SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36

Index No.:508298/14
Motion Calendar No.
Motion Sequence No.

SEAN LENNON,

Plaintiff(s),

DECISION / ORDER

-against-

Present:
Hon. Judge Bernard J. Graham
Supreme Court Justice

56th AND PARK (NY) OWNER, LLC, BOVIS LEND LEASE LMB, INC. LEND LEASE (US) CONSTRUCTION LMB INC., AND ATLANTIC HOISTING & SCAFFOLDING, LLC

Defendant(s).

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: amend the answer of defendants' to include the affirmative defenses of res judicata and collateral estoppel and upon amendment to award summary judgment to the defendants and a dismissal of plaintiff's complaint.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed.....	1-2,
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits.....	3,4
Replying Affidavits.....	5
Exhibits.....	
Other: .....(memo).....	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

The defendants, 56th and Park (NY) Owner LLC ("56th & Park"), Bovis Lend Lease LMB, Inc. ("Bovis"), Lend Lease (US) Construction LMB Inc. ("Lend Lease") and Atlantic Hoisting & Scaffolding, LLC ("Atlantic"), have moved for an Order, pursuant to CPLR § 3025(b), permitting the defendants to amend their answer to include the affirmative defenses of res judicata and collateral estoppel, and to deem the amended answer to have been served nunc pro tunc. The defendants further seek, that upon amendment of the answer, an award of

summary judgment and a dismissal of the plaintiff's, Sean Lennon ("Lennon") complaint, pursuant to CPLR § 3212.

The plaintiff opposes the relief sought in defendants' motion, contending that the defendants should not be permitted to amend their answer post note of issue. The plaintiff also opposes defendants' motion to dismiss with respect to its claims of the defendants violating Labor Law § 200, (as to defendants Bovis, Lend Lease and Atlantic); §240(1), as well as Labor Law § 241(6), as the plaintiff contends that there were multiple sections of the Industrial Code that were violated as a result of this incident. The plaintiff does not oppose the portion of defendants' motion seeking to dismiss the Labor Law § 200 claim as against 56th and Park, as there is no proof that the owner of the property was negligent in this matter. Additionally, the plaintiff asserts that the Court should search the record and award summary judgment to the plaintiff as to its claims that the defendants violated the aforementioned sections of the Labor Law.

Background:

The within action arises as the result of the alleged injuries sustained by the plaintiff, Lennon, on July 18, 2014, at a construction site located at 432 Park Avenue, New York, N.Y. ("subject property"). Plaintiff alleges that he was employed as a worker at the construction site by a sub-contractor, and that he was injured when an exterior hoist, or elevator, bounced while he was a passenger on it. The plaintiff contends that he injured his knees, neck and back as a result of the incident.

An action was commenced on behalf of the plaintiff by the filing of a summons and complaint dated September 10, 2014. The original named defendants, CIM Group, LLC, Macklowe Properties, Inc., Bovis Lend Lease LMB and Lend Lease served an answer to the complaint on or about November 20, 2014. Thereafter, plaintiff filed an amended complaint, in which the action was discontinued against CIM Group, LLC and Macklowe Properties, Inc. 56th

& Park was added as a defendant, after which 56th & Park were served, and they filed an answer to the amended complaint on or about January 30, 2015.

On March 15, 2016, the plaintiff filed a second amended complaint in which Atlantic was named and served as a defendant. Atlantic filed an answer dated March 22, 2016.

Claims of violation of the Labor Law were asserted against defendants Bovis, 56th & Park and Lend Lease. A negligence claim was asserted against defendant Atlantic.

The plaintiff served responses to both a demand for a Bill of Particulars and a supplemental bill of particulars. A deposition of the plaintiff was conducted on November 3, 2016, as well as that of Patrick McAlarney, the site safety director for Lend Lease who was deposed on April 5, 2017.

