The State of New Hampshire

STRAFFORD COUNTY **SUPERIOR COURT**

Debra Higgins and Keith Higgins

v.

Donna Bucchio and Residential Resources, Inc.

Docket No.: 219-2012-CV-00039

ORDER

The plaintiffs, Debra Higgins and Keith Higgins (collectively, "the Higgins'"), pursue this action against the defendants, Donna Bucchio ("Bucchio"), and Residential Resources, Inc. ("RR, Inc."), stemming from alleged injuries Debra Higgins suffered as the result of a claimed altercation between her and Bucchio. RR, Inc. has filed a Motion for Summary Judgment, based on the assertion that it is immune from suit under the workers' compensation bar, RSA 281–A:8. As an alternative, RR, Inc. avers that, as a matter of law, it owed no duty to protect Debra Higgins from what it has described as Bucchio's "unforeseeable criminal act." Mot. for S. Judg., ¶ 3. The Higgins object. The Court held a hearing on January 17, 2013.

Background

Debra Higgins was formerly employed to provide in-home care for Bucchio, who needed such care after she received a brain injury. The alleged altercation between Debra Higgins and Bucchio occurred at Bucchio's home on or about September 16, 2009, while Debra Higgins was performing her in-home care duties. At the time, Debra Higgins was supervised by Emily Dufresne Blaisdell. Debra Higgins thereafter received

workers' compensation benefits, to include a lump sum settlement. The associated worker's compensation papers reflect that the employer was WKS, Inc. ("WKS"), the "parent" company of RR, Inc.

WKS was originally a defendant in the present action. It filed a Motion to Dismiss, however, claiming that under RSA 281–A:8, the Higgins were barred from seeking personal injury damages from it. The Higgins then filed a Voluntary Non-Suit in regard to WKS, which the Court granted.

Analysis

Summary judgment shall be rendered if the record shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. See RSA 491:8-a, III. An issue of fact is "material . . . if it affects the outcome of the litigation under the applicable substantive law." Palmer v. Nan King Restaurant, 147 N.H. 681, 683 (2002) (citation omitted). The pleadings, discovery and affidavits shall be construed in the light most favorable to the non-moving party. Panciocco v. Lawyers Title Ins. Corp., 147 N.H. 610, 613 (2002) (citation omitted). The non-moving party may not rest upon mere allegations or denials of the pleadings; instead, "their response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue of material fact for trial." Id. (citation, quotations, and alterations omitted).

Workers' Compensation Statutory Immunity

The Higgins claim that WKS was Debra Higgins's employer, while RR, Inc. claims that both companies were pertinently alter egos. Thus, it too claims exemption from suit by virtue of the statutory immunity provided in RSA 281–A:8.

Under RSA 281–A:8, an employee eligible to receive workers' compensation is conclusively presumed to have waived "all rights of action whether at common law or by statute," against his or her "employer"; whether brought by the employee, the employee's spouse, or "any other person who might be otherwise entitled to recover damages" on behalf of the injured employee. An alter ego determination "is a question for the jury, unless the evidence would support only one finding as a matter of law." Tanguay v. Marston, 127 N.H. 572, 576 (1986).

In Leeman v. Boylan, 134 N.H. 230, 233 (1991), the Court addressed alter ego contentions in an action brought by an injured employee against, among others, the parent corporation of his employer. The injured employee had received workers' compensation benefits from his employer, but sued his employer's parent corporation, based on the allegation that the parent corporation had taken on the "primary overall responsibility for the safety of its subsidiary's employees." Id. at 231 (quotations and alterations omitted).

The Leeman Court reversed the trial court's dismissal of the action in its entirety, and rejected the notion that a parent-subsidiary relationship, without more, called for application of the workers' compensation immunity in favor of the parent. Id. at 233. In this regard, the Court cited with approval language contained in a Sixth Circuit Court of Appeals case indicating that because business owners can take advantage of the protections provided by "dividing the business into separate corporate parts," under the "principles of reciprocity," courts should:

> recognize the separate identities of the enterprises when sued by an injured employee. The tort system should not deny recovery to an injured employee due to the fortuitous circumstance that the alleged tortfeasor is

> not a stranger but is controlled by the same business enterprise that controls his immediate employer.

Id. at 233–34 (quotations, citation, and alterations omitted). The Court, however, remanded the case back to the trial court to allow for, among other things, a factual determination respecting whether it and the subsidiary corporation were alter egos. Id. at 236. The Leeman case thus did not preclude a finding of alter ego status.

In Singh v. Therrien Mgmt. Corp., 140 N.H. 355, 357 (1995), an injured employee, after receiving workers' compensation benefits from his employer, sued, among others, a closely-related affiliate corporation that had, as one of its principal purposes, to provide "maintenance and supervision" to other business organizations (to include the plaintiff's employer).

The Singh Court did not expressly rule on whether the two companies at issue were so intertwined as to be alter egos, but it did reference a New Jersey Supreme Court opinion where it was stated that "[t]he cases uniformly deny immunity if the employee seeks to recover in tort against a subsidiary or corporate affiliate of the employer, as distinguished from the employer's parent." Id. (quotations, citation, and alterations omitted). The Court does not read the Singh case as supportive of the view that an alter ego relationship may not be found here, as between a "parent" and a company owned and controlled by the "parent," [1]

Larsen's Workers' Compensation Law treatise compiles and summarizes numerous cases where injured employees attempt to sue corporate entities affiliated with their recognized employers, and states that "[g]enerally, common ownership, identity of management, and the presence of a common insurer are not enough to

[1] The parties agree that WKS is the "parent" company of RR,Inc. The record is not clear as to the actual stock ownership, but there is no question that WKS and/or the owner(s) of WKS own and control RR,Inc.

create identity between parent and subsidiary for compensation purposes . . . [and] [p]robably the most significant factor is actual control . . . [;] if the subsidiary is in practice not only completely owned but completely controlled by the parent, identity may well be found and immunity conferred." Larsen's Workers' Compensation Law § 112.01 (Lexis 2012). An integrated enterprise which carries out a common business function or purpose, with the operation being in the actual detailed control of the parent (or those persons running the parent), may be deemed to meet the standards for alter ego immunity. See generally Fletcher Cyclopedia of the Law of Corporations, § 43.80. Workers' compensation (Westlaw 2012).

