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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

SUNSHINE & FEINSTEIN, LLP as assignee of DIAMOND DEMOLITION, INC.

Plaintiff.

- *against* -

TRITEC BUILDING COMPANY, INC. And LFP 1020 PWB, LLC.

Defendants.

Sequence No.: 001 & 002
Index No.: 015898/04

The following named papers have been read on this motion:

	Papers Numbered
Notice of Cross-Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendants' motion for an order 1) granting defendants leave to serve an amended answer in which an affirmative defense for set-off is asserted; 2) upon being granted said leave for summary judgment dismissing the complaint; or, alternatively, 3) vacating the note of issue and directing plaintiff to respond to outstanding discovery demands is hereby granted in part and denied in part. Plaintiff's cross-motion for summary judgment is denied.

The following facts are undisputed. On or around June 13, 2003 Diamond Demolition, Inc. (hereinafter "Diamond") and defendant Tritec Building Company, Inc. (hereinafter "Tritec") entered into a contract pursuant to which Diamond, as a subcontractor, was to "provide all labor, material and equipment necessary to complete the demolition work" at a project on which Tritec was the contractor. Defendant LFP PWB, Inc. was the owner of the property where the project was performed. Said contract required Diamond to indemnify and hold harmless Tritec from all claims, damages, losses and expenses arising out of or resulting from the performance of Diamond's work. Further, said contract requires Diamond to obtain and maintain insurance during the duration of the project as follows:

1) Workers Compensation (minimum $500,000.00);
2) Commercial General Liability (minimum $1,000,000.00/2,000,000.00) and
3) umbrella insurance (minimum $5,000,000.00).

During the work at said project an employee of Diamond's, Hugo Nunez, suffered injuries as a result of an accident thereat and commenced a personal injury action against defendant Tritec as the prime contractor on the job. On March 14, 2007 a jury rendered a verdict in the sum of $10,000,000.00 in the personal injury action.

Diamond assigned its rights in the contract it had with Tritec to its attorneys, Sunshine & Finestein, LLP in satisfaction of outstanding legal fees owed to said law firm. Sunshine & Finestein thereafter commenced this action as assignee of Diamond against defendants for breach of contract, account stated, enforcement of a constructive trust and *quantum meruit*.

Leave to Serve an Amended Answer

Defendants first move for an order granting defendants leave to serve an amended answer containing the affirmative defense of set-off on the grounds that Diamond failed to obtain and maintain insurance as set forth above pursuant to the contract with Tritec. Had said insurance been in effect Diamond, who had contractually agreed to indemnify Tritec, would have been responsible for the amount of the judgment in the personal injury action. As the verdict therein was $10,000,000.00, the entire limits of the policies would have been exhausted and said amount far exceeds the amount of plaintiff's claim herein, $42,500.00.

Plaintiff first opposes this branch of defendants' motion by asserting that as reflected in the affidavit of Diamond's former operations manager, Thomas Kostor, Diamond did not have a contract to perform demolition work of the specific portion of the property where the worker was injured, the bank vault. Diamond completed its work at the project in July, 2003 and it was not until August, 2003 when Tritec determined that it wanted the vault demolished and that because Diamond was winding down its affairs and ceasing operations, the contract for demolition of the vault went to an entity known as Inner City Contracting, Inc. (hereinafter "Inner City").

Counsel for plaintiff avers that "[b]ased on court documents it appears that while Inner City was removing the vault door, an employee of Inner City was seriously injured."

Thus, plaintiff asserts that as Diamond never had a contractual obligation to remove the vault which, it is alleged is the location of the accident, the proposed amendment is so devoid of merit as to require denial of the motion to amend.

Further, plaintiff contends that the court should find plaintiff's application in seeking this relief to be unjustifiably delayed and as a result prejudicial to plaintiff. Counsel sets forth how Nunez sued Tritec and Tritec impleaded Diamond long before the commencement of the instant action.

Generally, leave to serve amended pleadings should be freely given. CPLR 3025(b). A

motion for leave to serve an amended pleading will only be denied where the amendment is wholly devoid of merit or is significantly prejudicial to the non-moving party. See, Norman v. Ferrera, 107 A.D.2d 739 (2nd Dep't 1985).

