

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part 13
Justice

LAI KOW	x	Index Number <u>4937</u> 2004
		Motion Date <u>August 15,</u> 2007
- against -		Motion Cal. Number <u>18</u>
LAI MOON GEN, et al.		Motion Seq. No. <u>2</u>

The following papers numbered 1 to 25 read on this motion by defendant Key Bank USA, NA (Key Bank) for leave to amend its answer to include an affirmative defense of workers' compensation and upon such leave, to dismiss the action pursuant to CPLR 3211 as workers' compensation is plaintiff's sole remedy and on these cross motions by defendants Lai Moon Gen, Lang Kawi Corp. and Dong Hui for leave to amend their answer to include the affirmative defenses of workers' compensation and failure to state a cause of action as against defendant Lai Moon Gen and upon such leave to dismiss the action pursuant to CPLR 3211 as workers' compensation is plaintiff's sole remedy and by plaintiff to strike defendants' answers or to preclude defendants Lai Moon Gen, Lang Kawi Corp. and Dong Hui from testifying at the time of trial on the grounds that said defendants have repeatedly failed to appear for court-ordered depositions.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notices of Cross Motion - Affidavits - Exhibits ..	5-13
Answering Affidavits - Exhibits	14-20
Reply Affidavits	21-25

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

In this action, plaintiff seeks damages for personal injuries

allegedly sustained in a motor vehicle accident on January 16, 2003, when the vehicle in which he was a passenger allegedly operated by defendant Dong Hui struck parked vehicles. Defendant Lang Kawi Corp. is the registered owner and defendant Key Bank is the titled owner of the subject vehicle. Plaintiff named defendant Lai Moon Gen as the operator of the subject vehicle in the complaint filed in this action. Plaintiff named defendant Dong Hui as the operator of the subject vehicle in a complaint filed in a later action under Index Number 38/06, which action was consolidated with the within action pursuant to an order of this court dated November 24, 2006. At plaintiff's examination before trial, he testified that defendant Dong Hui was the operator and that defendant Lai Moon Gen was a passenger of the subject vehicle. In affidavits, defendant Lai Moon Gen avers, among other things, that defendant Dong Hui was the operator and he was a passenger of the subject vehicle. Defendant Lai Moon Gen is listed as the operator of the subject vehicle on the police report. Plaintiff and defendant Lai Moon Gen contend that this was a mistake by the reporting police officer resulting from the parties' inability or limited ability to speak or understand English.

Plaintiff, defendant Lai Moon Gen and defendant Dong Hui are all employees of Penang Restaurant owned by defendant Lang Kawi Corp. At the time of the accident, plaintiff was traveling to his home from Penang Restaurant.

A note of issue was filed in this action on May 19, 2006, and discovery was deemed completed in an order of the Hon. Martin J. Schulman dated September 11, 2006. The note of issue was vacated in the TSP Part on April 11, 2007.

The branches of the motion of defendant Key Bank and the cross motion of defendants Lai Moon Gen, Lang Kawi Corp. and Dong Hui seeking leave to amend their answers to assert the affirmative defense of workers' compensation are granted. Said defendants shall serve their amended answers within 30 days of the date of this order.

Leave to amend pleadings should be freely given in the absence of prejudice or surprise to the opposing party. (See CPLR 3025[b]; see also Edenwald Contracting Co. v City of New York, 60 NY2d 957 [1983]; Arcuri v Ramos, 7 AD3d 741 [2004].) "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine." (Edenwald Contracting Co. v City of New York, supra at 959.)

Although this action has been pending for over three years and a note of issue was filed over a year and a half ago, the delay in moving to amend does not, in itself, prohibit the court from

permitting the amendment. (See Thompson v Ludovico, 246 AD2d 642 [1998].) A waiver of defense is accomplished only by a defendant ignoring the issue to the point of final disposition itself. (See Murray v City of New York, 43 NY2d 400 [1977].) Moreover, as already noted, the note of issue has been vacated and so this action is no longer on the trial calendar. In addition, plaintiff has failed to show prejudice or surprise resulting from the delay of defendants Key Bank, Lai Moon Gen, Lang Kawi Corp. and Dong Hui in asserting the exclusivity of workers' compensation as an affirmative defense since plaintiff was aware of all the essential facts underlying this defense. (See Myung Soon Kim v Hyunchul Chong, 8 AD3d 456 [2004]; see also Singh v Shafi, 252 AD2d 494 [1998]; Lanpont v Savvas Cab Corp., 244 AD2d 208 [1997].)

The branch of the motion of defendants Lai Moon Gen, Lang Kawi Corp. and Dong Hui for leave to amend their answer to assert the affirmative defense of failure to state a cause of action is denied since an affirmative defense that a complaint does not state a valid cause of action cannot be interposed in an answer. (See Jacobowitz v Leak, 19 AD3d 453 [2005]; see also Sagevick v Sanchez, 228 AD2d 488 [1996]; Guglielmo v Roosevelt Hospital Staff Housing Co., 222 AD2d 403 [1995].)

Plaintiff's cross motion to strike the answers of defendants Lai Moon Gen, Lang Kawi Corp. and Dong Hui or to preclude said defendants from testifying at the time of trial is denied.

Plaintiff failed to provide an affirmation of good faith efforts to resolve the discovery dispute as required by 22 NYCRR 202.7(a). (See Cestaro v Mun Yuen Roger Chin, 20 AD3d 500 [2005]; see also Diel v Rosenfeld, 12 AD3d 558 [2004]; Dennis v City of New York, 304 AD2d 611 [2003].) Moreover, plaintiff failed to establish that said defendants' failure to appear for examinations before trial was willful, contumacious or in bad faith. (See Diel v Rosenfeld, supra.)

In light of the fact that the note of issue has been vacated and the examinations before trial of defendants Lai Moon Gen, Lang Kawi Corp. and Dong Hui have not yet been held, said defendants are directed to appear for examinations before trial to be held at a time and place to be set in a written notice of at least 10 days to be served by plaintiff upon them, or at such time and place as the parties may agree.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. (See Leon v Martinez, 84 NY2d 83 [1994].)

When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one. (See Meyer v Guinta, 262 AD2d 463 [1999].) Similarly, to succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. (See Leon v Martinez, supra.)

Here, accepting the allegations in the complaint as true, plaintiff has sufficiently stated a cause of action for negligence. In addition, the documentary evidence submitted by defendants Key Bank, Lai Moon Gen, Lang Kawi Corp. and Dong Hui in support of the branches of their respective motion and cross motion to dismiss pursuant to CPLR 3211(a)(1) failed to resolve all factual issues as a matter of law and conclusively dispose of plaintiff's claim. These submissions included affidavits of defendant Lai Moon Gen and examination before trial testimony of plaintiff which cannot be considered by the court because they do not constitute "documentary evidence." (See Fleming v Kamden Properties, LLC, 41 AD3d 781 [2007]; see also Berger v Temple Beth-El of Great Neck, 303 AD2d 346 [2003]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:10, at 21.) The remaining submissions, that is, a copy of the police report, a copy of the lease agreement for the subject vehicle and a copy of the NYS Department of State, Division of Corporations listing for defendant Lang Kawi Corp., do not establish, as a matter of law, that plaintiff's claims are barred by the exclusivity provisions of the Workers' Compensation Law. Rather, it is apparent that there are factual disputes concerning, among other things, who was driving the subject vehicle and whether plaintiff's injuries arose out of the course of his employment. (See Singh v Shafi, supra.) Thus, the documentary evidence submitted was not conclusive in eliminating all questions of fact.

Accordingly, the branches of the motion of defendant Key Bank and the cross motion of defendants Lai Moon Gen, Lang Kawi Corp. and Dong Hui to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1) and/or 3211(a)(7) are denied.

Dated: December 14, 2007

J.S.C.