

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
PLCV2006-00789

EDWARD CAMELIO

vs.

MICHAEL J. POWERS

**MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT; AND
PLAINTIFF'S REQUEST FOR REPORT PURSUANT TO G.L. c. 231, §111**

Plaintiff Edward Camelio ("Camelio") filed this negligence action against defendant Michael Powers ("Powers") seeking to recover for injuries he sustained when he fell off a ladder while working on a project at Powers's home. This matter is before the court on the defendant's Second Motion For Summary Judgment pursuant to Mass. R. Civ. P. 56. As an alternative to granting the defendant's motion, Camelio requests that this Court report the case pursuant to G.L. c. 231, § 111. For the reasons discussed below, the defendant's Second Motion for Summary Judgment is **DENIED**. Accordingly, the plaintiff's request for a report is **DENIED**.

BACKGROUND

Viewed in the light most favorable to the plaintiff as the non-moving party, the undisputed facts as revealed by the summary judgment record are as follows. Powers incorporated E.M. Communications ("EMC") on November 13, 2002 as its sole owner, and serves as its president, treasurer, secretary, and director. Powers then hired Camelio to work as a cable technician and installer. Camelio's responsibilities involved drilling holes, climbing ladders, and routing and

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installing cable for EMC's customers. Powers was Camelio's supervisor. In July of 2003, EMC worked exclusively for Adelphia, completing work orders to install cable for Adelphia's customers. On July 17, 2003, EMC was a Dish Network retailer and was in the process of becoming a direct installation contractor. EMC had not yet performed any satellite dish installations as of that date. However, Powers intended Camelio to head EMC's Dish Network installation department once its installer application was approved. Camelio had experience in satellite dish installation from his prior employment.

On July 17, 2003, Powers asked Camelio to come to his new home to help install a satellite dish for his personal use. Powers had purchased the dish from Dish Network and thought he should have experience with the dish and its installation before he began selling it to customers. Powers had attempted to install the new dish himself but was unable to get a signal. Powers and Camelio had no formal arrangement for payment. Powers considered Camelio to be a friend and in the past, had performed work at Camelio's house for free. Powers did not expect Camelio to charge him, although he would have payed any bill Camelio sent.

On July 17, after both men had completed their Adelphia routes for the day, they drove separately to Powers's home at 137 Lake Avenue in East Wareham, arriving between 5:00 and 6:00 p.m. Camelio had two contractor grade fiberglass ladders on his truck: a 16 foot ladder and a 28 foot ladder, both of which he owned. Powers also had two contractor grade fiberglass ladders on his van: a 16 foot ladder and a 28 foot ladder. All the equipment on Powers's van, including the ladders, was owned by EMC. While Camelio was inside the house setting up the satellite boxes, Powers set up his 28-foot fiberglass ladder on the grass, which sloped away from the house. Powers stood up the feet of the ladder so they dug into the lawn, but did not stake or tie down the feet in any

way. Powers eyeballed the angle of the ladder based on his general experience with ladders. He then stood on the bottom rung and pulled the ladder back several times to make sure it was level and on solid ground. A friend had given Powers the ladder in 1997, at which time it was already used. On July 17, the ladder was in good condition, although it was weather beaten and had typical small stress cracks on the exterior of the fiberglass. The end caps on the feet of the ladder were worn.

Powers went inside the house, while Camelio went outside to install and tune the dish. Camelio stood on the bottom rung of the ladder and pulled it back to check its stability and footing. Camelio was wearing a tool belt but had nothing in his hands as he climbed the ladder. He did not realize until he reached the top that Powers had set up his own ladder. On one prior occasion, Camelio had used Powers's ladder and complained that it was not as strong as his own ladder. Powers remained inside and yelled information to Camelio about the strength of the signal, through an open window, while Camelio worked on adjusting the dish. After he had been standing at the top of the ladder for approximately 15 minutes, the ladder bowed and Camelio bounced straight back and fell 25 feet to the ground, sustaining serious injuries including a broken pelvis, nerve damage, and broken teeth. Powers ran outside and saw Camelio and the ladder on the ground. Photographs of the ladder after the accident revealed bends or twists which Powers did not recall prior to the accident. Camelio never received any payment from Powers or EMC for the work performed at Powers's house on July 17.

Following the accident, Powers put the ladder on Camelio's truck and drove it back to Camelio's house. Powers no longer wanted to use the ladder because it was cracked and twisted after the fall. He put Camelio's ladder on his own van and has used it ever since. Powers filled out and submitted an accident report form to the Department of Industrial Accidents ("DIA"). Camelio

retained Attorney Jennifer Cox to handle his workers' compensation claim, and received workers' compensation benefits including payment of medical bills and lost wages. Camelio continued to work for EMC approximately 15 hours per week doing customer service, paperwork, and dispatching. Eventually, Camelio settled his workers' compensation claim with EMC for a \$55,000 lump sum. This settlement was approved by the DIA on January 19, 2006. Camelio also receives total social security disability benefits.