In support of its assertion that it and WKS are alter egos, RR, Inc. presents to the Court numerous corporate documents, affidavits, and employment documents, certain signed by Debra Higgins, showing a strong connectedness, between the two companies. See e.g. Hannafin Aff. with exhibits; and Lynch Aff. with exhibits. Indeed the submissions show that the entities constituted, at pertinent times herein, a very integrated enterprise in regard to New Hampshire-based operations and business activities.

Heather Hannafin ("Hannafin"), identified as vice president of "WKS/ Residential Resources, Inc." summarizes in her affidavit (with exhibits) many of the pertinent connections between the two corporations. See Id. She refers to certain affiliated companies, whether in New Hampshire or elsewhere, as "WKS/Residential Resources." She highlights that the two New Hampshire companies have been presented together at the main headquarters in Keene, New Hampshire, where both companies' logos have been prominently displayed; that the board of directors of both companies have had

identical membership; that the companies have shared one corporate website (www.resresources.com); that certain other "WKS/Residential Resources corporate materials" have featured the logos of both; that the companies have filed one federal tax return with "WKS . . . the filing entity and the Residential Resources entities, including the defendant, . . . listed as subsidiaries;" that the companies have entered into Business Associate and vendor contracts together or essentially as one entity; that "[RR, Inc.] corporate records are pro forma and reflect the D/B/A quality of the corporate name . . .[while] [i]n contrast, WKS's corporate records are substantially more detailed;" that "[t]he cash flow for [RR, Inc.] reflects accounting relative to the New Hampshire contract . . . [while] WKS's bank records . . . indicate greater cash flow which accompanies employee remuneration of daily operations of the WKS/Residential Resources enterprise;" that RR,Inc. "does not have an employment infrastructure separate and apart from WKS," with WKS doing all hiring, purchasing of benefits, endorsing of employee checks, and maintaining of payrolls and a Human Resources Information System; and that "[e]mployees are identical and there are no employees solely employed by Residential Resources, with "the workforce [being] the same." Id.

Hannafin explains that WKS has so organized itself, with a number of subsidiaries in various states, in order to "hold contracts with the respective states, properly segregate contract funds pursuant to mandates of these states, and to provide a recognizable brand name for customers of our services." Id. She offers that WKS considers itself to function as "doing business as" Residential Resources. Id.

It has also been established that, at pertinent times, the principal officers of WKS, have occupied the same officer positions with the subsidiary, and that the workers'

compensation insurance which WKS pertinently had in place covered itself and RR, Inc. ("WKS, Inc./Residential Resources").

The submissions RR Inc. presents specifically associated with Debra Higgins' employment reflect that Ms. Higgins was consistently treated as being employed by an integrated enterprise, one which expressly included both corporations, one which provided services to disabled persons. They show too that Ms. Higgins was at all times informed of the integrated enterprise nature of her employment.

Ms. Higgins completed an employment application in April, 2009, which bore the logos of both companies; the hire letter she then received indicated that she would be working for both companies; she proceeded to execute an employment confidentiality agreement which had a heading containing the logos of both companies and which contained her affirmation that she was "a workforce member of WKS Inc./ Residential Resources;" she received, and agreed to, a "Staff Attendance/Punctuality Protocol," presented by a document again containing the logos of both companies and referencing a "WKS/RRI Employment Handbook;" and she received a number of memos and policy pronouncements over time which reflected they covered her employment activities as a WKS, Inc./Residential Resources, Inc. employee. Id. (Lynch Aff. and exhibits).

To be sure, the Higgins present evidence which reflects that each company remained a corporate entity. They were each established as a separate corporate entitity, and each issued its own shares. Lowery Aff. Exs. A, E, H, L. They list different principal purposes in their incorporation documents, though both also may engage in any lawful business. Id., Exs. B, I. According to their respective bylaws, they are slated to hold their annual meetings at different times. Id., Exs. D, K. They keep separate

bank accounts and corporate records. Id., Exs. N, O. They file separate state tax returns. Id.,. Exs. P, Q. Some correspondence and documentation issued by WKS fail explicitly to show, or confirm, the two companies' connectedness. See e.g. Pl.s Ex. 2 (presented at the January 17, 2013 hearing)

Yet, RR Inc. has nonetheless established beyond dispute that it and WKS constituted, at pertinent times herein, a strongly integrated business operation in New Hampshire to provide services to disabled persons, with the parent fully meshed with the subsidiary in regard to the day-by-day operations of the enterprise in this state, through shared officers, employees, policies and practices. Employees like Ms. Higgins, as well as her supervisors, all pertinently were informed that they worked for this integrated enterprise, and they actually did so. The evidence "support[s] only one finding as a matter of law." Tanguay, 127 N.H. at 576.

The Court concludes that RR, Inc. is in an alter ego relationship with WKS for purposes of the workers' compensation statutory bar, and is thus entitled to summary judgment.

The Court need not deal with RR, Inc.'s alternative contention.

Conclusion

Consistent with the analysis above, the Court **GRANTS** RR, Inc.'s Motion for Summary Judgment.

So Ordered.

January 28, 2013

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Date John M. Lewis
Presiding Justice