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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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DEBORAH DELOUKER-KLEIGER,

Plaintiff(s),

-against-

LAURIE PETROSKE,

Defendant(s).

---x

Index No. 21402/08

Motion Submitted: 5/25/11
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant moves this Court for an Order granting leave to amend her answer to include the affirmative defense of Workers' Compensation as plaintiff's exclusive remedy, and upon granting leave to amend the answer, dismissing the complaint pursuant to CPLR § 3211(a)(7). Plaintiff opposes the requested relief.

Plaintiff alleges that the accident giving rise to this action occurred on July 19, 2007, in the course of her employment as a pre-kindergarten teacher for Little People Childcare, Inc. ("LPC").[1] Specifically, plaintiff alleges that defendant negligently maintained her premises in that she failed to repair a broken door handle. According to plaintiff, when she went to open the defective door, she lost her grip on the broken and defective door handle,

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[1]LPC is not a party to this action.

lost her balance, and fell backward. Plaintiff was carrying two gallon jugs of milk for the children as she attempted to open the door. When plaintiff landed on the ground, she struck her head on the pavement, sustaining personal injuries.

It is undisputed that plaintiff has been collecting workers' compensation and medical benefits from the New York State Insurance Fund ("NYSIF") since 2007 to date.

The trial of this matter has been stayed by agreement of the parties pending determination of the instant motion.

Leave to amend pleadings "shall be freely given" absent prejudice or surprise resulting from the delay (***CPLR § 3025***, ***Northbay Construction Co., Inc. v. Bauco Construction Corp.,*** 275 A.D.2d 310, 711 N.Y.S.2d 510 (2d Dept., 2000); ***Sewkarran v. DeBellis,*** 11 A.D.3d 44, 782 N.Y.S.2d 758 [2d Dept., 2004]), and provided that the proposed amendment is not palpably insufficient as a matter of law nor patently devoid of merit (***Alatorre v. Chun***, 44 A.D.3d 596, 848 N.Y.S.2d 174 [2d Dept., 2007]).

Even when a defendant tardily asserts a Workers' Compensation Law defense, a court should grant defendant leave to amend the answer unless the plaintiff can demonstrate prejudice resulting from the delay, including a showing that the prejudice could have been avoided if the defense had been timely asserted. Such a showing of prejudice is not easily established when a plaintiff is aware of his or her employment status from the outset, and has received workers' compensation benefits (***Caceras v. Zorbas***, 74 N.Y.2d 884, 547 N.E.2d 89, 547 N.Y.S.2d 834 [1989]).

Although the workers' compensation defense may be waived, "such waiver is accomplished only by a defendant ignoring the issue to the point of final disposition itself . . . (***Murray v. City of New York***, 43 N.Y.2d 400, 406, 372 N.E.2d 560, 401 N.Y.S.2d 773 [1977]). Moreover, "[w]orkmen's 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 noncoverage falls on the plaintiff" (***Id.***).

In this case, defendant has submitted, *inter alia*, her own deposition testimony, and that of plaintiff. Plaintiff and defendant each testified that plaintiff was employed by LPC at the time of the accident, and that the accident occurred in the course of plaintiff's employment. Defendant has also submitted plaintiff's July 17, 2009 verified bill of particulars. In that bill of particulars, plaintiff stated that she was employed by LPC as a pre-school teacher, receiving approximately $630 per week. Plaintiff supplemented her bill of particulars on or about August 31, 2009 to include a letter from NYSIF documenting the workers' compensation and medical benefits paid to plaintiff through August 31, 2009

(Defendant's Exhibit G). Defendant has also included as part of her moving papers an April 21, 2011 letter from NYSIF updating the workers' compensation and medical benefits paid to plaintiff through that date (Defendant's Exhibit H). Thus, the Court finds that plaintiff cannot reasonably claim that she is "completely surprised" by the proposed amendment to defendant's answer (Affirmation in Opposition, paragraph 6). Moreover, based on the foregoing, the proposed amendment is neither palpably insufficient as a matter of law nor patently devoid of merit.

Plaintiff's claim of prejudice is likewise unavailing. In opposition to the instant motion, plaintiff alleges that the statute of limitations has expired, foreclosing her "from seeking relief from any other source, *for example* a product liability case against the manufacturer of the defective door handle" (emphasis added) (Affirmation in Opposition, paragraph 6).

