Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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GARY BONAVITA and ANNETTE BONAVITA,

Plaintiff(s),

-against-

IRVING McNICHOLAS, PROFESSIONAL EXTERMINATING CO., INC., ELIZABETH CLINES and JOSEPH CLINES,

Defendant(s).

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Index No. 5699/04

Motion Submitted: 5/15/08
Motion Sequence: 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants' Irving McNicholas and Professional Exterminating Co., Inc. motion for leave to amend their answer to include an affirmative defense that the plaintiffs' action is barred by the applicable provisions of the New York State Worker's Compensation Law is decided herein.

This action arises out of an automobile accident that occurred on May 19, 2001 in Brookville, Nassau County, due to the alleged negligence of defendant Irving McNicholas (McNicholas), the driver of a motor vehicle that allegedly hit the rear of the vehicle operated by plaintiff, Gary Bonavita. McNicholas was employed by defendant Professional

Exterminating Co., Inc. (Professional). Plaintiff Gary Bonavita was the owner of Professional. Defendants bring the within motion to amend the Answer to include a Workers' Compensation defense. The crux of the issue is whether plaintiff Gary Bonavita was also an employee of Professional at the time of the accident. Gary Bonavita asserts he was not employed by Professional, but rather, by Goodlife Long Island Realty (LI Realty).

The Workers' Compensation Board determined that the plaintiff was the sole shareholder of defendant Professional, the owner of the vehicle that struck the vehicle operated by the plaintiff. The Board also determined that the plaintiff was not in the employ of Professional at the time of the accident and, therefore, there was no basis for a compensation claim against Professional. The Workers' Compensation Board issued a decision dated January 22, 2007, ruling that "the claimant [Gary Bonavita] was not in the employ of Professional Exterminating at the time of the underlying injury, but rather was working for Goodlife [Long Island Realty]. As the claimant [Gary Bonavita] is not a covered employee within the meaning of WCL, the claim is hereby disallowed and closed. The attorneys for the defendants argue that after lengthy discovery, including examinations before trial of plaintiff Gary Bonavita and defendant McNicholas, the facts demonstrate that the determination of the Workers' Compensation Board was incorrect in that the plaintiff was an employee of Professional at the time of the accident. The attorneys for the plaintiffs cite ***Werner v. State of New York***, 53 N.Y.2d 346, 424 N.E.2d 541, 441 N.Y.S.2d 654 (1981), wherein the court states ". . . section 23 of the Workers' Compensation Law provides that '[a]n award of decision of the board shall be conclusive upon all questions within its jurisdiction, as against the state fund or between the parties, unless reversed or modified on appeal therefrom as hereinafter provided' " and the finality of the Workers' Compensation Board's decisions are governed by the ". . . settled principles of *res judicata,* which apply to administrative hearings and determinations when the agency involved is acting, as does the compensation board, in a quasi-judicial capacity (***Matter of Evans v. Monaghan***, 306 N.Y. 312, 118 N.E.2d 452 (1954); ***Matter of Venes v. Community School Bd. of Dist. 26***, 43 N.Y.2d 520, 373 N.E.2d 987, 402 N.Y.S.2d 807 [1978]; ***Werner v. State of New York, supra***).

The attorneys for the defendants assert that the Workers' Compensation Board noted in its decision that it had "no evidence to dispute the claimant's testimony that he was not working for Professional Exterminating at the time of the motor vehicle accident." Defendants' attorneys argue that since they did not represent the defendants at the time of the hearing, they lacked the opportunity to confront and cross-examine the plaintiff at the hearing. Defendants further contend that McNicholas, a witness with personal knowledge of relevant facts, was not a party to the Workers' Compensation hearing and, as such, did not have the opportunity to testify. Defendant alleges that had McNicholas been called to testify at the hearing before the Board, his testimony would have been in contradiction to plaintiff's testimony and sufficient to establish that plaintiff was employed by Professional.

"The Workers' Compensation Board has been said to be vested with primary jurisdiction over factual issues concerning compensation coverage. On the other hand, no one should be precluded from relitigating those issues in a court of law who has not had the opportunity to participate in the compensation hearing. . . the Workers' Compensation Board has primary jurisdiction, but not necessarily exclusive jurisdiction, in factual contexts concerning compensability" (***Liss v. Trans Auto System***, 68 N.Y.2d 15, 496 N.E.2d 851, 505 N.Y.S.2d 831 [1986]). In the within action as in ***Liss, supra***, the Workers' Compensation Board found the injuries not compensable, where the plaintiff sought redress from a defendant who was not a party to the hearing. The plaintiff having been forced to litigate the availability of compensation once, wants the determination of the Board to be final. The defendants, not having an opportunity to contest the issue, would like the Court to address the issue *de novo*.

The determination by the Workers' Compensation Board to deny coverage on the ground that an accident did not occur in the course of employment is not binding in a subsequent civil suit against a defendant who was not a party to the compensation proceeding. Determining that *de novo* review was required, the Court of Appeals reasoned that "where a defendant was not afforded an opportunity to cross-examine witnesses or present evidence at the prior hearing, the outcome of the hearing cannot have preclusive effect [citations omitted]" (***Liss, supra***, at 22). The Court reached this result despite the fact the defendant testified at the compensation hearing that "he had no control over the direction of his own testimony, no opportunity to cross-examine, and no counsel to guide him [citations omitted]" (***Liss, supra***, at 22). Since plaintiff and the compensation carrier in ***Liss*** were both aligned in opposition to coverage at the hearing, the Court concluded that it was actually non-adversarial, the defendant's view never having been presented (***Liss, supra*** at 23; see also ***Silverman v. Leucadia, Inc.***, 156 A.D.2d 442, 548 N.Y.S.2d 720 [2d Dept., 1989]).

Leave to amend a pleading shall be freely granted unless the proposed amendment lacks merit and the opponent will be prejudiced. ***CPLR 3025(b)***; ***Sheba Unlimited, Inc. v. Amsterdam Lewinter***, 49 A.D.3d 521, 856 N.Y.S.2d 118 (2d Dept., 2008); ***Old World Custom Homes, Inc. v. Crane***, 33 A.D.3d 600, 822 N.Y.S.2d 155 [2d Dept., 2006]). The defendants, at least for the purposes of this motion, have established *prima facie* a meritorious defense based on a Workers' Compensation claim. The issue of prejudice, referred to by both counsel in the most perfunctory of terms, has not been analyzed with any degree of specificity in the context of the facts herein.

Defendants have established that the proposed amendment has merit, and the plaintiff failed to establish that prejudice and surprise directly result from the delay in seeking the

amendment. (***Maloney Carpentry v. Budnik***, 37 A.D.3d 558, 830 N.Y.S.2d 262 [2d Dept., 2007]). Defendants moved to add the affirmative defense quickly after depositions of plaintiff and defendant McNicholas on November 6, 2007 and February 29, 2008 respectively and upon receipt of the January 22, 2007 Worker's Compensation Board determination.

A hearing was held before a Worker's Compensation Law Judge who rendered a decision on February 12, 2004 and an amended decision dated December 24, 2004 based upon plaintiff's testimony. In an application filed August 29, 2006 the plaintiff/claimant, through his attorney requested a review of those decisions. Despite the fact that the application was untimely the Board Panel excused the late filing due to counsel's prior written requests and "in the interest of justice." Clearly, though the instant litigation was pending, plaintiff did not make defendants aware of his application to afford them an opportunity to offer evidence.

The Board modified the Law Judge's decisions filed February 12, 2004 and December 24, 2004 to "reflect that the claimant was not in the employ (sic) Professional Exterminating at the time of the underlying injury, but rather working for Good Life." The date of filing that decision was January 22, 2007. It does not appear that a claim for Worker's Compensation Benefits was ever filed by plaintiff as an employee of Professional in connection with the 2001 accident. Plaintiff was involved in a subsequent accident in 2003 for which he received Worker's Compensation benefits. He was later convicted for Worker's Compensation fraud in connection with the 2003 benefits.

Plaintiff, however, alleges that this motion comes "as a complete surprise to me." Under the facts of this case, where plaintiff did not file a Request for Judicial Intervention until on or about July 2007, well after his application for review of the Law Judge's decisions and receipt of the modified decision of the Board, plaintiff cannot claim surprise that the issue would be raised once defendants became aware of plaintiff's Worker's Compensation claims and the conflicting evidence regarding his employer at the time of the accident.

The defendants' motion to amend the answer to include an affirmative defense that the plaintiff's action is barred by the applicable provisions of the Worker's Compensation Law is granted. (***Murray v. City of New York***, 43 N.Y.2d 400, 372 N.E.2d 560, 401 N.Y.S.2d 773 (1977); ***Caceras v. Zorbas***, 74 N.Y.2d 884, 547 N.E.2d 89, 547 N.Y.S.2d 834 (1989); ***Yemini v. Goldberg***, 46 A.D.3d 806, 848 N.Y.S.2d 676 (2d Dept., 2007); ***Alatorre v. Hee Ju Chun***, 44 A.D.3d 596, 848 N.Y.S.2d 174 ([2d Dept., 2007]).

The foregoing constitutes the Order of this Court.

Dated: September 30, 2008
Mineola, N.Y.

Karen V. Murphy
J. S. C.