SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

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BEATRIZ PAREDEZ,

DECISION/ORDER

Plaintiff,

-against- Index No.: 303990/2011

MORRIS DWECK and SOPHIA DWECK,

Defendants.

_____X

The following papers numbered 1 to 6 read on the below motion noticed on December 23, 2013 and duly submitted on the Part IA15 Motion calendar of **March 7, 2014**:

Papers Submitted	Numbered
Def's NOM, exhibits	1,2
Pl.'s Aff. in Opp., exhibits	3,4
Def.'s aff. In Reply, Exh.	5,6

Upon the foregoing papers, the defendants Morris Dweck and Sophia Dweck (collectively "Defendants"), make a motion seeking four forms of relief: (1) to amend their answer pursuant to CPLR 3025, to assert the Workers' Compensation Bar as a complete defense; (2) partial summary judgment pursuant to CPLR 3212, dismissing the claims that Defendants failed to obtain Workers' Compensation coverage; (3) a stay of this action pursuant to CPLR 2201, pending presentation to the Workers' Compensation Board for a determination; and (4) dismissal of the Labor Law §240 claim since the work engaged in by Plaintiff was not an activity covered under the statute. The plaintiff Beatriz Paredez ("Plaintiff") opposes the motion.

I. Background

According to her second amended complaint, Plaintiff alleges that she sustained injury after falling off of a ladder during the course of her employment with Defendants.

Plaintiff alleges that she was hired by defendant Sophia Dweck in June 2010 to clean her residence. This accident occurred in a hallway located on the first floor of the defendants' home. Plaintiff stated that, before the accident, she intended to vacuum and clean the bathroom, bedroom, staircases, and walls. At the time of the accident, she was using a ladder she retrieved from the garage, was wearing gloves and using a bucket filled with water. After ascending the ladder, she cleaned the wall for 20-30 seconds, placing her left hand on the wall to support herself. Thereafter, the ladder fell, propelling Plaintiff to the floor. The second amended complaint makes allegations sounding in negligence, violations of Labor Law §§200, 240, and 241(6), and claims that Defendants violated §§11 and 32 of Workers' Compensation Law by failing to obtain workers compensation coverage applicable to plaintiff's injuries. Defendants now make the instant motion seeking various forms of relief.

II. Analysis

a) *Leave to Serve an Amended Answer*

Defendants' motion to amend their answer to include the Workers' Compensation bar as an affirmative defense is granted. Generally, leave to amend a pleading is freely given and discretion and decision of whether to do so is committed to the discretion of the trial court, the exercise of which will not be lightly set aside (*see* CPLR 3025[b]). It is improvident, however, for a court to grant such leave if there is prejudice to the nonmoving party, the amendment plainly lacks merit, or where the new causes of action are palpably insufficient on their face (see, *Centrifugal Associates, Inc. V. Highland Metal Industries, Inc.*, 193 AD 2d 385 [1st Dept. 1993]). However, "[o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment" (*Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 40 AD 3d 363, 365 [1st Dept. 2007] citing *Hospital for Joint Orthopaedic Inst. v. James Katsikis Environmental Contractors, Inc.*, 173 AD 2d 210 [1st Dept. 1991]). Indeed, a movant seeking to amend must "simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (See, *MBIA Ins. Corp. V. Greystone & Co., Inc.*, 74 AD 3d 499, 500 [1st Dept. 2010]). Here, Defendants have demonstrated that the proposed affirmative defense is meritorious since

they have provided evidence that they did in fact procure workers' compensation insurance coverage for this incident. In opposition, Plaintiff failed to articulate any meaningful prejudice, or otherwise demonstrate that the proposed amendment patently lacks merit.

b) *Partial Summary Judgment and Referral to Workers' Compensation Board*

Defendants also move for summary judgment, dismissing Plaintiff's third cause of action alleging violations of §§11 and 32 of Workers' Compensation Law for failure to procure workers compensation coverage. Defendants provide a copy of their homeowners insurance policy, with an effective date of November 4, 2010 through November 4, 2011, evincing workers' compensation coverage for resident employees. The policy is certified by an Allstate Insurance employee, and notarized in the state of Texas.

Defendants argue that this evidence entitles them to summary judgment on Plaintiff's third cause of action, as well as a stay of this matter pending reference to the Workers' Compensation Board for a determination as to benefits. In opposition, Plaintiff contends that the policy is not in admissible form because it does not verify that the copy is "true and accurate" and does not contain a certificate of conformity. Accordingly, Defendant has not submitted sufficient evidence to establish entitlement to summary judgment. Plaintiff also argues that the motion is premature since Defendants' failed to answer the second supplemental complaint. The record reflects, however, that Defendants did in fact file such an answer, and annexed it to their moving papers. Plaintiff nevertheless asserts that discovery is required whether the coverage was in effect at the time of the accident or whether it was applicable to this accident. Plaintiff therefore contends that the motion for summary judgment, and request for a stay, pending determination by the Workers' Compensation Board, should be denied.

The court initially notes that the insurance policy was properly certified (CPLR 4540), and failure to submit a certificate of conformity under CPLR 2309 is not a fatal defect (*see CPLR* 2001; *Smith v. Allstate Insurance Company*, 38 AD3d 522, 523 [2d Dept 2007]; *Matapos Technology Ltd. v. Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]). The next issue is resolution of Defendants' motion for summary judgment on the third cause of action and referral of this matter to the Workers' Compensation Board.

Primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation law has been vested in the Workers' Compensation Board, and therefore it is "innapropriate for the Court to express its views with respect thereto pending determination by the Board." (*Botwinick v. Odgen*, 59 N.Y.2d 909, 910 [1985]). Therefore, where the existence of an employer-employee relationship creates a question of fact, that question is properly resolved in the first instance by the Board, as is the question of whether the injury was sustained in the course of employment (*O'Rourke v. Long*, 41 N.Y.2d 219, 224 [1976]). The question of whether a plaintiff has a "valid tort claim for damages or is relegated to workers' compensation benefits is a factual determination for the Workers' Compensation Board and such body may not be circumvented by resort to the courts nor can a plaintiff elect to waive workers' compensation benefits and proceed on a tort cause of action" (*Mattaldi v. Beth Isr. Med. Ctr.*, 297 A.D.2d 234, 235 [1st Dept. 200 2] citing *Corp v State of New York,* 257 AD2d 742, 743 [3rd Dept. 1999]; see also *Manetta v. Town of Hempstead Day Care Ctr.*, 248 A.D.2d 517 [2nd Dept. 1998]). Thus, that branch of Defendants' motion seeking summary judgment on the third cause of action is held in abeyance, the branch of the motion seeking a stay is granted, and this matter is referred to the Workers' Compensation Board for a hearing and determination as to the availability of workers' compensation benefits (see, *Nepomuceno v City of New York*, 94 A.D.3d 453, 454 [1st Dept. 2012]; *Liss,* 68 NY2d 15, 20-21[1986]; *Mattaldi*, 297 A.D.2d 234 [1st Dept. 2002]). Following that determination, it will be for this Court, if necessary, to determine whether Defendants provided the appropriate workers' compensation coverage (*see Monteiro v. Rasraj Foods & Catering, Inc.*, 79 A.D.3d 827 [2nd Dept. 2010]).

c) *Summary Judgment as to Plaintiff's Labor Law 240(1) Claim*

Plaintiff's Labor Law §240(1) claim, however, must be dismissed because she was engaged in routine household cleaning at the time of her alleged accident, and such activity does not fall within the purview of the statute (*Soto v. J. Crew, Inc.*, 21 N.Y.3d 562 [2013]). Since Defendants did not move to dismiss Plaintiff's claims under Labor Law §§200 and 241(6), they remain undisturbed.

III. Conclusion

Accordingly, it is hereby

ORDERED, that Defendants' motion to amend is granted with the condition that Defendants must serve an amended answer in accordance with the CPLR, with the proposed affirmative defense, within ten (10) days after service of a copy of this Order with Note of Entry, and it is further,

ORDERED, that upon service of this amended pleading, this matter is transferred to the Workers' Compensation Board for a hearing and determination of the availability of workers' compensation, and it is further

ORDERED, that Defendants' motion for summary judgment, dismissing Plaintiff's cause of action under Labor Law §240(1), is granted, and that claim only is dismissed with prejudice, and it is further,

ORDERED, that summary judgment as to Plaintiff's third cause of action is held in abeyance, and this matter is stayed pending resolution by the Workers' Compensation Board, and it is further,

ORDERED, that if Defendants do not serve the amended answer as detailed above, the instant motion is denied in its entirety.

Dated: 5/23, 2014

Hon. Mary Ann Brigantti-Hughes, J.S.C.