The Court finds that nothing has prevented plaintiff from commencing a products liability suit against the door manufacturer in the four years since the accident occurred. At the time plaintiff commenced this action against defendant, she could have also commenced an action against the door manufacturer given the fact that, in her complaint, plaintiff alleged that the door handle was broken. Whether or not defendant is liable as the homeowner for failing to maintain her property, or whether or not defendant seeks to assert a defense based in the Workers' Compensation Law, has absolutely no bearing on plaintiff's ability to have commenced a products liability suit against another party within the statutory limitations period. Thus, the Court finds that plaintiff will not suffer prejudice by the granting of an amendment of defendant's answer to include the affirmative defense of workers' compensation as plaintiff's exclusive remedy.

Accordingly, the Court grants that portion of defendant's motion seeking leave to amend her answer to include the affirmative defense of workers' compensation being plaintiff's exclusive remedy for her injuries. Having granted defendant's motion amending her answer, the Court will now address defendant's motion to dismiss the complaint pursuant to CPLR § 3211(a)(7).

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the facts pleaded must be presumed to be true and accorded every favorable inference, and the sole criterion is whether "from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (***Guggenheimer v. Ginzburg***, 43 N.Y.2d 268, 275, 372 N.E.2d 17, 401 N.Y.S.2d 182 (1977); *see* ***Leon v. Martinez***, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994); ***Sokol v. Leader***, 74 A.D.3d 1180, 1180-1181, 904 N.Y.S.2d 153 (2d Dept., 2010); ***Gershon v. Goldberg***, 30 A.D.3d 372, 373, 817 N.Y.S.2d 322 [2d Dept., 2006]).

Even accepting the facts as pleaded by plaintiff to be true, Workers' Compensation Law § 29(6) provides in relevant part, and as a matter of law that, "[t]he right to compensation or benefits . . . shall be the exclusive remedy to an employee . . . when such employee is injured . . . by the negligence or wrong of another in the same employ . . . ." (*see also* ***Murray, supra*** at 406).

In order to avail itself of the protection afforded by the Workers' Compensation Law § 29(6), the defendant must have been acting within the scope of employment and not engaging in a willful or intentional tort (***Macchirole v. Giamboi***, 97 N.Y.2d 147, 150, 762 N.E.2d 346, 736 N.Y.S.2d 660 [2001]). Concomitantly, all parties are considered co-employees "in all matters arising from and connected with their employment" (***Heritage v. VanPatten***, 59 N.Y.2d 1017, 1019, 453 N.E.2d 1247, 466 N.Y.S.2d 958 [1983]).

Furthermore, an injured worker may not maintain an action for personal injuries against the owner of the premises where the action occurred when the owner is also an officer of the corporation that employed the worker. Co-employee status between an injured worker and defendant owner is not vitiated by the fact that the employer is the owner of the premises where the injury occurred (***Macchirole, supra; Stephan v. Stein***, 226 A.D.2d 364, 640 N.Y.S.2d 245 [2d Dept., 1996]).

In this case, the parties' deposition testimony establishes that the accident occurred within the scope of employment. Defendant's deposition testimony establishes that defendant is the sole owner of the premises where the accident occurred, as well as the sole owner and stockholder of LPC, the company that employed plaintiff. Also, defendant testified that, like plaintiff, she is a salaried employee of LPC who is paid by LPC's check.

As part of the instant motion, defendant also submitted an affidavit further attesting to the fact that she owns the premises where the accident occurred, that she is the sole officer and shareholder of LPC, and that she was an employee of LPC at the time of the accident (May 9, 2011 Affidavit).

In opposition, plaintiff does not directly dispute that which is established by the defendant's deposition testimony and affidavit, and plaintiff has not provided any proof contradicting defendant's sworn statements. Plaintiff merely asserts that the defendant's testimony is "unsupported" by documentation, and that plaintiff did not ask "probing questions" with respect to the workers' compensation defense during the deposition because that defense had not been asserted at that time.

Contrary to plaintiff's assertions in the Affirmation in Opposition, plaintiff's counsel elicited testimony from defendant regarding her relationship to LPC, the premises where the accident occurred, defendant's responsibility for those premises, and the fact that defendant

was a salaried employee of LPC. Counsel also elicited testimony concerning defendant's filling out of the workers' compensation form relative to plaintiff's accident. Thus, plaintiff had ample opportunity to explore the workers' compensation defense at defendant's deposition, and in so doing, plaintiff elicited the very testimony establishing that defendant is entitled to the protection of the workers' compensation defense.

Thus, the Court finds that Workers' Compensation Law § 29(6) constitutes plaintiff's exclusive remedy to recover for injuries sustained as a result of the July 19, 2007 accident.

Accordingly, defendant's motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7) is granted, and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: July 28, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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ENTERED
AUG 02 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE