022,  
05/27/2022,  
05/31/2022

MOTION DATE 05/31/2022

MOTION SEQ. NO. 005 006 007  
008

**DECISION + ORDER ON  
MOTION**

-----X

CLIFFORD GROUP, INC.

Plaintiff,

-against-

DFNY ACOUSTICS & DRYWALL, INC., TRI-STATE  
DISMANTLING SERVICES, INC.

Defendant.

Third-Party  
Index No. 595924/2017

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CLIFFORD GROUP, INC., ERST 112 WEST 34TH STREET,  
LP

Plaintiff,

-against-

PRISTINE SERVICES INC.

Defendant.

Second Third-Party  
Index No. 595920/2019

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[continued on following page]

ERST 112 WEST 34TH STREET, LP  
Plaintiff,

Third Third-Party  
Index No. 595147/2021

-against-

DFNY DRYWALL & ACOUSTICS, INC., TRI-STATE  
DISMANTLING CORP.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 290, 291, 298, 300, 301, 302, 303, 304, 309

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 305, 306, 307, 308, 315, 316, 317, 318

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 310, 311, 312, 313, 314, 322, 323, 324, 325

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Upon consideration of the aforementioned papers, and oral argument heard on September 12, 2022, the Court issues the following decision and order, addressing each motion in turn.

MOTION SEQUENCE 005

ORDERED that motion sequence 005 is granted to the extent of dismissing the breach of contract claim for failure to procure insurance. The contract at issue in motion sequence 005 is identical to the contract at issue in motion sequence 004. As with motion sequence 004, here, DFNY has established that it

procured insurance; that the insurer has disclaimed coverage to Clifford as an additional insured, does not equate to a violation of the contract by DFNY and may well form the basis for further litigation between Clifford/DFNY and the insurance provider; and it is further

ORDERED that motion sequence 005 is otherwise denied.

MOTION SEQUENCE 006

ORDERED that motion sequence 006 is denied in its entirety. Whether plaintiff suffered a grave injury is an issue of fact for the jury or trier of fact to determine. The Court does not, and indeed cannot, determine whether plaintiff suffered a grave injury as a matter of law, under these circumstances.

MOTION SEQUENCE 007

A special employee is “one who is transferred for a limited time of whatever duration to the service of another” (*Thompson v. Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]). Thus, a general employee of one employer may simultaneously be the special employee of another (*id.*). However, the determination of whether an employee is a special employee is generally a question of fact reserved for the trier of fact (*id.*; see also *Stone v. Bigley Bros., Inc.*, 309 NY 132 [1955]). Where crucial facts relating to the issue of special

employment are undisputed, and no triable issue of fact exists regarding the special employment status, the Court may determine special employment status as a matter of law (*Thompson v. Grumman Aerospace Corp.*, 78 NY2d at 558; *Sweet v. Board of Educ.*, 290 NY 73, 76 [1943])

Here, the parties did not execute a written contract related to the employee's employment status requiring the Court to weigh "many factors" in determining whether a special employment status, was created (*Thompson v. Grumman Aerospace Corp.*, 78 NY2d at 358; *c.f. Braxton v. Mendelson*, 233 NY 122 [1922]).

Wilson, the employee, testified that he received direction and supervision while at the construction site from Clifford and not his employer, Pristine. Wilson further testified that any demolition work he performed would have been at the direction of Clifford. Pristine's General Manager, Coffield, likewise testified that Pristine's laborers, including Wilson, were directed, controlled, and supervised by Clifford employees. Pristine's payment of Wilson's wages and benefits does not militate against finding Wilson was a special employee of Clifford where Pristine surrendered direction and control over Wilson to Clifford (*Thompson v. Grumman Aerospace Corp.*, 78 NY2d at 559).

ORDERED that, as a matter of law, Wilson was a special employee of Clifford and motion sequence 007 is granted to the extent of dismissing the claims against Pristine.

MOTION SEQUENCE 008

ORDERED that motion sequence 008 is denied in its entirety.

FURTHER DIRECTIVES APPLICABLE TO MOTION SEQUENCES 005 – 008

ORDERED that any relief requested not addressed herein has nevertheless been considered and is hereby denied; and it is further

ORDERED that the parties shall, pursuant to the Court’s on-the-record direction, order a copy of the stenographic record of oral argument held on September 12, 2022, share in the costs of same, and file same with the Court to be so-ordered within 30 days of this decision and order; and it is further

ORDERED that the failure to timely file a copy of the record, as above, may result in sanctions, including but not limited to waiver of relief granted herein.

9/28/2022  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

HON. FRANK P. NERVO

J.S.C.  
 OTHER

REFERENCE