COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
C.A. NO. 06-789-B

EDWARD CAMELIO,)
Plaintiff,)
)
)
vs.)
)
)
MICHAEL J. POWERS,)
Defendant.)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Statement of Facts

From 2002 through July 2003, plaintiff Ed Camelio worked as a cable installer for E.M. Communications, Inc. E.M. Communications, Inc. is a Massachusetts corporation which was organized on November 13, 2002. Michael J. Powers is the president of the corporation. E.M. did cable installation work for a company known as Adelphia. Ed Camelio's work involved installation of cable service to customers of E.M. Communications, Inc., both new and existing. On and prior to July 17, 2003, E.M. Communications, Inc. was not in the satellite installation business. E.M. Communications, Inc. is not a party to this action.

On July 17, 2003, after they had both completed their work for E.M. Communications, Inc. and Adelphia, defendant Michael J. Powers asked plaintiff Edward Camelio to come to his new home in Wareham, Massachusetts to assist him with the installation of a satellite system there. The satellite system was for Michael Powers' personal use and consumption. Ed Camelio was not being paid for his work done at Michael J. Powers home. Ed was simply showing

Michael how to set up a system in his private home. The work in installing the satellite dish was simply a matter of two friends helping one another out at their private homes as they had done on previous occasions. Neither Ed Camelio, nor Michael Powers, were not in the course and scope of their employment at E.M. on July 17, 2003 when Ed was installing a satellite system at Michael J. Powers' private home.

On July 17, 2003, Ed Camelio arrived at Michael Powers' home at approximately 5:00 p.m. While Ed was setting up the satellite dish and doing other work in the house, Mike Powers set up his own ladder on the side of his house. Defendant Powers had obtained this ladder five years prior to July 17, 2003 from a friend. He received this ladder prior to the time that he incorporated E.M. Communications, Inc. The ladder was used and old when Powers obtained it.

Michael J. Powers set up his own ladder, even though he was aware that Ed did not like using it. Ed liked his own ladder because it was heavy duty and was a thicker grade of fiberglass. Prior to July 17, 2003, Ed had told Michael Powers that he did not like his ladder. Powers' ladder did not have the strength that Ed Camelio's ladder had. Ed had two contractor grade ladders on his truck which was in Powers' driveway at the time he set up the ladder. Ed's ladders were in good condition and less than two years old.

Powers had set up the ladder on a slope which angled down and away from the house. Despite the slope, Powers did not tie down or stake the feet of the ladder to the ground. Also, the Powers ladder which was used on July 17, 2003 contained a number of defects:

1. The feet were missing rivets and defendant Michael J. Powers had never checked his ladders for this condition.

2. The end caps were in worn condition on and prior to July 17, 2003. These end caps are what were used to rest the ladder on the side of the house. Defendant Michael J. Powers had never replaced the end caps on his ladder.
3. Defendant Michael J. Powers' ladder also contained twists and bends on the side rails. As defendant Powers admitted in his deposition, the twists and bends affected the stability of the ladder. He went so far as to say that the ladder did not look too safe and he would not climb it in that condition.
4. Defendant Michael J. Powers ladder also contained stress cracks prior to July 17, 2003.

After finishing his work in the house, Ed came back outside and climbed the ladder. Before doing so, he checked the footing and it seemed sufficient. While Ed was climbing the ladder, defendant Michael J. Powers was inside the house watching for the signal strength on the television screen. Ed did not realize he was on Mike Powers' ladder until he reached the top of his climb. After Ed had been up on the ladder for about five minutes, it began sliding down, it bowed, and bounced Ed straight off the back of it and he wound up falling two stories to the ground, sustaining serious personal injuries.

Immediately after Ed Camelio's fall, defendant Michael J. Powers switched his ladder with Ed Camelio's. He took as ladder from Ed's truck and replaced it with his defective unit. As he testified in his deposition, Powers felt that his ladder looked beat up and he just didn't feel comfortable on it.

Following the injuries to Ed Camelio on July 17, 2003, Michael J. Powers, on behalf of E.M. Communications, Inc., filed a notice of claim with the Department of Industrial Accidents. Plaintiff Ed Camelio never petitioned or filed a claim for workers compensation benefits. In

fact, in the Insurer's Notification of Payment dated July 23, 2003, and in response to question eight, the insurer acknowledged that it had not received a written claim for benefits from the employee. The workers compensation claim involved a number of disputes which were resolved through a lump sum settlement agreement without any hearings, testimony or findings related to either Ed Camelio or Mike Powers' employment status on July 17, 2003. Moreover, any workers compensation payments were made on behalf of the purported employer E.M. Communications, Inc. and not the individual homeowner Michael J. Powers.

