SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 96-0927
UNITED HOUSE OF PRAYER,	:	
Respondent.	:	

ORDER

The Secretary filed a petition for discretionary review in the above-referenced case and Chairman Weisberg directed the decision of the administrative law judge for review. A briefing order was issued and the Secretary's motion for extension of time was granted giving the Secretary until July 21, 1998, to file her brief.

The Secretary did not file her brief within the extension granted nor did she request a further extension. The Respondent subsequently moved to vacate the direction for review. The Secretary also did not respond to the Respondent's motion.

We conclude that the Secretary no longer has an interest in review of the administrative law judge's decision in this matter. Accordingly, we grant the Respondent's motion and vacate the direction for review. The decision of the administrative law judge is a final order.

Date: November 16, 1998

/Signed/
Stuart E. Weisberg, Chairman

/Signed/
Thomasina V. Rogers, Commissioner

96-0927

NOTICE IS GIVEN TO THE FOLLOWING:

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
v.	:	OSHRC DOCKET NO. 96-0927
	:	
UNITED HOUSE OF PRAYER,	:	
	:	
Respondent.	:	

ORDER

Respondent United House of Prayer ("the Church") has filed a motion for summary judgment with respect to a serious citation issued by the Occupational Safety and Health Administration ("OSHA") on June 6, 1996, following a December 8, 1995, fire in a building owned by the Church in which seven individuals lost their lives. Respondent predicates its motion on the parties' stipulated facts, filed on August 1, 1997, and January 23, 1998, and contends that those facts establish it was not an employer which could be held responsible under the Occupational Safety and Health Act ("the Act") for the alleged violations in this case. The Secretary has filed her response to the motion.

Summary of the Parties' Stipulations

The Church is a non-profit religious organization with an administrative office in Washington D.C. and congregations in various locations in the United States. The subject building, located in New York City, was undergoing extensive renovation and was consequently not occupied at all by the Church at any time during 1995; however, a clothing store ("Freddy's" or "the Store") was leasing a first-floor and basement space in the building and was operating as a business at the time of the fire. The renovation project involved the sanctuary and related spaces to be used for Church functions, and also involved the renovation of the entire building's sprinkler system. A certified architect drew up the project plans, the Church contracted with a construction company named "LMA" to act as general contractor, and LMA subcontracted with various companies to perform the construction work, including Belize Construction, the construction management subcontractor, and Sunset Plumbing, the sprinkler system subcontractor. (Stip. Nos. 2-11; 14-

16; 43).

The Church's contract with LMA stated that LMA was "solely responsible" for coordinating and carrying out the work pursuant to the contract, that it was responsible for acts and omissions relating to the work performed under the contract, and that it was responsible for complying with applicable laws and regulations pertaining to safety and for "initiating, maintaining, and supervising all safety precautions and programs" in connection with the performance of the contract; LMA was also required to maintain existing systems until replacement systems were installed and operational and to maintain water service for drinking and fire protection during the project.[1] The Church's lease with Freddy's provided for the Store to comply with all laws and regulations relating to the building, to comply with fire protection and other policies, and to ensure that any alterations or additions necessary for its sprinkler system were done in compliance with relevant regulations. The lease also provided that the Church granted Freddy's the "right to emergency ingress and egress through a basement fire exit of the Premises." Before 1995, Freddy's basement had had a wall with a door going to the Church's basement, but in early 1995 this wall was covered with a cinder block wall pursuant to the project specifications. The original project plans did not provide for an exit from Freddy's basement into the exit corridor of the Church, but in June 1995 a decision was made to do so; Freddy's lease was therefore modified in July 1995, and plans were drafted in November 1995, to have an exit from the Store's basement into the Church's exit corridor. However, some preliminary construction work was required before this could be accomplished, and on December 8, 1995, the new exit had not yet been completed.[2] Consequently, the only exits from Freddy's basement were two separate staircases going up to the first floor, from which the front door, the sole exit to the outside of the Store, could be reached.[3] (Stip. Nos. 17-41)

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[1]The Church had no employees who were qualified to review the project plans or the construction work to determine if they complied with relevant codes and regulations. (Stip. No. 12).

[2]The Church was not involved in establishing the timetable for the completion of the construction work. (Stip. No. 34).

[3]One of the staircases was at the left rear side of the basement; the other, which Freddy's had had put in after the cinder block wall was built, was in the center of the basement. (Stip. Nos. 37-40).

During the time relevant to this case, the Church's property management company for the building was Mullen & Woods, which was responsible for matters such as building maintenance and code compliance. On October 13, 1994, the New York City Fire Department issued a violation to the Church, in care of Mullen & Woods, for conditions relating to Freddy's sprinkler system; the violation was for failure to have records of monthly inspections, failure to have a sign indicating the main drain valve, and failure to have a certificate of fitness. At a construction project meeting held on March 15, 1995, which a Church pastor attended, a violation of Freddy's sprinkler system was reported; at a subsequent meeting on March 29, 1995, which the same pastor also attended, an employee of Mullen & Woods reported that all of the violations relating to Freddy's sprinkler system had been corrected. On May 12, 1995, the New York City Department of Buildings issued a violation to Mullen & Woods alleging the construction project had not obtained approval for the removal and conversion of the sprinkler system. However, at construction project meetings held in August and September of 1995, a code expediter who was working with LMA and the architect reported that plumbing drawings had been prepared and filed with the City to address the permit violation; the Church pastor noted above was present at all of these meetings. (Stip. Nos. 13; 44-52).