As a preliminary matter the court notes that nowhere do defendants annex a copy of their proposed amended answer with the affirmative defense. The motion will be denied where the movant fails to annex a copy of the proposed amended pleading to the motion. Branch v. Abraham and Strauss Department Store, 220 A.D.2d 474 (2nd Dep't 1995); Goldner Trucking v. Stoll Packing Corp., 12 A.D.2d 639 (2nd Dep't 1960). As plaintiff does not raise this issue in opposition to this branch of the motion, the court shall consider same on the merits. The court also finds plaintiff's position that defendant unjustifiably delayed seeking this relief to be unavailing. In the absence of significant prejudice the court will not deny a delayed application for leave to amend a pleading. Edenwald Contracting Co., Inc. v. City of New York, 60 N.Y.2d 957 (1983). Plaintiff cannot be heard to claim prejudice as Diamond was a third party defendant in the personal injury action. Plaintiff also fails to demonstrate that its position has somehow changed as a result of the delay or that it will be unable to oppose the proposed defense due to the unavailability of records and/or witnesses.

Where a sub-contractor fails to obtain insurance pursuant to its contract with the prime contractor, and the prime contractor suffers damages as a result of the sub-contractor's failure to obtain said insurance, said damages may be asserted as an offset to any claim for non-payment against the contractor by the sub-contractor. See, e.g., Washington Metropolitan Area Transit Authority v. Mergentime Corporation, 626 F.2d 959 (C.A.D.C. 1980). Further, the sub-contractor is liable to the contractor and property owner for all out-of-pocket damages caused by the sub-contractor's failure to obtain necessary insurance naming the contractor as an additional insured. See, Taylor v. Doral Inn, 293 A.D.2d 524 (2nd Dep't 2002).

Plaintiff's position that the work being performed at the time Mr. Nunez suffered his injuries was not done pursuant to Diamond's contract with Tritec is unavailing. Pursuant to decision filed on March 22, 2006 the New York State Workers Compensation Board found, *inter alia*, that Diamond was Mr. Nunez's employer at the time he suffered his injuries. At a hearing in the personal injury action the Hon. Barbara R. Kapnick of the Supreme Court, New York County held that based upon the determination of the Workers Compensation Board, that Diamond was Mr. Nunez's employer at the time he suffered his injuries. (See, hearing transcript, pp. 17-22). "Determination by the Workers Compensation Board as to all questions of fact, including those regarding the employer-employee relationship are final." Calhoun v. Big Apple Wrecking Corp., 162 A.D.2d 574, 575 (2nd Dep't 1990). See, also, Decavallas v. Pappantoniou, 300 A.D.2d 617 (2nd Dep't 2002).

In order for the doctrine of *res judicata* to apply and prohibit the re-litigation of an issue, the following three part test must be satisfied: 1) a final judgment on the merits; 2) arising out of the same transaction or series of transactions; 3) involving the same parties or privies. See, O'Brien v. City of Syracuse, 54 N.Y.2d 353 (1981). The Workers Compensation Board and Justice Kapnick having determined the issue of who Mr. Nunez's employer was at the time he suffered his injuries, the court finds that plaintiff may not therefore claim that such an

amendment is devoid of merit.

Thus, defendants' motion is granted to the extent that they are granted leave to serve an amended answer which contains an affirmative defense for set-off based upon the verdict in the personal injury action as set forth above. Said answer is to contain no other amendment.

Motions for Summary Judgment

Although defendants do not formally seek leave to file a late motion for summary judgment as required by Brill v. City of New York, 2 N.Y.3d 648 (2004), the court, under normal circumstances, i.e. where defendants annexed a proposed pleading to their motion, would have granted defendants leave to make said late motion. To this court defendants have adequately demonstrated that they were unable to move for summary judgment until they were granted leave to serve the amended answer which forms the basis for seeking summary judgment. However, as CPLR 3212(a) permits motions for summary judgment to be made after issue is joined, the court denies defendants' motion for summary judgment. As set forth above, defendants are yet to serve the amended answer.

Plaintiff's cross-motion for summary judgment is likewise denied, plaintiff having failed to demonstrate good cause for leave to make a late motion for summary judgment. Brill v. City of New York, supra.

Motion to Vacate the Note of Issue

To the extent defendants seek an order vacating the note of issue and directing plaintiff to respond to outstanding discovery demands the motion is denied. On April 25, 2006 the court certified this matter ready for trial by short form order due to the parties' failure to complete discovery as directed. At two conferences prior to that date the parties reported that little, if any discovery had been conducted herein. To grant defendants' motion at this point would be an embarrassing acknowledgment that the parties can ignore this court's directives and the proper standards established by the Office of Court Administration and set a precedent that this court has worked diligently to avoid setting.

So Ordered.

A.J.S.C.

Dated: September 17, 2007