In this action, plaintiff has asserted negligence on the part of homeowner and defendant Michael J. Powers in furnishing to Ed Camelio an unsafe ladder and for his failure to exercise reasonable care in setting up the ladder.

ARGUMENT

1. *Summary judgment standard*

In considering a motion for summary judgment, a court does not weigh the evidence or make its own determination of the facts. *Attorney General v. Bailey*, 386 Mass. 367, 370 (1982). In addition, a court should neither grant a motion for summary judgment because the facts offered by the moving party appear more plausible than the non-movant, nor because it appears the opponent is unlikely to prevail at trial. *Id*. Instead, in drawing inferences from the affidavits, depositions, exhibits or other material, the court must view them in the light most favorable to the party resisting the motion. *Hub Assocs v. Goode*, 357 Mass. 449, 451 (1970) (citing *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962)). A mere "toehold" of controversy is enough to survive a motion for summary judgment. *Marr Equipment Corp. v. ITO Corp. of New England*, 14 Mass. App. Ct. 231, 235, *fur. app. rev. den*., 387 Mass. 1103 (1982). For this reason, summary judgment should be granted only where the opposing party has no reasonable

expectation of proving an essential element of that party's case. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706 (1991) (emphasis added).

2. Defendant failed to raise the immunity defense in his answer

Pursuant to Rule 8 of the Massachusetts Rules of Civil Procedure, if the defendant fails to plead a Rule 8(c) affirmative defense, whether set out specifically in the rule or not, he waives it. Mass.R.Civ.P. 8(d). The immunity and exclusivity provisions under the workers compensation laws of Massachusetts are affirmative defenses. In its answer to the complaint, Powers failed to make any mention of either the exclusivity provision or immunity as an affirmative defense. Such an omission is fatal to the defendant's claim. Mass.R.Civ.P. 8(d); *Patterson v. Huntzes*, 5 Mass. App. Ct. 806 (1977). Moreover, that omission precludes the defendant Powers from even raising this issue in a summary judgment motion.

3. Defendant is not immune from suit

a. Powers and E.M Communications, Inc. are separate entities

Under Massachusetts law, employees are guaranteed compensation for workplace injuries regardless of fault and free of traditional common-law defenses. In exchange for this guaranteed right of recovery, the law bars employees from recovering against their employers for injuries received on the job. G.L. c. 152, §§ 23, 24. However, employees remain free to bring suit against third parties who may be liable for injuries compensable under the workers compensation act. G.L. c. 152, § 15. In this case, Camelio has brought an action against Michael J. Powers, the individual homeowner who furnished him with an unsafe ladder improperly set up for his use. He has not brought an action against his purported employer E.M. Communications, Inc.

Defendant Powers has no basis in law for raising the exclusivity bar because he has not, and cannot, satisfy the two-part test set forth in *Lang v. Edward J. Lamothe Co.*, 20 Mass. App. Ct. 231 (1985). According to this test, a direct employment relationship between Ed Camelio and Michael J. Powers must exist at the time of the injury, and the alleged employer "must be an insured person liable for the payment of compensation." *Id*. See also *Numberg v. GTE Transport, Inc*., 34 Mass.App.Ct. 904 (1993); *Margolis v. Charles Precourt & Sons, Inc.*, 1999 WL 317437, 10 Mass.L.Rptr. 43 (1999). In this case, the only entity which can assert the immunity defense is E.M. Communications, Inc..