On various instances before the fire, Sunset Plumbing shut off the water serving the building's sprinkler system in order to work on the system. On December 8, 1995, Sunset Plumbing shut off the water serving the system to work in an area of the Church adjacent to Freddy's basement, rendering the system in the entire building, including the Store, inoperable. The Church did not authorize the shutting down of the system and had no notice on this or on any of the prior occasions that such activity was occurring; in addition, shutting off the water serving the system was contrary to the project specifications. On this particular day, approximately eight employees of Freddy's were working in the Store. An armed individual started a fire in the Store with an accelerant and then blocked the front door and prevented the occupants from escaping. As a result, the fire caused the death of seven employees of Freddy's. (Stip. Nos. 42; 53-65).

The Citation Items

Item 1 of the citation alleges a violation of 29 C.F.R. 1910.36(b)(8), as follows:

> Where necessary by reason of size, occupancy or arrangement, building(s) or areas(s) thereof were not provided with at least two means of egress remote from each other

and so arranged as to minimize any possibility that both may be blocked by any one fire or other emergency conditions.

Item 2, which alleges a violation of 29 C.F.R. 1910.36(c)(2), states as follows:

All existing exits and any existing fire protection were not continuously maintained during repairs or alteration of an existing building, nor were other alternative measures taken to provide equivalent safety.

Item 3 of the citation alleges a violation of 29 C.F.R. 1910.37(m), as follows:

All automatic fire sprinkler systems were not continuously maintained in a reliable operating condition at all times and such periodic tests and inspections necessary to assure proper maintenance were not made.

Discussion

Summary judgment is appropriate where the pleadings, discovery and any affidavits establish that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56. *See also Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1869 (No. 89-1300, 1992) ("*SGH*"). The Church contends that its motion for summary judgment should be granted because it had no employees at the site and did not have the capacity to control the cited conditions. The Secretary, on the other hand, contends that Respondent was an employer within the meaning of the Occupational Safety and Health Act ("the Act") due to its administrative and office personnel in Washington D.C.; the Secretary further contends that the Church was a controlling employer at the subject site in view of its leases and contracts with respect to the building and the fact that it had a representative attend the construction project meetings. There is no question that Respondent was an employer as to its personnel in its Washington D.C. office. However, the issue in this case is whether Respondent was an employer in regard to the subject site such that it can be held responsible for the alleged violations. I find it was not.

In the above-noted decision in *SGH*, the Commission used its long-established "substantial supervision" test to find that an engineering firm hired by the owner to perform certain structural engineering services in connection with a construction project was not liable under the OSHA construction standards because it neither created nor controlled the hazardous conditions at issue in that case. *Id*. at 1869. In *Reich v. SGH*, 3 F.3d 1 (lst Cir.

1993), the court affirmed the decision on different grounds, holding that the engineering firm was not liable for the alleged violations because it had no employees at the site on any regular basis, and no employees there on the day of the accident, and that under the circumstances the site was not a "place of employment" that SGH had a duty to protect under the Act; in so finding, the court specifically noted that it had found no cases supporting the Secretary's position and that in every case the Secretary referred to the cited employer had had employees at the actual construction site. *Id*. at 5. Moreover, Commission precedent is well settled that employers in multi-employer work site cases are entitled to defend on the basis that they did not create or control the cited hazard. *Anning-Johnson Co.*, 4 BNA OSHC 1193 (Nos. 3694 & 4409, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1976). This defense includes showing that the employer did not possess the expertise, personnel or means to correct the hazardous condition. *Union Boiler Co.*, 11 BNA OSHC 1241, 1246 (No. 79-232, 1983).

Applying these principles to the parties' stipulations, I find that the Church did not create or control the cited conditions and that it was not responsible for the alleged violations. First, the Church was not occupying the building and had no employees at the site. Second, the Church hired a management company to take care of the building, an architect to design the renovation project, and a general contractor to carry out the project; further, the Church had no personnel who were qualified to review the architectural drawings or oversee the construction work, and while it had a representative at the renovation project meetings it had no active role in the actual construction work. Third, after the construction work resulted in the cinder block wall covering up the previous exit, the Church modified its lease with Freddy's and plans were drawn up for a new exit from the Store's basement into the Church's exit corridor; moreover, although the new exit was not completed by the time of the fire, the Church did not establish or control the timetable for the construction work required in this regard. Fourth, the Church did not authorize or know about the water to the sprinkler system being turned off, an activity that was contrary to the project specifications.

In finding that the Church was not responsible for the alleged violations, I have noted that the Secretary has neither addressed any of the cases mentioned above nor referred to any previous cases in which citations were issued to an employer with no employees at the work site. I have also noted that all of the employers in the above cases were cited pursuant to the

construction standards, while Respondent in this case was cited pursuant to the general industry standards; regardless, I agree with Respondent that these same principles apply in this matter. Moreover, in my view, that the Secretary cited the Church pursuant to the general industry standards undermines her contention that Respondent was a controlling employer at the site during the construction project. In fact, there is nothing in the parties' stipulations to dissuade me from concluding, as the First Circuit did in its decision in *SGH*, that under the circumstances the work site was not a "place of employment" that the cited employer had a duty to protect under the Act. *Reich v. SGH*, 3 F.3d 1, 5 (1st Cir. 1993). This does not preclude the possibility, of course, that there could be some other theory of liability, *i.e.*, that the Church might somehow have breached its duty as landlord to its tenant with respect to the basement exit and the water serving the sprinkler system. However, I express no opinion in this regard, and, as noted *supra*, the only issue before me is whether Respondent was an employer under the Act in regard to the subject site and the cited conditions. I conclude that it was not.

For the foregoing reasons, Respondent's motion for summary judgement is GRANTED and the citation items in this case are VACATED.

Irving Sommer
Chief Judge

Date: