Romero v Mayflower Bus. Group, LLC
2018 NY Slip Op 33982(U)
November 14, 2018
Supreme Court, Queens County
Docket Number: 700914/2017
Judge: Joseph Risi
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI IA Part 3
Acting Supreme Court Justice

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SANTIAGO RAMOS ROMERO,

Plaintiff,

-against-

MAYFLOWER BUSINESS GROUP, LLC and JOHN DOES 1-10 (a series of fictitious names representing the presently unknown parties who owned, maintained, leased, managed, controlled, constructed, erected, altered and repaired the premises at 61-27 186th Street, Fresh Meadows, New York), and CROSSCITY CONSTRUCTION CORP.

Defendants.
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Motion Seq. #2

FILED
NOV 27 2018
COUNTY CLERK
QUEENS COUNTY

The following papers numbered EF20 to EF38 read on this motion by defendants Mayflower Business Group, LLC ("Mayflower"), and Cross City Construction Corp. ("Cross City") (together herein referred to as "defendants"), to dismiss the action pursuant to 3211[a][7]; and cross motion by plaintiff for leave to amend the complaint pursuant to CPLR 3025[b].

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF20-EF23
Notice of Cross Motion/Opposition - Affidavits - Exhibits	EF26-EF35
Reply Affidavits	EF36-EF38

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff in this labor law action seeks damages for personal injuries which he

allegedly sustained in the course of his employment while working as a laborer for Cross City Construction. The complaint alleges that Mayflower "owned, maintained, leased, managed, controlled, constructed, erected, altered and repaired" the premises where the accident occurred. Defendants move to dismiss the action on the ground that the court lacks subject matter jurisdiction over the same, and that the matter should be handled by the Workers Compensation Board. Plaintiff opposes the motion and moves to amend the complaint to assert that he was an "independent contractor" and not an employee of Cross City and, therefore, defendants' motion is moot.

Motion by defendants

Defendants move pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them on the basis of the exclusivity provisions of Workers' Compensation Law §§ 11 and 29(6). Generally, "Workers' compensation benefits are [t]he sole and exclusive remedy of an employee against his employer for injuries in the course of employment" (*Weiner v City of New York*, 19 NY3d 852, 854 [2012] [internal quotation marks omitted]; *see De Los Santos v Butkovich*, 126 AD3d 845, 846 [2d Dept 2015]). "This precludes suits against an employer for injuries in the course of employment" (*Weiner v City of New York*, 19 NY3d at 854; *see Cunningham v State of New York*, 60 NY2d 248, 251 [1983]). Here, however, the plaintiff properly elected his remedy of pursuing this action against defendants under Workers' Compensation Law §§11 and 50, since defendants did not have Workers' Compensation coverage at the time of the accident (*see Chowdhury v 390 Fifth*, 2 AD3d 560 [2d Dept 2003]; *Matter of Ocasio v Sang Soo Kim*, 307 AD2d 662 [3d Dept 2003]). Accordingly, the motion to dismiss pursuant to CPLR 3211 (a) (7), is denied (*see Rosario v Montalvo & Son Auto Repair Ctr., Ltd.*, 149 AD3d 885, 886 [2d Dept 2017]).

Cross Motion

Plaintiff's cross motion for leave to amend the complaint is granted.

Plaintiff seeks to amend the caption to name the following entities and individuals as defendants who, upon information and belief, acted individually and in a joint-enterprise capacity with, and as the alter-ego of Cross City and actively participated in the oversight, management, operation and control of the subject premises at all relevant times: JFH Construction Corp; Cross City Hotel LLC; Mayflower International Hotel Management LLC; US Hongzhuang Hotel Management Inc.; Hongzhuang LLC; Mayflower 22nd Century Child Day Care Inc.; Mayflower 22nd Century Real Estate Inc.; Mayflower Hotel Group Inc.; Mayflower Hotel Management Corporation; Mayflower Inn Corporation; Mayflower Inn Express Corporation; Mayflower International Hotel Group Inc.; Mayflower International Hotel Reservation Center Inc.; Xiazhuang Ge; and Weihong Hu.

With regards to defendant Xiazhuang Ge, plaintiff submits that "a corporate officer

who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced" (*Peguero v 601 Realty Corp*., 58 AD3d 556, 558 [1st Dept 2009], *quoting from Espinosa v Rand*, 24 AD3d 102, 102 [1st Dept 2005]). In the second amended complaint, plaintiff alleges that Xiazhuang Ge and Weihong Hu were not only owners of Cross City and other named corporate entities, but were also directly involved in supervising the laborers, including plaintiff, on the construction site where the subject accident occurred. Thus, plaintiff submits, these defendants were properly named in their individual capacity in this action.

Plaintiff further seeks to amend the complaint to name Jane Does 1-25 (a series of fictitious names representing the presently unknown parties who acted in a joint-enterprise capacity with, and as the alter-ego of Cross City Construction Corp., and actively participated in the oversight, management, operation and control of Cross City Construction Corp.).

Leave to amend a pleading is freely granted absent prejudice or surprise resulting directly from any delay in asserting the proffered claim (CPLR 3025[b]; *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp*., 59 NY2d 755 [1983]; *Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82,86 [1st Dept 2007]). The party opposing a motion to amend a pleading must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment (*see Daniels v Empire-Orr, Inc*., 151 AD2d 370, 371 [1st Dept 1989]). The determination of whether to allow the amendment is committed to the court's discretion, and the exercise of that discretion will not be overturned absent a showing that the facts supporting the amendment do not support the purported claim or claims (*see Sewkarran v DeBellis*, 11 AD3d 445 [2d Dept 2004]; *Non-Linear Trading Co. v Braddis Assoc*., 243 AD2d 107, 116 [1st Dept 1998]).

In opposition, defendants argue that plaintiff failed to demonstrate the merit of the proposed amendments. "Cases involving CPLR 3025 (b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed. No evidentiary showing of merit is required under CPLR 3025 (b). The court need only determine whether the proposed amendment is 'palpably insufficient' to state a cause of action or defense, or is patently devoid of merit. Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied. If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing (see CPLR 3212)" (*Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). Here, plaintiff made the requisite showing of the viability of his proposed amendments.

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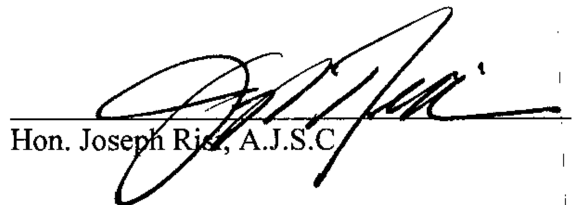
Since there was no showing of substantial prejudice or surprise (see CPLR 3025[b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]), or that the proposed amendments are "palpably insufficient, or patently devoid of merit *(MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]), leave to amend is granted.

Conclusion

The motion to dismiss is denied. The cross motion for leave to amend the complaint is granted.

Dated: November 14, 2018



Hon. Joseph Risi, A.J.S.C

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