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SHORT FORM ORDER

INDEX No. 99-28002

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4/28/05
ADJ. DATES 7/8/05
Mot. Seq. # 009 - MG
Mot. Seq. # 010 - MD
Mot. Seq. # 011 - XMD

PAUL BLACKBURN,

Plaintiff,

-against-

WYSONG AND MILES CO., H. WEISS & CO., AR MACHINERY CO. and STEIN INDUSTRIES, INC.,

Defendants.

WYSONG & MILES COMPANY,

Third-Party Plaintiff

-against-

STEIN INDUSTRIES, INC.,

Third-Party Defendant.

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Garden City, NY 11530

SCIBILIA, POLACCO & ALEDORT
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41 Hilton Ave.
Hempstead, NY 11550-2119

O'CONNOR, O'CONNOR, HINTZ & DEVENEY, LLP
Attys. for Stein Industries
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Garden City, NY 11530

KELLER, O'REILLY & WATSON, PC
Attys. for H. Weiss & Co. #1, #2
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Upon the following papers numbered 1 to 23 read on these motions to compel and amend pleadings and cross motion for summary judgment; Notices of Motion/Order to Show Cause and supporting papers 1-3; 8-10; Notice of Cross Motion and supporting papers 11-13; Answering Affidavits and supporting papers 6-7; 14-15; 16-17; Replying Affidavits and supporting papers 18-19; 20-21; 22-23; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#009) by the defendant H. Weiss & co for an Order pursuant to CPLR 3124 complelling defendant Stein Industries, Inc. to produce its employee Bob Murphy for an examination before trial and to provided proper responses to H.Weiss' notices for discovery and inspection dated October 7, 2004 and October 12, 2004, is granted to the extent that under the provisions of CPLR 3124 the defendant Stein Industries shall respond to H. Weiss' notice of discovery and inspection dated October 7, 2004 and October 12, 2004 within twenty (20) days of the date of this Order and the defendant Stein Industries shall produce for an examination before trial by the defendant H. Weiss, their employee Bob Murphy. The examination of Bob Murphy shall be scheduled by the respective parties to be held within forty (40) days of the date of this Order; and it is further

ORDERED that the motion (#010) by plaintiff for an Order pursuant to CPLR 3025(b) permitting plaintiff to supplement the summons and amend the complaint to add a defendant, Andrew Stein, and to serve the supplemental summons and amended complaint in the form which is annexed hereto in the plaintiff's moving papers and pursuant to CPLR 203(c) deeming the causes of action against the newly added defendant, Andrew Stein, to relate back to to the causes of action in the original complaint against defendant Stein Industries, is denied; and it is further

ORDERED that the motion (#011) by the defendant Stein Industries for an Order pursuant to CPLR 3212 dismissing the plaintiff's complaint as against Stein Industries, is denied without prejudice with leave to renew upon the completion of the discovery set forth herein in this Order; and it is further

ORDERED that movants on the respective motions (#009, #010 and #011) shall serve a copy of this Order with Notice of Entry upon counsel for the respective parties to this action within twenty (20) days of the date herein pursuant to CPLR 2103 (b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court; and it is further

ORDERED that the parties shall appear for the compliance conference scheduled for **September 27, 2005,** at 9:30 a.m. in IAS Part 33 at the courthouse located at 235 Griffing Avenue - Annex, Riverhead, New York.

Defendant H. Weiss & Co (hereinafter "Weiss") in motion #009 moves for an Order pursuant to CPLR 3124 compelling the co-defendant Stein Industries, Inc. (hereinafter "Industries") to produce its employee Bob Murphy for an examination before trial and to provided proper responses to H.Weiss' notices for discovery and inspection dated October 7, 2004 and October 12, 2004. Weiss states in its moving papers that Stein Industries has not responded to the two notices of discovery and inspection with appropriate responses. The Court has read Industries' responsive letter of communication dated March 2005 regarding Weiss' notice and found it to be somewhat confusing. In opposition, Industries states that it has responded to Weiss' notices previously and referenced a missing exhibit from Stein's opposition papers dated June 22, 2005 submitted to the Court as proof of a timely response, thus leaving the Court without any guidance as what was sent to

Weiss even noting the exhibits in Industries' reply affirmation dated July 14, 2005. While Stein states it complied with the discovery response, Weiss states it has not.

The Court directs Stein to comply with Weiss' October 2004 notice for discovery and inspection and reserve the responses Stein says it has already served in response to the October 2004 notices. Stein shall file the affidavit of service regarding the reserved responses with the Clerk of the Court, thus a record is established as to this fact.

Counsel are reminded of the provisions of CPLR 3122 which was intended to "encourage the parties to resolve discovery disputes without court intervention" (***Budhram v City of New York,*** 264 AD2d 796, 695 NYS2d 393 [2d Dept 1999]). However, as the parties have not done so, the Court in this Order will do so. Regarding the examination before trial of a further employee of Stein, the Court notes that on September 30, 2004 after the completion of an examination of one of Industries' employees, Weiss reserved its right for a further deposition of Industries' employee who worked on the equipment in question. On this basis alone, the Court in its discretion, directs that the examination of Bob Murphy be held within forty (40) days of the date of this Order (*see* ***Burgos v Makoc,*** 289 AD2d 437, 735 NYS2d 408 [2d Dept 2001]). The parties are to cooperate fully and promptly in scheduling this examination before trial in the time period set forth by this Order.

Plaintiff moves in motion #010 to supplement the summons and amend the complaint to add as a defendant Andrew Stein (hereinafter "Stein"), a principal in Stein Industries and to serve the supplemental summons and amended complaint annexed to his moving papers.[1] Plaintiff also seeks under CPLR 203(c) to have the causes of action against Stein relate back to the causes of action in plaintiff's original complaint. Plaintiff's reasoning in amending the complaint six years later is that Stein, in his capacity as a principal in Stein Industries, committed an intentional tort as against the plaintiff which would remove Stein from the protection of the exclusivity of the Workers' Compensation Law. The plaintiff had applied, and is presently receiving, Workers' Compensation benefits from Stein Industries as the result of the accident which occurred on May 21, 1999.

While CPLR 3025 provides that leave amend a pleading shall be freely given, leave to amend is not granted upon the mere request of a party without a proper basis . . . a court must examine the underlying merit of the proposed claims, since to do otherwise would be a waste of judicial resources (*see* ***Board of Managers of the Alexandria Condominium v Broadway/72nd Associates***, 285 AD2d 422, 729 NYS2d 16 [1st Dept 2001]; ***Morgan v Prospect Park Assoc., Holdings, LLP,*** 251 AD2d 306, 674 NYS2d 62 [2d Dept 1998]). However, it is incumbent that one seeking leave to amend a pleading make an evidentiary showing that the claim can be supported (*see* ***Wise v Greenwald,*** 194 AD2d 850, 598 NYS2d 600 [3d Dept 1993]) and should

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[1] Plaintiff did not plead receipt of workers' compensation benefits in his original complaint nor in the proposed amended complaint.

be denied where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit (*see* ***Leszczynski v Kelly & McGlynn,*** 281 AD2d 519, 722 NYS2d 254 [2d Dept 2001]; ***Curran v Auto Lab. Serv. Ctr.*** 280 AD2d 636, 721 NYS2d 662 [2d Dept 2001]).

In order to establish and sufficiently plead an intentional tort that will overcome the exclusivity provisions of the Workers' Compensation Law, a plaintiff-employee must show "an intentional or deliberate act by the employer directed at causing harm to the particular employee" (***Acevedo v Consolidated Edison Co. of N.Y. Inc.,*** 189 AD2d 497, 501, 596 NYS 2d 68 [1st Dept 1993] *citation omitted*; *lev. app. dism* 82 NY2d 748, 602 NYS2d 806 [1993]). The plaintiff must be able to point to specific facts which evidence an intent to harm him (*see* ***Bulis v DiLorenzo,*** 142 AD2d 707, 531 NYS2d 107 [2d Dept 1988]). "While an intentional tort may give rise to a cause of action outside the ambit of the Workers' Compensation Law, the complaint must allege an intentional or deliberate act by the employer directed at causing harm to this particular employee" (***Fucile v Grand Union Comp., Inc.,*** 270 AD2d 227, 228, 705 NYS2d 377 [2d Dept 2000]); *see also* ***Acevedo v Consolidated Edison of N.Y. Inc.,*** 189 AD2d 497 at 501 *supra*). "Allegations that the employer exposed the employee to a substantial risk have been held insufficient to circumvent the exclusivity of the Workers Compensation Law" (***Gallagher v Trapp,*** 221 AD2d 315, 316, 633 NYS2d 387 [2d Dept 1995]).

Also, "allegations that the employer intentionally failed to provide safe working conditions does not bring the case within the intentional injury exception" (***Ferguson v Dan Davis Auto World, Inc.,*** 207 AD2d 991, 677 NYS2d 98 [4th Dept 1994]). An allegation that the defendant "'intentionally ignored' the known hazard of an explosion in connection with the design and an operation of the Freshen-Up manufacturing process cannot not be deemed to satisfy the case-law requirement of 'specific acts' directed at causing harm to 'particular employees' necessary to bring this action within the 'intentional injury' exception, and is tantamount to an allegation of gross negligence, or perhaps, even reckless conduct on the part of the defendants-respondents leading to an industrial accident. Unfortunately for the plaintiffs, such conduct is not excepted from the 'exclusive remedy' provisions of the Workers Compensation Law" (***Orzechowski v Warner-Lambert Co.,*** 92 AD2d 110, 113, 460 NYS2d 64 [2d Dept 1983]). An allegation that the employer knew plaintiff would sustain injuries in a toxically dangerous factory, but fraudulently withheld the information from the plaintiff was also held insufficient to come within the intentional tort exception to the Workers' Compensation Law (*see* ***Briggs v Pymm Thermometer Corp.,*** 147 AD2d 433, 537 NYS2d 553 [2d Dept 1989]).

