**Fugetta v Bambino De'Lino Rest. Inc.**

2007 NY Slip Op 30451(U)

March 28, 2007

Supreme Court, Queens County

Docket Number: 0024452/2003

Judge: Lawrence Vincent Cullen

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LAWRENCE V. CULLEN IA Part 6
Justice

| | |
|---|---|
| RONALD FUGETTA et al., x | Index Number 24452 2003 |
| Plaintiffs, | |
| - against - | Motion Date December 5, 2006 |
| BAMBINO DE'LINO REST. INC., et al., | Motion Cal. Number 12 |
| Defendants. x | Motion Seq. No. 1 |

The following papers numbered 1 to 12 read on this motion by the defendants for leave to amend the verified answer to assert an affirmative defense based on the exclusivity provisions of the Workers' Compensation Law.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affidavits - Exhibits ........ | 1-4 |
| Answering Affidavits - Exhibits ................ | 5-7 |
| Reply Affidavits-Exhibits ...................... | 8-12 |

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

This personal injury action arose out of an accident which allegedly occurred on November 17, 2002 at the premises owned and operated by defendants as a restaurant. The plaintiff alleges when he concluded a job interview with Christine Persich, the restaurant manager, he slipped and fell on a mat at the front entrance of the premises.

The defendants' answer contained general denials and failed to allege that the plaintiff was employed by defendants at the time of the accident or the exclusivity of the Workers' Compensation Law as a remedy for the plaintiff.

On August 18, 2005 at the examinations before trial, the plaintiff was deposed and Christine Persich was deposed on behalf of the defendants. Both the plaintiff and Ms. Persich testified that the plaintiff was on the premises for a job interview.

Plaintiff testified he had worked at the restaurant on a few occasions prior to the accident. Ms. Persich, however, testified that she had never seen the plaintiff at the restaurant before the interview. No questions were raised regarding a possible workers' compensation claim or defense.

In November of 2005, Ms. Persich contacted the defendants' insurance broker and defense counsel to inform them she wanted to amend her testimony to say that the plaintiff was actually employed as a bartender at the restaurant at the time of the accident. Ms. Persich was informed by the general liability insurer to provide notice of the claim to the defendants' workers compensation/employers liability insurance company, by letter dated December 9, 2005. A copy of this letter was sent to the plaintiff's counsel.

On the eve of jury selection, by notice of motion filed August 15, 2006, defendants moved for leave to amend the verified answer to assert an affirmative defense based on the exclusivity of the Workers' Compensation Law remedy.

CPLR 3025(b) provides that leave to amend is to be freely given. (See Matter of Roberts v Borg, 35 AD3d 617 [2006].) Generally, leave to amend to assert a workers' compensation defense must be granted even at such a late stage. (See Caceras v Zorbas, 74 NY2d 884 [1989].) However, where delay in moving to amend results in surprise or prejudice to the opposing party, it should not be granted. (See Myung Soon Kim v Hyunchul Chong, 18 AD3d 566 [2004];Arcuri v Ramos, 7 AD3d 741 [2004].)

Prejudice sufficient to defeat the amendment must be traceable to the omission from the original pleading and result in the loss of a special right, change of position or significant trouble or expense occurring in the interim which could have been avoided if the amended matter had been contained in the original pleading. (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3025:6, p 356.)

As the Workers' Compensation Law § 28 provides that the right to claim compensation shall be barred unless within two years after the accident a claim for compensation shall be filed with the chairman, the plaintiff will be left without a remedy if the defendants are granted leave to amend.

When the plaintiff testified at the EBT that he previously worked at the restaurant, the defendants had notice that the Workers ' Compensation Law might be implicated. Presumably the defendants were in possession of employment records for individuals who worked at the restaurant and had ample opportunity to ascertain whether the plaintiff had been employed by them on the day of the accident.

Plaintiff cannot be charged with failing to preserve his right to file a workers' compensation claim after his attorneys received a copy of the December 2005 letter from defendants' insurer, since the Statute of Limitations had already expired.

The prejudice which the plaintiff will suffer flows directly from the defendants' delay in moving to amend and is traceable to the omission in the original pleading. The prejudice to plaintiff is so manifest that it would be an improvident exercise of discretion to allow the defendants to amend their answer at this time. (See Murray v City of New York, 43 NY2d 400 [1977]; Haller v Lopane, 305 AD2d 370 [2003]; Zaffuto v New York Community Church, 161 AD2d 640 [1990]; Cf. Goodarzi v City of New York, 217 Ad2d 683 [1995].)

If the proposed amendment were not prejudicial, leave to amend would have to be denied nonetheless. In general, leave to amend a pleading rests within the trial court's discretion and should be freely granted in the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit. (See Negvesky v United Interior Res., Inc., 32 AD3d 530 [2006]; Krioutchkova v Gad Realty Corp., 28 AD3d 427 [2006].)

Defendants' initial motion papers contained no evidence of plaintiff's employment with the restaurant. Even assuming the court would entertain the reply affirmation, the additional information does not make the amendment meritorious.

The three affidavits submitted as proof of plaintiff's employment, while nearly identical, fail to aver that plaintiff was an employee on the day of the accident or that the accident occurred during the course of plaintiff's employment. There is no evidentiary demonstration to satisfy the court that there is any merit to defendants' affirmative defense. (See Joyce v McKenna Assocs., 2 AD3d 592 [2003].)

Accordingly, defendants' motion is denied.

Dated: March 28, 2007

LAWRENCE V. CULLEN, J.S.C.