Defendant asserts that because Powers is the president of that corporation, and the purported owner of the company, he should benefit from its immunity from suit because they are one and the same. The rule in this commonwealth, however, is that corporations are to be regarded as separate entities. *Gurry v. Cumberland Farms, Inc*., 406 Mass. 615, 625-26 (1990). Most courts refuse to allow corporations to assume the benefits of the corporate form and then disavow that form what it is to theirs and their stockholders' advantage. *Id*. at 626. In *Searcy v. Paul*, 20 Mass. App. Ct. 134 (1985), the court declined to disregard the corporate fiction so as to provide a third-party defendant immunity from an action by an employee of a somewhat affiliated corporation which had made a workers compensation settlement with that employee. Like this case, *Searcy* involved a claim of negligence in the furnishing of an unsafe ladder. The purported owner of the corporation which provided workers compensation benefits sought immunity for himself because the corporation paid benefits under the workers compensation laws. The court refused to grant him immunity and allowed the corporation's employee to bring actions for negligence against third parties, either individuals or corporations, even if in some degree of affiliated with the insured employer corporation. *Id*. at 139.

b. Powers' negligence did not occur in the course and scope of his employment

Further, an injury suffered while an employee is engaged in a purely personal activity will not be considered to arise out of and in the course of his employment for the purposes of the workers compensation laws. *D'Angeli's Case*, 3 Mass.App.Ct. 764 (1975); *Ritchie's Case*, 351 Mass. 495 (1967). See generally, Locke, *Workmen's Compensation*, 29 M.P.S. 242. In this case, Ed Camelio was simply helping out his friend installing a satellite system in his personal home for his personal use and consumption.

The case of *Mulford v. Mangano*, 418 Mass. 407 (1994) is instructive on this point. In *Mulford*, the plaintiff and defendant were both employed at a Papa Gino's restaurant in Stoneham, Massachusetts. On April 23, 1987, Mulford worked his regular shift as a dishwasher. Mangano, employed as a cook, was not scheduled to work that day but came to the restaurant around 9:00 p.m. He came to the restaurant to give Mulford a ride home. In circumstances that were disputed, Mulford fell from the hood of Mangano's automobile as Mangano backed it from its space. Mulford brought an action against Mangano to recover for his injuries, and Mangano moved for summary judgment on the ground that he was a co-employee entitled to immunity under the workers compensation act. Mangano argued that he came to the restaurant that evening also to observe the cashing out procedure followed by managers at the end of the day in the hope of learning skills to become a manager himself.

The court denied the motion for summary judgment finding that there was a genuine issue of material fact on the question of whether Mangano was acting within the course of his employment. The Court specifically found that the employee's state of mind at the time he acted is relevant, but is not controlling on the issue of whether he was acting in the course of his

employment. In fact, the court expressly rejected "any test that looks solely to an employee's state of mind to see if the job-related purpose was so significant even if the private purpose had not existed." *Mulford,* 418 Mass. at 412. In this case, defendant Powers asserts that he was somehow acting in the course of his employment because he was installing this satellite dish in his home as a way of learning the process for his business. He ignores the fact that he was actually installing this dish in his personal home which was not his place of business, and planned to use it for his own personal consumption. Moreover, it is clear that this work was done after work hours, Ed Camelio was not being paid for his work, and it was not the subject of any work order issued by the employer in this case E.M. Communications, Inc. Powers' state of mind is not controlling because the fact remains that he was engaged in a purely personal activity. Further, where a party's motive or state of mind is at issue, summary judgment is really appropriate. *Quincy Mutual Fire Insurance Co. v. Abernathy*, 393 Mass. 81, 86 (1984).

Finally, co-employees themselves are not immune from suit when they act outside the scope of their employment on tasks which are unrelated to the interest of the employer. *Brown v. Nutter, McClennen & Fish*, 45 Mass App. Ct 212, 214 (1998). The installation of the satellite dish at Powers' personal home for his personal use and consumption cannot be credibly argued to be job-related or in furtherance of the corporation's business. Accordingly, the immunity afforded by the workers compensation act does not apply in this context.

c. Dual persona

This action is also not barred by the exclusivity provisions because Powers occupied a dual persona on July 17, 2003. The dual persona doctrine recognizes that there are certain circumstances in which an employee may collect damages from his employer despite the

existence of workers compensation benefits. Massachusetts case law has not expressly adopted the dual persona theory, but has discussed and cited it with approval. *Barrett v. Rogers*, 418 Mass. 614, 616 (1990). Under the dual persona theory, if an employer's liability to an injured worker derives from a "second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person," the employer is not immunized under the workers' compensation law, but is rather regarded as a third party. *Gurry v. Cumberland Farms, Inc*., 406 Mass. 615 (1990). See also 2A A. Larson, *Workmen's Compensation* § 72.80 at 14-229 (1988 ed.). *Billy v. Consolidated Mach. Tool Corp*., 51 N.Y. 2d 152 (1980). See *Robinson v. KFC Nat'l Management Co.*, 171 Ill. App. 3d. 867 (1988). *Kimzey v. Interpace Corp*., 10 Kan. App. 2d 165 (1985). *Schweiner v. Hartford Accident & Indem. Co*., 120 Wis. 2d 344 (1984).

At the outset, Powers and E.M. Communications, Inc. are legally distinguishable from one another. One is a corporation and the other is an individual. Furthermore, Powers is a defendant in this action because of his status as a homeowner and the individual who supplied an unsafe ladder. This action arises out of the installation of a satellite dish in his personal home (not the place of employment) and for his personal use and consumption. E.M. Communications, Inc. was not in the satellite installation business and so this activity cannot be said to have been in furtherance of the employer’s business. The activities on July 17, 2003 were completely independent from and unrelated to his or E.M.’s status as a purported employer as to make it appropriate to impose individual liability.

4. There is no issue preclusion in this case

The acceptance of a lump sum settlement by Ed Camelio would only preclude an action against E.M. Communications, Inc. Here, Camelio has not taken any action against the corporation. As noted earlier, Massachusetts employees remain free to bring suit against third parties who may be liable for injuries compensable under the workers compensation act. G.L. c. 152, § 15. The cases cited by the defendant in his Memorandum of Law all deal with cases where the workers compensation claim and negligence claim were brought against the same individual or entity. Here, we have two separate and distinct parties. For this reason, judicial estoppels and issue preclusion do not apply. To the extent that defendant may argue that the acceptance of these benefits would protect Powers also as a purported co-employee, the argument must fail as well.

To begin, any issues raised in the workers compensation proceedings would pertain only to Ed Camelio's status on July 17, 2003. Those proceedings had nothing to do with Michael Powers' status or the issue of whether he was in the course and scope of his employment. As an alleged co-employee, Powers would have to have been in the course and scope of his employment in order to be immune from suit. The workers compensation proceedings involving Ed Camelio in no way touched upon Michael Powers and cannot be invoked in these proceedings for any advantage.

Additionally, it was Michael Powers who filed the workers compensation claim in this case and there has been specific acknowledgement that Ed Camelio did not petition or otherwise assert a claim there. It is Michael Powers who was attempting to play fast and loose with the courts by filing a workers compensation claim in an attempt to immunize himself. He should not be rewarded with immunity for his actions in filing the claim in a questionable case and for his

attempt to avoid responsibility by switching ladders right after the incident. As estoppel is an equitable principle, the defendant must come with clean hands.

Finally, the advancing of different positions alleged here must be viewed similar to handicap discrimination cases. In that area of the law, a majority of courts have rejected a defendant's claim that seeking disability benefits automatically disqualifies a plaintiff from pursuing a handicap discrimination claim. *Labonte v. Hutchins & Wheeler*, 424 Mass. 813 (1997). Courts are wary of allowing plaintiffs to play "fast and loose with the courts" by claiming to be too disabled to perform the functions of a job and also claiming that they were terminated from their positions despite being able to perform those same functions. See *McNemar v. Disney Store, Inc*., 91 F.3d 610, 618 (3d Cir. 1996). However, if the evidence creates a disputed issue of fact whether the handicapped person can perform the essential functions of the job, then estoppel is not appropriate. See *Pegues v. Emerson Elec. Co.*, 913 F. Supp. 976, 980-981- (N.D. Miss. 1996) (application for disability benefits does not "necessarily foreclose" a claim of handicap discrimination); *Parisi v. Jenkins*, 236 Ill. App. 3d 42, 177 Ill. Dec. 496, 603 N.E.2d 566 (1992); *Department of Transp. v. Grawe*, 113 Ill. App. 3d 336, 69 Ill. Dec. 250, 447 N.E.2d 467 (1983); *Jishi v. General Motors Corp*., 207 Mich. App. 429, 526 N.W.2d 24 (1994); *Paschke v. Retool Indus*., 445 Mich. 502, 519 N.W.2d 441 (1994). Likewise, in this case where the evidence creates a disputed issue of fact related to the employment status of both Camelio and Powers, then estoppel is not appropriate.

CONCLUSION

For the foregoing reasons, defendant Powers' motion for summary judgment should be DENIED.

Plaintiff,
By his attorneys,

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