Plaintiff's complaint alleges no specific or deliberate acts or facts evidencing an intent to harm him (*see* ***Gallagher v Trapp,*** 221 AD2d 315, *supra*). The complaint merely states the Stein was aware of a dangerous workplace condition and failed to correct it. Even assuming the truth of the allegations in the complaint, the complaint still fails to allege that Stein committed an intentional tort sufficient to overcome the exclusivity provision of the Workers' Compensation Law (see ***Briggs v Pymm Thermometer Corp.,*** 147 AD2d 433, *supra*).

In viewing plaintiff's allegations in the proposed amended complaint, the most that can be said is that reckless conduct is alleged and claimed that Stein intentionally failed to provide plaintiff with a safe workplace and said allegations are insufficient to sustain a claim as against Stein (*see* ***Ferguson v Dan Davis Auto World, Inc.***, 207 AD2d 991, *supra*; ***Orzechowski v Warner-Lambert Co.,*** 92 AD2d 110, 113, *supra*) or intentionally ignoring a hazard is not a "specific act directed at causing harm to particular employees" and therefore, does not constitute an intentional tort for the purposes of the Workers' Compensation Law (*id*). In order to establish an intentional tort, plaintiff had to show that his employer acted with "the desire to bring about the consequences of the act" (***Bulis v DiLorenzo,*** 142 AD2d 707, *supra*) and an appreciation of the risk does not constitute the level of intent requisite for an intentional tort (*see* ***Acevedo v Consolidated Edison of N.Y. Inc.,*** 189 AD2d 497 *supra*).

Plaintiff has failed to produce any evidentiary proof nor does the record before the Court on this motion support plaintiff's contention that Stein intentionally or deliberately injured him in order render the exclusivity remedy provision of the Workers' Compensation Law ineffective (*see* ***Gallagher v Trapp,*** 221 AD2d 315, *supra*; *cf.* ***Ralph v Oliver***, 186 AD2d 977, 588 NYS 2d 444 [4th Dept 1992]). Mere allegations in a complaint that the defendant employer acted "wilfully" or "intentionally" without "facts sufficient to establish that the defendant's conduct was "deliberately" meant to cause harm, will not defeat a motion to dismiss (*see* ***Bulis v DiLorenzo,*** 142 AD2d 707 at 708, *supra*). In a similar vein, knowledge of a hazard, or a failure to protect plaintiff from a known hazard does not rise to the level of an intentional tort (*see* ***Acevedo v Consolidated Edison of N.Y. Inc.,*** 189 AD2d 497 *supra*). The Court has carefully read the examination before trial of Stein and did not discern any testimony wherein it was established that Stein's conduct was deliberately calculated to intentionally cause harm to the plaintiff or any other employee. Accordingly, the plaintiff's proposed amended complaint which seeks to add Stein as defendant is denied as being barred by the Workers' Compensation defense (*see* ***Coppola v Singer,*** 211 AD2d 744, 621 NYS2d 924 [2d Dept 1995]; ***Heritage v Van Patten,*** 59 NY2d 1017, 466 NYS2d 958 [1983]; *see also* ***Alejandro v Riportella,*** 250 AD2d 566, 672 NYS2d 412 [2d Dept 1998]).

Even if the plaintiff had pleaded an intentional tort claim which the Court finds that he did not, he would still be barred from maintaining a separate action against his employer because he had already accepted Workers' Compensation benefits which is not in dispute herein. A plaintiff loses his right to sue his employer, even where he has been injured intentionally, by his choice to avail himself of and accept Workers' Compensation benefits.(*see* ***Werner v State of New York,*** 53 NY2d 346, 441 NYS2d 654 [1981]). The Court of Appeals in ***Werner,*** held that a claimant who applies for and accepts workers' compensation benefits is barred by the exclusive remedy and finality provisions of the Workers' Compensation Law from maintaining an action against his employer for intentional tort (*see also* ***O'Conner v Midiria,*** 55 NY2d 538, 450 NYS2d 455 [1982]; ***Billy v Consolidated Machine Tool Corp.,*** 51 NY2d 152, 432 NYS2d 879 [1980]). Whether the Workers' Compensation Board determines the injuries were accidental or not, a plaintiff is nevertheless barred from maintaining a separate action against his employer once he has applied for and received workers' compensation benefits (*see* ***Orzechowski v Warner-Lambert Co.,*** 92 AD 2d 110, *supra*). Accordingly, the

plaintiffs proposed amended complaint which seeks to add Stein as defendant is denied as being barred by the Workers' Compensation Law § 29(6) (*see* ***Coppola v Singer,*** 211 AD2d 744, *supra*; ***Heritage v Van Patten,*** 59 NY 2d 1017, *supra*; *see also* ***Alejandro v Riportella,*** 250 AD2d 566, *supra*).

The motion (#011) of defendant Stein Industries, Inc. for an Order granting it summary judgment dismissing plaintiff's complaint as against it, is denied without prejudice with leave to renew upon the completion of discovery which has been so ordered by the court on this motion. Counsel for Stein Industries, Inc., upon the completion of said discovery, may submit the motion with an attorney's affirmation to the effect that this Court's Order has been complied with.

Accordingly the motions and cross motion are decided as herein indicated. This constitutes the Order and decision of the Court.

DATED: 9/26/05

THOMAS F. WHELAN, J.S.C.