Williams v City of New York
2008 NY Slip Op 33720(U)
October 29, 2008
Supreme Court, New York County
Docket Number: 105075/05
Judge: Eileen A. Rakower

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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GENE WILLIAMS,

Plaintiff,

Index No.
105075/05

Mot. Seq. No. :
002
Decision and
Order

- against -

THE CITY OF NEW YORK, PIPELINE CONSTRUCTION, LLC and CONSOLIDATED EDISON,

Defendants.

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HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when he tripped and fell on the sidewalk "on the west side of Centre Street, between White Street and Leonard Street, in front of Collect Pond Park, approximately 50 feet south of 111 Centre Street, approximately 6 feet from the curb" in the County and State of New York on November 18, 2004. Defendant the City of New York ("City") moves to amend its answer pursuant to CPLR §3025(b), and to dismiss plaintiff's complaint pursuant to CPLR 3212. Plaintiff and defendant Pipeline Construction LLC ("Pipeline") oppose.

City, in support of its motion submits: (1) the pleadings; (2) a portion of plaintiff's 50-h transcript; and (3) an affidavit by Mindy Roller, Deputy Chief of the Workers' Compensation Division at the New York City Law Department.; (4) a copy of a New York Law Journal "Decision of Interest;" and (5) a proposed amended answer. City argues that it should be permitted to amend its answer to add the defense that plaintiff's action is barred by the Worker's Compensation Law and the affirmative defense of *res judicata/collateral estoppel* because plaintiff will not be surprised or prejudiced by the amendments. City claims that plaintiff was aware of his employment status from the outset and was aware that he was entitled to Worker's Compensation benefits, evidenced by the fact that he filed for those benefits.

Plaintiff, in opposition, argues that City was aware that they could raise a Worker's Compensation defense since plaintiff's 50-h hearing, yet they chose to wait three and a half years to move to amend their answer. Thus, plaintiff argues, the City is "guilty of laches" and he would be prejudiced by the lengthy delay because during that period he attended numerous compliance conferences and incurred expenses of conducting discovery. Pipeline adopts plaintiff's argument.

Section 3025(b) states:

> Amendments and supplemental pleadings by leave: A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

The decision to allow an amendment is committed "almost entirely" to the discretion of the court. (*Murray v. City of New York*, 43 NY2d 400[1977]). Leave to amend the answer to include the affirmative defense of exclusivity of worker's compensation should be granted absent a showing of surprise or prejudice. (*Sanfilippo v. City of New York*, 239 AD2d 296[1st Dept. 1997]).

City has shown that plaintiff would not be prejudiced by the amendment as he was aware since the commencement of his lawsuit that he was entitled to claim Worker's Compensation benefits. Indeed, plaintiff took advantage of those benefits by filing such a claim. As the court in *Edenwald Contr. Co. V. City of New York*, 60 NY2d 957[1983] stated: "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine." (*Id.* at 959)(internal citations omitted). A mere lapse of time without a showing of prejudice will not sustain a defense of laches. (*Skrodelis v. Norbergs*, 217 AD2d 316[2nd Dept. 2000]).

Plaintiff asserts that he was prejudiced because he was subjected to discovery throughout the time that City delayed bringing this motion to amend. However, plaintiff was aware that he had already filed a claim for Worker's Compensation Benefits yet he consciously chose to pursue litigation against the City. Additionally, plaintiff's claim that the delay prejudiced him because he had to attend compliance conferences is similarly without merit. City is not the only defendant from whom plaintiff had to obtain discovery, thus, he would have gone through the discovery

process regardless of City's involvement in the case.

City argues that plaintiffs complaint should be dismissed because he applied for and received Worker's Compensation benefits. Ms. Roller affirms that she conducted a search for claims filed by plaintiff and that the search produced a claim filed for Worker's Compensation on December 24, 2004, which arose out of the subject incident. The claim was accepted and, as of the date of City's motion, $8,640.00 in compensation was paid to plaintiff. Additionally, the City has paid approximately $4,000.00 in medical bills. Plaintiff, in opposition, argues that there is a question of fact about whether plaintiff was actually employed by the City.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

The court in *Murray* addressed the issue of the exclusivity of a workers' compensation claim. There, the court stated:

> Workers compensation is an exclusive remedy as a matter of substantive law and, hence, whenever it appears or will appear from a plaintiff's pleading, bill of particulars or the facts that the plaintiff was an employee of the defendant, the obligation of alleging and, in any event, of proving non-coverage falls on the plaintiff.(*Id.* at 406).

Here, plaintiff testified during his 50-h hearing that, at the time of the accident, he worked for the Manhattan District Attorney's Office. Further, plaintiff testified that his work hours were 7:00 a.m. to 3:00 p.m. and that the accident occurred around 9:00 a.m., while he was walking back to his office. City has shown that plaintiff was entitled to, and filed for, workers' compensation benefits. Plaintiff fails to submit

evidence which would raise an issue of fact. Thus, the complaint is dismissed as against the City.

Wherefore it is hereby

ORDERED that defendant the City of New York's motion for leave to amend the answer is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served *nunc pro tunc* as of the date of the within motion; and it is further

ORDERED that the motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant The City of New York, and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled.

DATED: October 29, 2008

EILEEN A. RAKOWER, J.S.C