Following the commencement of this action, the plaintiff filed a claim with the Workers Compensation Board. A hearing was conducted on November 24, 2014. before Judge Elaine Stogel of the Workers Compensation Board. Judge Stogel in rendering her decision, opined that the plaintiff lacked credibility with respect to the happening of the incident as well as the injuries that were sustained. Judge Stogel noted when plaintiff testified at the hearing that he stated that he had only sustained an injury to his right knee. It was not until the Judge had questioned the plaintiff as to whether he had injured any other part of his body, that the plaintiff stated that he had also hurt his lower back.

The plaintiff initially sought medical attention for his injuries on July 25, 2014, which was one week after the alleged incident. At the time, the plaintiff told Dr. Touliopoulos that the elevator hoist started to buckle, that his body was being jolted around and he had hyperextended both of his knees (see transcript of Workers Compensation hearing p. 13). CT scans and x-rays were conducted of both knees. The findings from these diagnostic exams were that there were degenerative changes, the left knee was found to be normal, and the right knee showed diffuse and small to moderate effusion. The doctor was of the opinion that the claimant did not sustain a disability and could return to work without any restrictions.

The plaintiff presented further evidence that he later sought treatment with a different physician. It was at that time that the plaintiff stated that he had also injured his back. The Court noted that despite the fact that no MRI was taken of the alleged injuries, the doctor made a diagnosis of bilateral knee derangement with meniscal tears of his right knee and a sprain/strain of his lumbar spine.

Judge Stogel further stated that the plaintiff continued to seek treatment for his injuries with another physician, and it was at that time (October 24, 2014), that plaintiff complained that he had also injured his neck.

At the hearing, Robert O'Reilly, a general superintendent for Safety Atlantic, the company that oversaw the hoist elevators at the project site, testified that after reviewing the elevator maintenance records from July 18, 2014, and having spoken to his mechanic Fernandez Rivera, he ascertained that no incident had been reported on that date. He testified that if the elevator hoist had severely malfunctioned as plaintiff attests, and had to be taken out of service and workers offloaded, that a written report of the incident would have been required and completed. Mr. O'Reilly further testified that if the elevator hoist was overloaded it would not produce a herky jerky type of ride, but instead the emergency brake would have activated and it would have locked the elevator (see Workers' Compensation transcript p. 22-25, 31, 41).

The defendants also produced a second witness, David Cannamela, the medical administrator at the job site. Mr. Cannamela testified that he initially learned of the alleged incident when one of plaintiff's treating physicians called him regarding an issue of payment following plaintiff's office visit. Mr. Cannamela further testified that following the alleged incident, he spoke with the hoist elevator operator, who stated that while the elevator may have bounced while operating, nothing unusual occurred that day and there were no complaints made by any other worker.

Judge Stogel in rendering her decision, opined that she did not believe that the hoist elevator had malfunctioned in any way. The Court noted that Mr. Lennon's account of his

injuries was inconsistent as he gave different versions of what had transpired. Although the plaintiff reported that he had injured his knees, back and neck, he did not report the back injury to the first physician who treated him, did not include that injury in a report he had filed, and did not report the neck injury until a later time. Judge Stogel, in denying plaintiff's claim, determined that the entire claim was at best an afterthought.

A Note of Issue was filed by the plaintiff on April 7, 2017. The defendants moved to vacate the Note of Issue upon the grounds that discovery was not complete and there was a need to conduct further discovery. The Court, in an order dated May 4, 2017, granted the defendant's motion only to the extent that defendants were permitted to conduct further discovery and the date within which a summary judgment motion could be made was extended until September 7, 2017.

