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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 402405/2007

BARRETT, CHRISHINA

INDEX NO. _____

VS

NEW YORK CITY DEPARTMENT

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

AMEND

CAL #9

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for summ judgmt

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3, 4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 31 2010
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

NYS SUPREME COURT
RECEIVED
AUG 31 2010
MOTION SUPPORT OFFICE

Dated: 8/27/10
AUG 27 2010

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

CHRISHINA BARRETT,

Plaintiff,

-against-

NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, THE CITY OF NEW YORK, MAHAMED SANOGO, GRAND STYLE TRANSPORTATION, SAHAIL MIAN, 555 TAXI, INC., PETER WRIGHT & PV HOLDING CORP.,

Defendants.

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Index No. 402405/07

Motion Subm.: 8/3/10
Motion Seq. No.: 001
Calendar No.: 9

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Adam B. Ross, Esq.
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For City:
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City of New York Law Dept.
Manhattan Trial Unit, Tort Div.
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For Sanogo/Grand Style:
Carol S. Dibari, Esq.
Baker, McEvoy, *et al.*
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New York, NY 10001
212-857-8230

For Mian/555 Taxi:
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By notice of motion dated May 3, 2010, defendants New York City Department of Homeless Services and City of New York (collectively, City) move pursuant to CPLR 3025 for an order granting them leave to amend their answer and deeming the amended answer served *nunc pro tunc*, and pursuant to CPLR 3211(a)(7) and 3212 for an order summarily dismissing the complaint and any cross-claims against them. Plaintiff, defendants Mahamed Sanogo and Grand Style Transportation (collectively, Grand Style), and Sahail Mian and 555 Taxi, Inc.

(collectively, 555 Taxi) oppose the motion.

I. BACKGROUND

On September 17, 2005, plaintiff was allegedly injured while operating a vehicle owned by City, when it collided with a vehicle owned by 555 Taxi, Inc. and operated by Mian and a vehicle owned by PV Holding Corp. and operated by Peter S. Wright. (Affirmation of Peter C. Lucas, ACC, dated May 3, 2010, Exh. A). On or about November 28, 2005, plaintiff served a notice of claim on City. (*Id.*).

On January 26, 2006, plaintiff testified at a 50-h hearing that the accident occurred while she was employed by and at work for City, that she received workers' compensation benefits for her injuries, that City owned the vehicle and was aware that it had defective brakes, and that the defective brakes caused her accident. (*Id.*, Exh. F).

On or about October 31, 2006, plaintiff served her summons and complaint, on or about December 21, 2006 City served its answer, and on or about November 21, 2007 Grand Style served its answer with cross-claims. (*Id.*, Exhs. B, D, E).

On August 17, 2009, plaintiff testified at an examination before trial that she received workers' compensation benefits for her injuries. (*Id.*, Exh. G).

II. MOTION TO AMEND

A. Contentions

City argues that it should be permitted to amend its answer to assert as an affirmative defense that plaintiff's action is barred by her receipt of workers' compensation benefits, an exclusive remedy. (Lucas Aff.). It relies on plaintiff's admissions that she received the benefits and an affidavit from an employee of the workers' compensation division of the City Law

Department confirming that plaintiff received workers' compensation benefits for the injuries she allegedly sustained in the accident at issue. (*Id.*, Exh. H). City denies that it waived the defense by failing to assert it in its answer, or that plaintiff will be able to show any resulting prejudice as she knew from the inception of the action that her receipt of the benefits would bar relief here.

Plaintiff argues that City's delay is inexcusable and unreasonable as it knew after her 50-h hearing on January 26, 2006, eleven months before it served its answer, that she had received workers' compensation benefits. (Affirmation of Adam B. Ross, Esq., dated July 2, 2010 [Ross Aff.]). She observes that City never explained its excessive four-year delay and has prejudiced all of the parties' ability to litigate the action.

As Grand Style was not present at the 50-h hearing and did not learn of plaintiff's receipt of benefits until her 2009 deposition, it maintains that it is prejudiced by City's delay. (Affirmation of Carol S. Dibari, Esq., dated June 3, 2010 [DiBari Aff.]).

555 Taxi adopts plaintiff's and Grand Style's arguments. (Affirmation of Brian L. Gotlieb, Esq., dated June 7, 2010).

In reply, City asserts that plaintiff's claims of prejudice are conclusory and unsupported absent any indication that she would have proceeded differently had City asserted the defense earlier, and maintains that mere lateness in moving to amend constitutes an insufficient basis for denying the application and that a motion to amend to add the defense of workers' compensation exclusivity may be made as late as during a trial. (Reply Affirmation Peter C. Lucas, ACC, dated July 12, 2010 [Lucas Reply Aff.]).

B. Analysis

Pursuant to CPLR 3025(b), a party may amend its pleading at any time by leave of the

court, which shall be freely given upon such terms as may be just. It is within the court's discretion whether a party may amend its complaint. (*Murray v City of New York*, 43 NY2d 400, 404-405 [1977], *rearg dism* 45 NY2d 966 [1978]; *Lanpont v Savvas Cab Corp., Inc.*, 244 AD2d 208, 209 [1st Dept 1997]). The factors the court must consider in making this determination are whether the proposed amendment would "surprise or prejudice" the opposing party (*Murray*, 43 NY2d at 405; *Lanpont*, 244 AD2d at 209, 211; *Norwood v City of New York*, 203 AD2d 147, 148 [1st Dept 1994], *lv dism* 84 NY2d 849), and whether such amendment is meritorious. (*Thomas Crimmins Contr. Co., Inc. v City of New York*, 74 NY2d 166, 170 [1989] ["Where a proposed defense plainly lacks merit, however, amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore properly denied."]; *Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003] [same]). A defendant's prejudice is shown by proof that it "has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18 [1981]).

Here, while City does not explain its delay, mere delay in moving to amend is insufficient to deny leave to amend absent any resulting prejudice. (*Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33 [1st Dept 2001]). Thus, defendants have been permitted to amend their answers to assert a defense of workers' compensation exclusivity on the eve of and even after trial. (*See eg Caceras v Zorbas*, 74 NY2d 884 [1989] [defendant permitted to amend answer to include defense of workers' compensation exclusivity after jury had been selected for trial]; *Murray v City of New York*, 43 NY2d 400 [1977] [trial court properly permitted amendment after verdict rendered]; *Kim v Chong*, 8 AD3d 456 [2d Dept 2004] [amendment allowed even though defense

first raised after case ready for trial]; *Lanpont*, 244 AD2d at 208 [defendant granted leave to amend answer even though it waited until day of trial]).

Moreover, plaintiff's and co-defendants' assertions that they have been prejudiced by the delay are fatally conclusory, and, in plaintiff's case, meritless as she knew from the outset that her receipt of the benefits would bar her from obtaining damages from City. (*See eg Caceras*, 74 NY2d 884 [plaintiff could not "claim prejudice or surprise because he was aware of his employment status from the outset and had received workers' compensation benefits"]; *Singh v Shafi*, 252 AD2d 494 [2d Dept 1998] [same]).

Thus, City's motion for leave to amend is granted and the answer is deemed amended, *nunc pro tunc,* to include the affirmative defense that plaintiff's action is barred by plaintiff's receipt of workers' compensation benefits.

III. CITY'S MOTION TO DISMISS

A. Contentions

City argues that pursuant to sections 10 and 11 of the Workers' Compensation Law, plaintiff's action against it is barred by her receipt of workers' compensation benefits absent any dispute that she was injured while performing her work as its employee, and given her allegation that her injuries were caused by City's negligence. (Lucas Aff.). As plaintiff does not allege that she suffered a "grave injury," City also contends that any cross-claims against it must be dismissed.

Plaintiff and Grand Style argue that as City had a duty to maintain the vehicle in which plaintiff was injured, she has stated a claim for independent negligence against City, which is not barred by the Workers' Compensation Law, relying on *Castro v Salem Truck Leasing, Inc.*, 63

AD3d 1095 (2d Dept 2009). (Ross Aff.; DiBari Aff.).

In reply, City distinguishes *Castro* as there, the vehicle's owner was not the plaintiff's employer. (Reply Aff.).

B. Analysis

In *Castro*, the vehicle's owner leased the vehicle to the plaintiff's employer and the court held that as there was an issue of fact as to the owner's independent negligence in failing to maintain the vehicle properly, the plaintiff's action against the owner was not barred by the Workers' Compensation Law. (63 AD3d at 1095; *see also Donohue v L. DeLea & Sons, Inc.*, 56 AD3d 602 [2d Dept 2008]; *Nguyen v Neroc, Inc.*, 8 AD3d 248 [2d Dept 2004]; *Chiriboga v Ebrahimoff*, 281 AD2d 353 [1st Dept 2001]; *Rodriguez v Lodato Rental, Inc.*, 267 AD2d 293 [2d Dept 1999]; *Delio v Percom Equip. Rental Corp.*, 249 AD2d 354 [2d Dept 1998]; *Christiansen v Silver Lake Contr. Corp.*, 188 AD2d 507 [2d Dept 1992]; *Rascoe v Riteway Rentals*, 176 AD2d 552 [1st Dept 1991]). Thus, it has been held that the Workers' Compensation Law does not bar an action against a third-party owner of a vehicle based on the owner's independent or affirmative negligence toward the injured plaintiff-employee. (*Chiriboga*, 281 AD2d at 353).

Here, as City is both the owner of the vehicle and plaintiff's employer, these cases are inapposite and, absent any authority for the proposition that when the owner of a vehicle is also the plaintiff's employer, it may nonetheless be held liable for any independent or affirmative negligence on its part, plaintiff's claims against City remain barred. (*See eg Rossi v C.C.O. Equip., Inc.*, 200 AD2d 933 [3d Dept 1994], *lv denied* 84 NY2d 802 [as defendant owner showed he and plaintiff driver operated as joint venture, Workers' Compensation law barred driver's claim against owner]; *Hill v State*, 157 Misc 2d 109 [Ct Cl, New York 1993], *affd* 209 AD2d

1007 [4th Dept 1994] [plaintiff's claims against defendant, her employer and owner of vehicle, barred by Workers' Compensation law]; *cf Vita v New York Waste Svces., LLC*, 34 AD3d 559 [2d Dept 2006] [defendants failed to show action was barred as they did not establish that owner of vehicle was alter ego of plaintiff's employer or that plaintiff was owner's special employee]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants City of New York and New York City Department of Homeless Services' motion for leave to amend its answer is granted, and the amended answer is deemed served *nunc pro tunc* on all parties; it is further

ORDERED, that defendants City of New York and New York City Department of Homeless Services' motion for an order granting them summary judgment is granted, and the complaint is dismissed against defendants with costs and disbursements to defendants as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk is directed to enter judgment accordingly; it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiffs shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158 within 30 days of the date of this order.

ENTER:

Barbara Jaffe, JSC

DATED: August 27, 2010
New York, New York

AUG 27 2010