[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. Justice

PART 46

Index Number : 115887/2009
NYC HOUSING AUTHORITY
vs.
FRANZA, DAVID
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 3, were read on this motion ~~to~~/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered ~~that this motion~~ and adjudged that:

The court grants plaintiff's motion for summary judgment pursuant to the accompanying decision. C.P.L.R. § 3212(b).

FILED
DEC 12 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/30/12

Lucy Billings
LUCY BILLINGS J.S.C.
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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NEW YORK CITY HOUSING AUTHORITY, Index No. 115887/2009

Plaintiff

- against - DECISION AND ORDER

DAVID FRANZA,

Defendant

----------x

LUCY BILLINGS, J.S.C.:

Plaintiff moves for summary judgment on plaintiff's claim for recovery of $17,600.00 in Workers' Compensation payments to defendant, plaintiff's former employee, for lost earnings from July 2006 to May 2007. C.P.L.R. § 3212(b). Finding defendant misrepresented his inability to work and his nonperformance of work activities during that period, in violation of New York Workers' Compensation Law § 114-a, the State Workers' Compensation Board disqualified him from those benefits. Upon oral argument of plaintiff's motion, based on the prior administrative adjudication, and for the reasons explained below, the court grants the motion.

I. THE FINDINGS OF THE WORKERS' COMPENSATION BOARD PANEL AND THEIR PRECLUSIVE EFFECT

A claims supervisor of plaintiff's nonparty administrator for its Workers' Compensation claims attests to the facts regarding defendant's claim for and plaintiff's payment of Workers' Compensation to defendant. The only facts defendant presents relating to the merits of plaintiff's claim are through

his continued insistence that he was not working or engaging in physical activity when videotaped on several occasions beginning July 12, 2006. Nor did he work, undertake work activity, or commit fraud through May 16, 2007, when his Workers' Compensation Board hearing commenced.

The Workers' Compensation Board Panel Decision October 10, 2008, determined these very issues to the contrary, after a hearing where defendant appeared, was represented by an attorney, and testified; defendant's treating physician as well as plaintiff's examining physician testified; and the videotape was admitted in evidence. N.Y. Workers' Comp. Law § 25(3)(b); Poli v. Taconic Correctional Facility, 83 A.D.3d 1339, 1340 (3d Dep't 2011); Husak v. New York City Tr. Auth., 40 A.D.3d 1249, 1250-51 (3d Dep't 2007); Jacob v. New York City Tr. Auth., 26 A.D.3d 631, 632 (3d Dep't 2006); Amster v. New York City Sheriff's Off., 17 A.D.3d 789, 790-91 (3d Dep't 2005). As Workers' Compensation Law § 23 dictates, this decision precludes different findings here: "An award or decision of the board shall be final and conclusive upon all questions . . . between the parties, unless reversed or modified on appeal therefrom . . . ." See N.Y. Workers' Comp. Law § 25(3)(a); Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 349-50 (1999); Allied Chem. v. Niagara Mohawk Power Corp., 72 N.Y.2d 271, 274, 276 (1988); Liss v. Trans Auto Sys., 68 N.Y.2d 15, 22 (1986); BDO Seidman LLP v. Strategic Resources Corp., 70 A.D.3d 556, 560-61 (1st Dep't 2010).

Defendant never appealed the Workers' Compensation Board

Panel Decision. Yet he now contends as his sole defense that the administrative proceeding unfairly denied him an opportunity to rebut the investigator's testimony and surveillance video demonstrating his work or work activity and thus his fraud between July 2006 and May 2007. See Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d at 349-50; Allied Chem. v. Niagara Mohawk Power Corp., 72 N.Y.2d at 277; BDO Seidman LLP v. Strategic Resources Corp., 70 A.D.3d at 560. Even if this contention were undisputed, the means for him to advance such defense was an appeal from the Workers' Compensation Board Panel to the Appellate Division, Third Department. N.Y. Workers' Comp. Law § 23.

Nevertheless, the administrative proceeding did provide defendant the opportunity to cross-examine plaintiff's witnesses. He declined to cross-examine plaintiff's investigator, however, and did not request to testify again in rebuttal until after the parties' summations, and never proffered what rebuttal he would present. For these reasons, the administrative law judge fairly denied defendant's belated request to reopen the proceeding to recall defendant. Defendant's defense thus is unsupported by any evidentiary or legal grounds.

II. ATTORNEYS' FEES AND EXPENSES

While plaintiff was free to move for attorneys' fees and expenses if defendant's defense proved entirely frivolous, 22 N.Y.C.R.R. § 130-1.1; Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons Intl., Inc., 94 A.D.3d 580, 581-82 (1st Dep't

2012); Visual Arts Found., Inc. v. Egnasko, 91 A.D.3d 578, 579 (1st Dep't 2012); Newman v. Berkowitz, 50 A.D.3d 479, 480 (1st Dep't 2008); Intercontinental Bank Ltd v. Mircale & Rivera, 300 A.D.2d 207, 208 (1st Dep't 2002), plaintiff did not seek attorneys' fees and expenses on this basis anywhere in this motion. Plaintiff sought fees and expenses simply for its collection efforts, but has provided no statutory, regulatory, or contractual authority for such an award, Mount Vernon City School Dist. v. Nova Cas. Co., 19 N.Y.3d 28, 39 (2012); Baker v. Health Mgt. Sys., 98 N.Y.2d 80, 88 (2002); Hooper Assocs. v. AGS Computers, 74 N.Y.2d 487, 491 (1989); Campbell v. Citibank, 302 A.D.2d 150, 154 (1st Dep't 2003), and failed further to seek fees and expenses in its complaint. Its first request for fees and expenses based on a frivolous defense is in reply to defendant's opposition to the motion. Because this belated request deprived defendant of an opportunity to oppose the request, see Capetola v. Capetola, 96 A.D.3d 612, 613 (1st Dep't 2012), the court denies plaintiff this additional relief. 22 N.Y.C.R.R. § 130-1.1(d); Matter of Lawrence, 79 A,D,3d 417 (1st Dep't 2010); NYCTL 1997-1 Trust v. Seijas, 307 A.D.2d 876, 877 (1st Dep't 2003); Rudansky v. Giorgio Armani, S.p.A., 306 A.D.2d 174 (1st Dep't 2003); Day v. NYP Holdings, 290 A.D.2d 342, 343 (1st Dep't 2002). See Mehmet v. Add2Net, Inc., 66 A.D.3d 437, 438 (1st Dep't 2009); Serradilla v. Lords Corp., 50 A.D.3d 345, 346 (1st Dep't 2008).

III. CONCLUSION

For the reasons set forth above, however, the court grants plaintiff's motion for summary judgment in full and awards plaintiff a judgment of $17,600.00 against defendant. C.P.L.R. § 3212(b). The Workers' Compensation Board Decision that orders defendant to pay that amount was filed and mailed to defendant October 19, 2009. The court therefore awards plaintiff interest from October 24, 2009, the date of defendant's presumed receipt. C.P.L.R. §§ 2103(b)(2) and (c), 5001(b). Plaintiff also is entitled to costs and disbursements pursuant to C.P.L.R. §§ 8101, 8201(1), and 8301(a), to be calculated by the Clerk. The Clerk shall enter the judgment specified, plus the costs and disbursements, forthwith.

DATED: November 30, 2012

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.