Camelio filed this action against Powers on July 3, 2006, alleging in Count I of the complaint that Powers negligently controlled and maintained the ladder, failed to instruct him in recognizing unsafe conditions in violation of OSHA regulations, failed to properly supervise the work, failed to warn him of a dangerous condition, failed to comply with industry safety standards applicable to ladder safety, and failed to exercise due care to prevent injury to people on his premises. Count II of the complaint alleges that Powers is liable under G.L. c. 143, § 5 as the owner of the building where construction work was performed in violation of the State Building Code and other regulations. Powers answered the complaint and asserted twelve affirmative defenses.

On September 5, 2007, Powers moved for summary judgment on the ground that Camelio's claims are barred by the exclusivity provisions of the Workers' Compensation Act, G.L. c. 152, §§ 23-24. This Court (Rufo, J.) denied the motion, concluding that there was a genuine issue of material fact with respect to whether Camelio was acting in the course of his employment when he fell from the ladder. On August 11, 2009, this Court (Connon, J.) allowed Powers's motion to amend his answer to assert the G.L. c. 152, § 24 exclusivity provision as an express affirmative defense. Powers again moves for summary judgment on the ground that the exclusivity provisions bar Camelio's claims against him.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

I. IMMUNITY UNDER THE WORKERS' COMPENSATION ACT

Powers contends that Camelio's claims against him are barred by the exclusivity provisions of the Workers' Compensation Act, G.L. c. 152, §§ 23, 24. Section 24 provides in relevant part:

An employee shall be held to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury that is compensable under this chapter, to recover damages for personal injuries, if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right

Under this provision, an employee is barred from recovering against his employer or co-employees for injuries received in the course of employment because the workers' compensation scheme is the exclusive remedy for such injuries. Fredette v. Simpson, 440 Mass. 263, 266 (2003); Doe v. Purity

Supreme, Inc., 422 Mass. 563, 566 (1996); Barrett v. Rodgers, 408 Mass. 614, 616 (1990). Powers argues that Camelio's injury occurred in the course of employment, such that workers' compensation benefits are his exclusive remedy. See, e.g., Collins's Case, 342 Mass. 389, 391-392 (1961) (employee ordered by supervisor to perform personal errand at property owned personally by supervisor was acting in course of employment). As noted by this Court (Rufo, J.) in ruling on the prior summary judgment motion, the record suggests a factual dispute as to whether Camelio was acting in the course of his employment with EMC when he fell from the ladder while installing a satellite dish at Powers's residence.

Powers argues, however, that Camelio's acceptance of a lump sum settlement bars this lawsuit. Chapter 152, section 23 provides in relevant part:

If an employee accepts payment of compensation under this chapter on account of personal injury or makes an agreement under section forty-eight [for a lump sum settlement], such action shall constitute a release to the insured of all claims or demands at common law, if any, arising from the injury.

Although acceptance of a workers' compensation settlement precludes a later claim against the employer for the same injury, Camelio's settlement was with EMC, not Powers individually. Section 23 affords immunity from a common law action to one who is an insured person liable for the payment of compensation and is the direct employer of the employee. Lang v. Edward J. Lamothe Co., 20 Mass. App. Ct. 231, 232, rev. den., 395 Mass. 1104 (1985). EMC and Powers are not the same legal entity, and Powers is not the insured entitled to a release of all claims under § 23. See Searcy v. Paul, 20 Mass. App. Ct. 134, 139 (1985) (worker's lump sum settlement with corporate employer did not bar suit against individual owner of premises where injury occurred, even though he was 100% owner of employer, or suit against corporation which managed premises, even

though same individual was its president and majority shareholder); Paolucci v. Merenda, 2006 Mass. App. Div. 38, 39 (sole shareholder of corporate employer was separate legal entity and not entitled to be treated as the employer for purposes of immunity). The court will not disregard the corporate fiction to immunize distinct legal entities from suit. Searcy v. Paul, 20 Mass. App. Ct. at 139. Thus, Camelio's settlement with EMC does not necessarily bar claims against Powers individually.

