

Biscup v E.W. Howell, Co., Inc.
2013 NY Slip Op 33834(U)
March 27, 2013
Supreme Court, Nassau County
Docket Number: 7101/10
Judge: Antonio I. Brandveen
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(2)

SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

SCOTT BISCUP,

Plaintiff,

- against -

E.W. HOWELL, CO., INC.,

Defendant.

TRIAL / IAS PART 30
NASSAU COUNTY

Action No. 1

Index No. 7101/10

Motion Sequence No. 007

E.W. HOWELL, CO. LLC,

Third Party Plaintiff,

- against -

SBS STEEL, INC. and SUPER STEEL
STRUCTURES, LLC,

Third Party Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3, 4</u>
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff cross moves to amend/supplement the bill of particulars to include a violation of Industrial Code § 23-1.7(d) as a predicate for a Labor Law § 241(6) cause of action. The plaintiff contends the amendment relates to a slipping hazards allegation in the lawsuit, and does not require additional discovery. The plaintiff asserts the alleged violation

[* 2]

emanates the testimony of the plaintiff and the Dwayne Marsh of the third party defendant, SBS Steel, Inc., who each identified muddy conditions caused the slip.

The defendant E.W. Howell, Co., Inc. opposes this cross motion. The defense contends the plaintiff testified he jumped from a flatbed truck because he thought a steel panel was about to fall upon him. . The defense contends this cross lacks merit, and is an attempt by the plaintiff to avoid dismissal of the Labor Law § 241(6) allegation. The defense adds the plaintiff fails to provide a reasonable excuse for the six and one half year delay since the verified complaint was served in applying for permission to serve an amended or supplemental bill of particulars. The defense maintains a violation of Industrial Code 23-1.7(d) as a predicate for a Labor Law § 241(6) cause of action is inapplicable to this litigation because the plaintiff's testimony does not support a violation as the proximate cause of the alleged accident. The defense avers this belated request to amend is prejudicial to the defendant because it denies an opportunity to conduct discovery regarding the alleged violation of Industrial Code 23-1.7(d). The defense points out the plaintiff served a June 24, 2010 verified bill of particulars, and a March 1, 2011 supplemental verified bill o particulars which were both devoid of any allegation the plaintiff was injured from a slipping hazard under Industrial Code 23-1.7(d). The defense claims reliance upon the discovery, and preparation of its defense based upon an alleged Industrial Code 23-2.1 violation regarding improper storage of material.

The third party defendants SBS Steel, Inc. and Super Steel Structures, LLC oppose the plaintiff's cross motion. The third party defendants contend plaintiffs's Labor Law § 241(6) cause of action is not supported by the facts. The third party defendants point to the plaintiff's deposition testimony where the plaintiff testified the mud on his boots did not cause him any difficulty in getting up or down the flatbed, and he lost his footing from the mud on his boots.

The third party defendants add the plaintiff did testify he fell off the flatbed from a slipping hazard, but he perceived a side panel going to fall and he jumped off the flatbed. The third party defendants notes the deposition testimony contrasts with recent sworn statement.

Generally, leave to amend pleadings is freely given (CPLR 3025 [b]) and the decision of whether to do so is committed to the discretion of the trial court, the exercise of which will not lightly be set aside (*Neumann v Metropolitan Med. Group*, 161 AD2d 1106; *Brown v Samalin & Bock*, 155 AD2d 407). However, circumstances do arise when it is improvident for a court to grant leave to amend, e.g., if prejudice to the nonmoving party would result or if the amendment plainly lacks merit (*see, Bobrick v Bravstein*, 116 AD2d 682, 683), or when the causes of action set forth in the amendment are palpably insufficient on their face (Smith v Bessen, 161 AD2d 847)

Mathiesen v Mead, 168 A.D.2d 736, 736-737, 563 N.Y.S.2d 887 [2d 1990].

This Court determines the plaintiff fails to satisfy his CPLR 3025 [b] burden (*Lucido v. Mancuso*, 49 A.D.3d 220, 851 N.Y.S.2d 238 [2d Dept 2008]). Contrary to the plaintiff's assertions, the proffer by the plaintiff does not support his contentions regarding the amendment. The circumstances here would result in prejudice to E.W. Howell, Co., Inc., SBS Steel, Inc. and Super Steel Structures, LLC. The plaintiff's proposed amendment clearly lacks merit, and the cause of action premised upon an alleged violation of Industrial Code 23-1.7(d) is palpably insufficient (*Putnam County Sav. Bank v. Aditya*, 91 A.D.3d 840, 938 N.Y.S.2d 98 [2d Dept 2012]).

When leave to amend a bill of particulars is sought on the eve of trial, however, judicial discretion should be exercised in a "discreet, circumspect, prudent and cautious" manner (*Price v Brody*, 7 AD2d 204, 206 [1959]). Moreover, where there has been an inordinate delay in seeking leave to amend, the plaintiffs must establish a reasonable excuse for the delay and submit an affidavit to establish the merits of the proposed amendment (*see Reape v City of New York*, 272 AD2d 533 [2000]; *DeNicola v Mary Immaculate Hosp.*, 272 AD2d 505, 506 [2000])

Dimino v Rosenfeld, 306 A.D.2d 371, 372, 760 N.Y.S.2d 859 [2d Dept 2003]

Here, there is an inordinate delay in seeking leave to amend. The plaintiff fails to make a

[* 4]

showing of any reasonable excuse for the extensive delay in seeking leave to amend. Moreover, “when leave to amend a bill of particulars is sought on the eve of trial, judicial discretion should be exercised in a “discreet, circumspect, prudent and cautious” manner (*Price v. Brody*, 7 A.D.2d 204, 206, 181 N.Y.S.2d 661)” (*DeNicola v. Mary Immaculate Hosp.*, 272 A.D.2d 505, 506, 708 N.Y.S.2d 152 [2d Dept 2000]).

Accordingly, the plaintiff’s cross motion is denied.

So ordered.

Dated: **March 27, 2013**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION X

ENTERED

APR 01 2013

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**