Defendants' contentions:

The defendants, in support of their motion to amend their answer to add the affirmative defense that plaintiff's action is barred based upon the doctrine of res judicata and/or collateral estoppel, maintain that this application will satisfy all of the basic conditions for an amendment, as the defense has merit, is not palpably insufficient, the plaintiff has not been prejudiced by the timing of the proposed amendment, and he cannot legitimately claim surprise. Defendants contend that the plaintiff will not be unduly prejudiced by an amendment of their answer as the plaintiff was fully aware that his workers compensation claim had been denied by an Administrative Law judge following a hearing in which he was represented by counsel. In addition, an appeal of that determination was affirmed by the Workers Compensation Board.

As to the motion for summary judgment and a dismissal of plaintiff's action, the defendants' assert that the affirmed decision of the Workers Compensation Board which denied the claim of the plaintiff as to both the occurrence of an accident and the injury sustained, should

bar the plaintiff from proceeding on a claim in this Court based upon the principles of res judicata and collateral estoppel.

Defendants maintain that the contention by the plaintiff that he was not accorded a "full and fair opportunity to litigate before the Workers Compensation Board is based primarily on invective, derogatory and unwarranted attacks on his prior counsel, the Administrative Law judge and the Workers' Compensation System". The plaintiff did not identify a single right that was improperly denied to him or any procedure undertaken by the Board that violated his rights or procedures. The defendants further contend that the plaintiff was represented by counsel before the Board, and there was no objection raised at the time to the process or procedures used by the Board.

Defendants contend that if the Court were to consider plaintiff's Labor law § 240 claim, that it should be dismissed as that statute is not applicable to the circumstances of plaintiff's alleged occurrence. The defendant maintains that simply standing within a moving hoist or elevator does not expose one to any construction-related elevation requiring a safety device. In support of this argument the defendants refer to the matter of Lawrence v. HRH Construction Corp., 165 Misc.2d 690, 692, 629 NYS2d 976, 978 [Sup. Ct., N.Y. Co. 1995), wherein the Court in dismissing the Labor Law § 240 cause of action, where the plaintiff slipped and fell while walking on an escalator that was under construction, stated that "there has been no relationship shown between the occurrence of the accident and a hazard caused by elevation differentials. The fact that the plaintiff happened to be walking down an unfinished escalator does not create an elevation related hazard".

As to plaintiff's Labor Law § 241(6) claim, the defendants maintain that the alleged violation of 12 NYCRR 23-7.2 was never pled in plaintiff's complaint or included in the response to the demand for a bill of particulars, and as such, should not be considered by the court. It is further contended that the defendants did not violate 12 NYCRR23-1.5(c), as there was no evidence that indicated that the hoist was not in good repair or in safe working condition.

The defendants maintain that the plaintiff has done nothing more than allege that he felt the elevator he was riding in bounce. There is no evidence offered that identifies what occurred nor has the plaintiff identified a single safety device that should have been utilized in order to prevent the alleged occurrence. There was no component of the elevator found to be defective nor has the plaintiff identified anything that failed.

Plaintiff's contention:

In opposing the relief sought in defendants' motion which seeks an amendment of tis answer, the plaintiff maintains that the defendants have had knowledge of the decision of the Workers Compensation Board for over a period of three years, yet having waited until six months after the Note of Issue was filed to seek to amend their answer, this request is improper. "Where the application for leave to amend is made long after the action has been certified for trial, "judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious" (Morris v. Queens Long Is. Med. Group, P.C., 49 AD3d 827, 828, 854 NYS2d 222 [2nd Dept. 2008} quoting Clarkin v. Staten Isl. Univ. Hosp. 242 AD2d 552, 662 NYS2d 91 [2nd Dept. 1997]).

As to the decision of the Workers' Compensation Board, plaintiff maintains that their determination should not collaterally estop the plaintiff from moving forward with this action. The plaintiff is of the opinion that he was "railroaded" by the worker's compensation process, he was never advised by anyone, including his workers' compensation attorney, that the purpose of the hearing was to disallow his claim. Counsel for the plaintiff maintains that it is clear that Judge Stogel, the Workers Compensation Judge, had disdain for the plaintiff and even called him a liar.

Plaintiff asserts that the defendants have failed to meet their burden of establishing that the issue decided in the workers compensation proceeding was identical to that presented in the

negligence action and as a result, neither the doctrine of collateral estoppel nor res judicata should be applied by the court.

As to the Labor law claims, plaintiff maintains as a Union Ironworker and employed by Post Road Ironworks at the construction site, he was injured while riding on a mechanical hoist that was taking him to a floor following lunch. Labor Law § 240(1) was intended to protect workers engaged in erection, demolition. . . of buildings and structures. Owners, contractors, and their agents at sites where there is work undertaken shall furnish scaffolds, ladders, hoists . . . which shall be so constructed and operated to give proper protection to person employed in such work. The plaintiff asserts that there has been a violation of Labor Law § 240(1) and at the very least a triable issue of fact has been presented with respect to this statute.

As to the common law negligence claim (Labor Law § 200), all machinery equipment and devices shall be operated so as to provide reasonable and adequate protection to those who are employed. Plaintiff maintains that there was deposition testimony adduced that an employee of Lend Lease operated the hoist at the time of the incident. Plaintiff asserts that the operator of the lift is responsible for ensuring that it is working properly and the hoist should not be operated when it is bouncing jerking or stopping. As a result of the facts that are alleged in this matter, there is at the very least a triable issue of fact with respect to whether there had been a violation of this statute.

As to their Labor Law § 241(6) claim, the plaintiff maintains that the defendants have violated multiple sections of the Industrial Code. These violations would include sections 23-1.5 (condition of equipment and safeguards), 23-7.1 (maintenance of hoists) and 23-7.2 (pertaining the car attendant of the temporary hoist),

Discussion:

This Court has reviewed the submissions of counsel for the respective parties, and considered the arguments presented herein, as well as the applicable law, in making this

determination with respect to the motion by the defendants for leave of Court to amend their answer to include the affirmative defenses of collateral estoppel and res judicata, and upon said amendment, to award summary judgment to the defendants and dismiss the action of the plaintiff.

At issue before the Court is whether the relief sought by the plaintiff in this Supreme Court proceeding should be barred by the doctrine of collateral estoppel and res judicata based upon the findings and determination of the Workers Compensation Board. In the event that this Court does not find these doctrines to be applicable and determinative, then the Court has to consider whether the plaintiff has presented a viable cause of action based upon common law negligence, as well as alleged violations of Labor Law §§§ 200, 240 and 241.

Here, the plaintiff claims that he was injured in a workplace incident at a construction site located at 432 Park Avenue, New York, N.Y. while on an exterior hoist on July 18, 2014. The plaintiff alleges that following the incident as a result of his injuries, his employer assigned him to lighter duty. On July 28, 2014, plaintiff went on vacation and claims he was unable to return to work. The plaintiff then applied for Workers Compensation benefits for his workplace injuries. A hearing was conducted on November 24, 2014 before the Hon. Judge Elaine Stogel. Both the claimant and the insurance carrier, who represented the employer, appeared by counsel at the hearing. Judge Stogel, in rendering her opinion, denied plaintiff's claim for benefits and determined that the plaintiff was not involved in a work-related accident on July 18, 2014, and found the testimony of Sean Lennon, as to the happening of the incident, to not be credible.

Following an appeal of the determination of Judge Stogel, a three-member appeals panel of the Workers Compensation Board ruled that plaintiff had not met his burden to establish that any workplace accident had occurred. The appeals panel found that Lennon had given multiple different accounts of the occurrence, as well as how and what he had injured. The panel concluded that the record supported the decision of Judge Stogel that no errors of fact or law were made.

This Court initially considered defendants' motion for leave of Court to amend their answer to add the affirmative defenses of collateral estoppel and res judicata.

"Leave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay". (McCaskey, Davies and Assocs., Inc. v. New York City Health & Hosps. Corp., 59 NY2d 755, 757, 463 NYS2d 434 [1983]; Fahey v. County of Ontario, 44 NY2d 934,935, 408 NYS2d 314 [1978]). "In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (Trataros Constr., Inc. v. New York City Constr. Auth., 46 AD3d 874, 849 NYS2d 86 [2007]; Thomsen v. Suffolk County Police Dept., 50 AD3d 1015 857 NYS2d 181 [2nd Dept. 2008]). A motion made pursuant to CPLR § 3025(b) may be made at any time and the court has discretion which may be determined on a sui generis basis as to whether to allow an amendment. (Murray v. City of New York, 43 NY2d 400, 405-405, 401 NYS2d 773 [1977]). Mere lateness is not a barrier to permitting a party to amend, as it must be lateness coupled with significant prejudice to the other side (see Edenwald Contracting Co., Inc. v. City of New York, 60 NY2d 957, 471 NYS2d 55 [1983]; St. Paul Fire & Marine Ins. Co. v. Town of Hempstead, 291 AD2d 488, 738 NYS2d 226 [2nd Dept. 2002]). Prejudice is not found in the mere exposure of the defendant to greater financial liability. Instead, there must be some indication that a party has been hindered in the preparation of his case or has been prevented from taking some measure in support of his or her position (see Detrinca v. DeDillippo, 165 AD2d 505, 568 NYS2d 586 [1st Dept. 1991]); Loomis v. Civetta Corinno Constr. Corp., 54 NY2d 18, 444 NYS2d 571 [1981]).

This Court has also considered the argument of the plaintiff that the defendants should not be permitted to amend their answer after a Note of Issue has been filed, as no objection had been made to the certification that all discovery was complete and the matter was ready for trial. While this Court may agree with the plaintiff that under such circumstances its discretion in permitting an amendment of the pleadings should be much more limited, however, the Court has taken into account that the plaintiff was a participant in proceedings before the Workers

Compensation Board and was aware of both the determination made by Judge Stogel, as well as that of the three member Workers Compensation Board, who affirmed that decision. This Court has determined that under these circumstances an amendment of the answer to include these affirmative defenses would be proper, and as a result, this Court finds that the portion of the motion in which defendants seek to amend their answer is granted, and that such amendment shall be deemed to have been filed nunc pro tunc.

This Court has next considered the defendants' motion to dismiss. In doing so, this Court carefully considered the determination of the Workers Compensation Board and whether collateral estoppel should be applied to this administrative decision. "The quasi-judicial determinations of administrative agencies are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal (Jeffreys v. Griffin, 1 NY3d 34, 39, 769 NYS2d 184 [2003]. "Whether collateral estoppel should be applied in a particular case turns on general notions of fairness involving a particular inquiry into the realities of the litigation" (Jeffreys v. Griffith, 1 NY3d at 41). It is well settled that collateral estoppel is applicable to quasi-judicial determinations or administrative agencies (see Clemens v. Apple, 65 NY2d 746, 492 NYS2d 20 [1985]). The doctrine of collateral estoppel, which "bars relitigation of an issue which has necessarily been decided in a prior action is determinative of the issues disputed in the present action, provided that there was a full and fair opportunity to contest the decision now alleged to be controlling" (Tydings v. Greenfield, Stein & Senior, LLP, 11 NY3d 195, 199, 868 NYS2d 563 [2008]); Capellupo v. Nassau Health Care Corp., 97 AD3d 619, 621, 948 NYS2d 362 [2nd Dept. 2012]).