Nonetheless, Powers contends that the workers' compensation settlement is entitled to preclusive effect in this action, establishes that Camelio was injured in the course of his employment, and bars any action against Powers as a co-employee. Although the DIA-approved settlement does not expressly contain a finding that Camelio's fall from the ladder occurred in the course of his employment with EMC, an injury in the course of employment was a prerequisite to recovery under the workers' compensation act. Cf. Kniskern v. Melkonian, 68 Mass. App. Ct. 461, 465, rev. den., 449 Mass. 1105 (2007) (plaintiff's acceptance of lump sum settlement under Chapter 152 was necessarily premised on plaintiff's status as employee, and he could not sue employer and argue independent contractor status even though settlement purported to preserve right to contest that issue). Thus, the lump sum settlement with EMC necessarily resolved the issue of whether Camelio's injury occurred in the course of his employment. Under certain circumstances, a non-party to a prior proceeding may use collateral estoppel defensively to preclude a party from relitigating an issue which was fully and fairly litigated and actually decided in a final judgment on the merits in the prior proceeding. See Martin v. Ring, 401 Mass. 59, 60 (1987) (non-party to workers' compensation proceeding before Industrial Accident Board could assert collateral estoppel to preclude injured employee from relitigating, in tort suit against property owner, issue of whether

back injury was caused by fall from ladder); Rubin v. Lexington Ins. Co., 57 Mass. App. Ct. 1115 at *1 (2003) (injured employee who received payment of workers' compensation benefits cannot contest existence of employee-employer relationship in later tort suit).¹

Even assuming that Camelio is precluded from relitigating the issue of whether his injuries occurred in the course of his employment, he is not necessarily barred from suing Powers. The exclusivity provisions of the workers' compensation act extend to actions against a co-employee for negligence committed in the course of the co-employee's employment. Fredette v. Simpson, 440 Mass. at 266; Mulford v. Mangano, 418 Mass. 407, 411 (1994); Frassa v. Caulfield, 22 Mass. App. Ct. 105, 109, rev. den., 398 Mass. 1101 (1986). The complaint alleges that Powers failed to instruct Camelio in the avoidance of unsafe conditions, failed to assure that Camelio received proper work site safety training, failed to inspect for unsafe conditions which posed a threat to workers such as Camelio, and failed to warn Camelio of an unsafe condition on the work site. These claims arguably assert negligence against Powers in his role as EMC's President or a supervisor. However, the complaint also asserts negligence by Powers in negligently controlling and inspecting the ladder, failing to exercise due care to prevent injuries to people lawfully on his premises, and failing to exercise due care after undertaking the control of a project performed on his premises. Powers is immune from suit only if he was acting in the course of his employment with EMC at the time of Camelio's injury. See Fredette v. Simpson, 440 Mass. at 266; Mulford v. Mangano, 418 Mass. at

¹Powers also asserts judicial estoppel, a discretionary equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it previously asserted in another proceeding. See Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 640 (2005). See, e.g., Niles-Robinson v. Brigham & Women's Hosp., Inc., 47 Mass. App. Ct. 203, 206-207 (1999) (employee who sought and received workers' compensation benefits for multiple chemical sensitivity was judicially estopped from suing employer and arguing that workers' compensation act did not apply to her injuries).

410-411. Powers's subjective intent as to whether his conduct was work-related is relevant but not controlling, as an objective test is used to assess whether a co-employee acted in the course of employment: i.e., at least in part for a job-related purpose. Fredette v. Simpson, 440 Mass. at 266; Mulford v. Mangano, 418 Mass. at 412. The DIA settlement did not adjudicate the question of whether Powers's conduct on July 17, 2003 was in the course of his employment as President of EMC or Camelio's supervisor, and the summary judgment record reveals a factual dispute with respect to that issue. Accordingly, Powers has not established as a matter of law that Camelio's claims are barred by the workers' compensation exclusivity provisions.

II. POWERS'S LIABILITY AS LANDOWNER

Camelio argues that even if his injury occurred in the course of his employment and Powers also was acting in the course of his employment with EMC, he is not precluded from suing Powers in negligence as a landowner. Despite the exclusivity provisions barring recovery against an employer, an injured employee remains free to sue third parties who may be liable for injuries compensable under the workers' compensation act. See G.L. c. 152, § 15; Barrett v. Rodgers, 408 Mass. at 616. Although Powers is the sole owner, officer, and director of EMC, the corporation is a separate legal entity from Powers as an individual. See Paolucci v. Merenda, 2006 Mass. App. Div. at 39. Cf. Holt v. Boston, 24 Mass. App. Ct. 175, 178-179 (1987) (Trustees of Board of Health and Hospitals of City of Boston, although a corporation for certain limited purposes, was not a separate entity from the City which could be sued by injured employee). An injured employee may bring a negligence action against third parties, either individuals or corporations, even if they are in some degree affiliated with an immune employer. Searcy v. Paul, 20 Mass. App. Ct. at 139. Thus, Powers

is a third party who may be sued under G.L. c. 152, § 15 for negligent conduct as a landowner aside from any negligence committed in his capacity as EMC's agent or Camelio's supervisor.

