Short Form Order

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INDEX NO.: 15825-2003
CALENDAR NO.: 200600107OT

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

MOTION DATE: January 26, 2007

MOT. NO.: 011 MG

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MICHAEL GIBBONS,

Plaintiff,

-against-

SUFFOLK COUNTY BOY SCOUTS COUNCIL, INC., BOY SCOUTS OF AMERICA, JIM GRIMALDI, ERIC KOCH, KENNETH D'APICE, ROBERT KOCH, BOY SCOUTS OF AMERICA-NORTHEAST REGION and THE BOY SCOUTS OF AMERICA-NATIONAL COUNCIL,

Defendants.

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Upon the following papers numbered 1 to 27 read on this motion to amend the answer; Notice of Motion/ Order to Show Cause and supporting papers 1-15; Answering Affidavits and supporting papers 16-26; Other 27; it is,

ORDERED that this motion by the defendants, SUFFOLK COUNTY COUNCIL, INC., BOY SCOUTS OF AMERICA, JIM GRIMALDI and KENNETH D'APICE to amend each of their answers to assert the affirmative defense of Workers Compensation is considered under CPLR 3025 and is granted.

Plaintiff and defendant, ERIC KOCH, were each members of the SUFFOLK COUNTY BOY SCOUT COUNCIL INC, BOY SCOUTS OF AMERICA employed as camp counselors at the Baiting Hollow Scout Camp in Calverton, NewYork. While employed at the camp, they shared a camp cabin with other scouts employed as summer camp staff. Plaintiff alleges that he was sexually assaulted in the camp cabin during the summer of 2002 by ERIC KOCH. JIM GRIMALDI was the director of the camp and KENNETH D'APICE was an executive at the camp. The complaint sounds in common law negligence in failing to properly hire and supervise the staff. Each of the moving defendants seeks to amend their answer to include the affirmative defense that the plaintiff's claim is barred by workers compensation which is the exclusive remedy by an employee against his employer for acts of negligence (Workers Compensation Law §11).

Leave to amend a pleading should be freely given in the absence of prejudice unless the proposed amendment is palpably improper or insufficient as a matter of law (CPLR 302[b]; *Fahey v. County of Ontario,* 44 N.Y.2d 934, 935, 408 N.Y.S.2d 314, 380 N.E.2d 146). In exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom (*Haller v. Lopane*, 305 A.D.2d 370, 759 N.Y.S.2d 504). When made on the eve of the trial, judicial discretion should be discreet, circumspect, prudent and cautious (*Alexander v. Seligman,131* A.D.2d 528, 516 N.Y.S.2d 260). This action has not yet been scheduled for the selection of a jury. Although defendants proffer no reason why they did not assert the defense earlier, plaintiff has not set forth any specific prejudice other than that which normally results from delay.

Accordingly, the court will examine the viability of this defense. An intentional act perpetrated by the employer directed against its employee is outside the scope of workers compensation exclusivity (*Mylroie v. GAF Corp.*, 81 A.D.2d 994, 995, 440 N.Y.S.2d 67). In order for a defendant engaged in a supervisory capacity on behalf of an employer, to have the protection of the exclusivity provision, he or she must have been acting within the scope of his or her employment and not have been engaged in a willful or intentional tort *(Hanford v. Plaza Packaging Corp.*, 2 N.Y.3d 348, 778 N.Y.S.2d 768, 811 N.E.2d 30). The complaint alleges that the moving defendants fell below the standard of care in failing " not to intentionally wantonly and or negligently inflict injuries." i.e. prevent the sexual assaults. Allegations that the employer exposed the employee to a substantial risk of injury have been held insufficient to circumvent the the requirement of an intentional act (*Gagliardi v. Trapp*, 221 A.D.2d 315, 633 N.Y.S.2d 387). The Honorable Robert Doyle in denying summary judgment to these defendants by order dated October 26, 2006 held, "Whereas the assaults described were not within the scope of staff duties, the prevention of these acts was, and the incidents occurred on defendants' premises within the scope of standard staff employment hours." The complaint does not allege facts which tend to show that the supervisory defendants intentionally failed to prevent the sexual attacks and the holding of the court establishes that they were acting within the scope of their employment. The law recognizes that what is an intentional act for the perpetrator may be deemed accidental from the viewpoint of the employer (*Maines v. Cronomer Valley Fire Dept., Inc.,* 50 N.Y.2d 535, 407 N.E.2d 466, 429 N.Y.S.2d 622). Whether or not an employer may be liable in respondent superior for the intentional acts of its employee is a different issue not at bar *(Melo v. Jewish Bd. of Family and Children's Services, Inc.*,183 Misc.2d 776, 706 N.Y.S.2d 569).

Accordingly, the court finds that the defense is viable with respect to each of the moving defendants and that they have presented proof showing that the insurance was in place (exhibit A to

the moving papers). The fact that the plaintiff did not seek such benefits is not determinative (*O'Connor v. Midiria* 55 N.Y.2d 538, 450 N.Y.S.2d 455, 435 N.E.2d 1070). The second cause of action for assault and battery sounds only against ERIC KOCH and is therefore unaffected by the amendment. The court notes that the third claim for punitive damages was previously dismissed. The motion is granted and the amended answers are deemed served as of the date of service of this order with notice of entry upon the plaintiff.

Date: March 2, 2007

HON. PAUL J. BAISLEY, JR.
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**