SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

JAIME TRELLES,

Plaintiff,

- against -

VIPA GENERAL CONTRACTOR LTD. and PIOTR LINEK,

Defendants.

INDEX NO. 15662/2003

MOTION DATE April 17, 2007

MOTION CAL. NO. 27

PIOTR LINEK,

Third-Party Plaintiff,

- against -

H & M BROKERAGE,

Third-Party Defendants.

The following papers numbered 1 to 7 read on this motion by the defendant Piotr Linek to amend the answer to assert an affirmative defense pursuant to Workers' Compensation Law §29[6] and for summary judgment dismissing the plaintiff's complaint.

	PAPERS NUMBERED
Notice of Motion/Affid(s)-Exhibits.....	1 - 4
Affidavit(s) in Opp.....	5
Replying Affidavits-Exhibits.....	6 - 7

Upon the foregoing papers the motions is determined as follows:

On April 11, 2003, the plaintiff was employed by the defendant Vipa General Contractor LTD ("Vipa") and was engaged in performing renovations on a premises in New Jersey. On that day, the plaintiff asserts he was injured when he fell of a roof. The defendant Piotr Linek ("Linek") was the president and sole shareholder of Vipa. The plaintiff's claim against Vipa was nullified when Vipa was discharged by a Bankruptcy Court.

The branch of the defendants' motion for leave to amend their

answer to assert an affirmative defense that the plaintiff's action is barred by the Workers' Compensation Law is granted. The decision whether to grant leave to amend a pleading is within the sound discretion of the trial court and should be freely granted (See e.g., Lane v Beard, 265 AD2d 382).

Although this action has been pending for over three years and a note of issue was filed over a two years ago, the defendants' delay in moving to amend does not, in and of itself, prohibit the court from permitting the amendment (See, Thompson v Ludovico, 246 AD2d 642). With respect to the defense of workers' compensation specifically, it has been held that it "may be asserted in an action virtually at any time" (Lindner v Kew Realty Co., 113 AD2d 36, 42) and that waiver of the defense "is accomplished only by a defendant ignoring the issue to the point of final disposition itself" (See, Murray v New York, 43 NY2d 400, 407). Amendment of an answer to assert a workers' compensation defense is permissible even after a plaintiff has been awarded summary judgment on liability (See, Goodarzi v City of New York, 217 AD2d 683).

Here, while the plaintiff can claim surprise at the belated assertion of the defense, any claim of prejudice fails as the plaintiff was aware of all the essential facts underlying this defense (See, Murray v New York, supra; Cameli v Pace University, 131 AD2d 419, 420; Schluter v Haverstraw Town Tercentennial, Inc., 34 AD2d 654).

With respect to the branch of the motion by Linek for summary judgment dismissing the complaint on the basis that the plaintiff's claim was barred by Workers' Compensation Law §11, the general rule is that an action for personal injuries is barred against a co-employee if it is the same cause of action for which the injured plaintiff has received workers' compensation benefits. The pertinent language of the Workers' Compensation Law states that "the right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, when such employee is injured or killed by the negligence or wrong of another in the same employ" (Workers' Compensation Law §29[6]). Thus, the Workers' Compensation Law shields a co-employee from suit when the plaintiff is injured in the course of employment (Macchirole v Giamboi, 97 NY2d 147, 150). Parties are considered co-employees in "all matters arising from and connected with their employment" (Heritage v Van Patten, 59 NY2d 1017, 1019).

Since Linek establishes in his affidavit that the plaintiff was employed by Vipa and that he was the corporation's president and sole shareholder, it is plain that the plaintiff and Linek were co-employees at the time of the plaintiff's injury (See, Macchirole v Giamboi, supra at 151; Lozado v Felice, 8 AD3d 663, 634; Kupke v Mullane, 215 AD2d 531). This, however, is insufficient to establish entitlement to judgment as a matter of law in this case.

In paragraph thirty of the complaint, the plaintiff alleges that Vipa failed to obtain workers' compensation insurance as required by

statute (See, Workers' Compensation Law §10; §50). Pursuant to section 11 of the Workers' Compensation Law, therefore, the plaintiff had the "option" to "elect to claim compensation under [the Workers' Compensation Law], or to maintain an action in the courts for damages on account of such injury"[emphasis added] (See, O'Rourke v Long, 41 NY2d 219, 222). Accordingly, to demonstrate prima facie entitlement to judgment as a matter of law in this action, Linek was required, but failed, to proffer evidence in admissible form that the plaintiff applied for and accepted workers' compensation benefits (Cf., Di Vincenzo v. Tripart Dev., Inc., 272 AD2d 904).

The defendant Linek's reliance on Burke v Torres, 120 AD2d 283 to support the assertion that he is not subject to liability in this action even without a workers' compensation policy being in effect is without merit. That court pointed out that it would be inequitable to permit a injured party to bring an action for personal injuries against "a fellow employee who never had the responsibility to obtain workers' compensation coverage" (Burke v Torres, supra at 285). Here, however, the fellow employee, Linek, was precisely the person who was responsible to obtain the requisite coverage. Thus, under these circumstances, section 11 of the Workers' Compensation Law is applicable and the plaintiff was permitted to elect whether to seek compensation or commence and action against the defendant Linek.

Any evidence contained in Linek's reply papers in a belated attempt to establish a prima facie case is improper and may not be considered by the court (See, Canter v East Nassau Med. Group, 270 AD2d 381, 382; Fischer v Weiland, M.D., P.C., 241 AD2d 439).

Accordingly, the branch of the motion to amend his answer is granted and the defendant Linek is given leave to serve an amended answer in the form annexed to the moving papers within 30 days of the date of this order. The branch of the defendant Linek's motion for summary judgment dismissing the plaintiff's complaint pursuant to Workers' Compensation Law is denied.

Dated: April 19, 2007

Peter J. Kelly, J.S.C.