Finally, Camelio argues that if Powers is deemed to be legally inseparable from EMC as its sole shareholder, officer and director, he is nonetheless amenable to suit under the "dual persona" doctrine. That doctrine recognizes that there are certain circumstances in which an employee may recover damages from his employer by characterizing the employer as a third party under the workers' compensation act. Barrett v. Rodgers, 408 Mass. at 616. Although the Supreme Judicial Court has never expressly adopted the dual persona doctrine, it has cited it favorably. See Barrett v. Rodgers, 408 Mass. at 617; Longever v. Revere Copper & Brass, Inc., 381 Mass. 221, 223 (1980). An employer may be regarded as a third party subject to suit if the employer's liability to the injured employee derives from a second persona so completely independent from and unrelated to its status as employer that by established standards, the law recognizes it as a separate legal person. Barrett v. Rodgers, 408 Mass. at 617; Perkins v. Commonwealth, 52 Mass. App. Ct. 175, 177-178 (2001). See, e.g., Gurry v. Cumberland Farms, Inc., 406 Mass. 615, 620-621 (1990) (employer as successor to manufacturer's liability for defective machinery was separate legal entity from employer as employer of employee injured by that machinery on the job, such that employee could sue employer for injuries despite exclusivity of workers' compensation scheme). A second function of a single entity results in a second persona only when that function generates obligations unrelated to the entity's status as employer. Barrett v. Rodgers, 408 Mass. at 619; Longever v. Revere Copper & Brass, Inc., 381 Mass. at 224.

It is doubtful that Camelio needs to rely on the dual persona doctrine given that, as discussed *supra*, Powers as an individual is a separate legal entity from EMC. See Paolucci v. Merenda, 2006

Mass. App. Div. at 39. However, the parties address the dual persona issue at length in their briefs. Powers argues that the facts of this case do not fall within the doctrine, if applicable. Where an employee is injured on a work premises owned by the employer, Massachusetts courts have rejected any attempt to argue that the employer as landowner is a separate legal entity from the employer as employer. The employee may not sue the employer as owner of the workplace where the injury occurred because the obligation of an employer to provide a safe workplace overlaps with the obligation of a property owner to maintain its premises in a reasonably safe condition. See Hoy v. National School Bus Service, Inc., 2005 Mass. Super. LEXIS 277 at * 10 (June 15, 2005) (Cratsley, J.); Wade v. Hutchins, 1995 Mass. Super. LEXIS 553 at *5 (June 22, 1995) (Sosman, J.) (where employer ran real estate business out of her private residence and employee fell at work, employee could not sue employer as owner of residence for negligence maintenance of premises). See also Paolucci v. Merenda, 2006 Mass. App. Div. at 39 (sole corporate shareholder who also owned workplace building was acting in scope of employment with respect to measures taken to maintain safety of premises and could not be sued in tort as property owner for permitting dangerous condition to exist). Cf. Barrett v. Rodgers, 408 Mass. at 617 (employer who conducted business d/b/a rather than as corporation was a single legal entity and employee who was attacked by employer's dog in the workplace could not sue employer as dog owner).

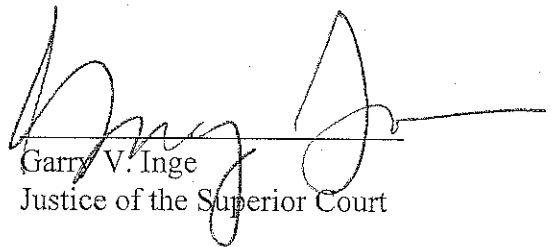
Here, however, the property where the injury occurred was not the workplace premises but rather, Powers's personal residence. Powers as a homeowner directing work on his non-corporate property could be deemed to be a separate legal entity under the dual persona doctrine. See, e.g., Sobczak v. Flaska, 706 N.E.2d 990, 993 (Ill. App. 1 Dist. 1998), rev. den., 714 N.E.2d 533 (Ill. 1999) (under dual persona doctrine, employee's supervisor and part-owner of employer company

could be sued for injury which occurred at supervisor's home as either owner of property or site contractor who controlled work employee did there). In the unlikely event that EMC and Powers, as its sole shareholder, officer and director, were deemed to be a single legal entity for purposes of the workers' compensation act, this could be one of those rare instances in which the dual persona doctrine applies. See Barrett v. Rodgers, 408 Mass. at 617-618 (noting that only rarely will single legal entity ever be liable under both workers' compensation act and in lawsuit, for single injury).

Thus, Powers has not established that the exclusivity provisions of the Workers' Compensation Act, G.L. c. 152, §§ 23, 24, bar Camelio's claims as a matter of law.²

ORDER

For the foregoing reasons, it hereby **ORDERED** that Defendant Michael Powers's Second Motion for Summary Judgment be **DENIED**.



Garry V. Inge
Justice of the Superior Court

DATED: March 19, 2010

²This conclusion moots Camelio's request for a report pursuant to G.L. c. 231, § 111.