Since the defendants are seeking to invoke collateral estoppel, they bear the burden of proof that the doctrine is applicable. In determining whether that burden was met, this Court considered those factors that have been applied by courts, including the Court of Appeals in

Clemens v Apple, 65 NY2d at 746. The Court in Clemens determined that "once the issue of identity between the prior and pending actions is established, certain factors should be considered to determine whether a full and fair opportunity to litigate the issue at bar existed, including "the nature of the forum and importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation". This Court in considering these factors finds that the plaintiff had a full and fair opportunity to litigate the critical issues before a judge of the Workers Compensation Board, which includes whether a workplace accident occurred, whether it took place on July 18, 2014, and in the manner that plaintiff has alleged. This Court finds that there is an identity of issues between this action and the Workers' Compensation proceeding. The parties were permitted to present sworn testimony and plaintiff was represented by counsel at the hearing.

Additionally, there was an incentive to litigate this matter as it was important for the parties to establish that the accident either occurred or did not occur in the manner in which the plaintiff has alleged it took place. Future litigation was foreseeable as the claims made by the plaintiff were based upon violations of the Labor Law and an action was commenced in this Court by the plaintiff seeking damages for his alleged injuries which action was initiated at the time of the Workers Compensation proceedings. As to any of the other elements that the Court should consider, (such as the availability of new evidence) the plaintiff has failed to make a compelling argument that this Supreme Court matter should proceed and this Court should not apply the doctrine of collateral estoppel in determining this matter.

This Court further reviewed the transcript of the Workers' Compensation hearing and finds that, contrary to the argument of the plaintiff, he had a full opportunity to present evidence and to offer proof that the accident occurred in the manner that the plaintiff has alleged, and that his injuries occurred as a result of this incident.

There was no issue more crucial or decisive than establishing that the incident occurred in the manner that plaintiff alleged and his failure to do so does not appear to be the result of any limitations that were placed upon the plaintiff at the hearing. Judge Stogel observed the demeanor of the witnesses and her conclusions as to the credibility of the witnesses was absolute and unqualified.

This Court finds that the defendants have satisfied their burden of proof by establishing that the elements needed to apply the doctrine of collateral estoppel were present here. This Court finds that defendants presented competent evidence in admissible form that collateral estoppel effect should be given to a determination of the Workers' Compensation Board. Said determination was made after proceedings to which the plaintiff was a party, and a finding that the plaintiff had failed to demonstrate that the injuries arose in the manner in which the plaintiff had claimed (see Ryan v. New York Tel. Co., 62 NY2d 494, 478 NYS2d 823 [1964]); McRae v. Sears, Roebuck & Co., 2 AD3d 419 [2nd Dept. 2003]). Similar findings were made by the Court in Emanuel v. MMI Mechanical Inc., 131 AD3d at 1002, where the Court dismissed a personal injury action and determined that the issue as to whether there was a work-related injury was addressed in the Workers' Compensation proceeding and is the same issue in this Supreme Court proceeding. Likewise, the Court in Vega v. Metropolitan Trans. Auth., 133 AD3d 518, 21 NYS3d 19 [1st Dept. 2015] determined that the plaintiff was collaterally estopped from raising an issue that was previously determined by the Workers Compensation Board.

While each of the parties made cogent arguments pertaining to whether there had been common law negligence or a violation of Labor Law §§ 200, 240 and 241, in light of this Court's determination that the doctrine of collateral estoppel should be applied to the decision of the Workers Compensation Board, this Court need not render a decision as these issues.

Conclusion:

The motion by defendants, 56th and Park (NY) Owner LLC, Bovis Lend Lease LMB, Inc., Lend Lease (US) Construction LMB Inc., and Atlantic Hoisting & Scaffolding, LLC, for an Order, pursuant to CPLR § 3025(b), permitting the defendants to amend their answer to include the affirmative defenses of res judicata and collateral estoppel, and to deem the amended answer to have been served nunc pro tunc is granted. Upon amendment of the answer, the motion by the defendants for summary judgment and a dismissal of the plaintiff, Sean Lennon's, complaint, pursuant to CPLR § 3212, is granted.

This shall constitute the decision and order of this Court.

Dated: April 30, 2018
Brooklyn, New York

ENTER,

Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM

KINGS COUNTY CLERK
FILED
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