Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

JORGE ESQUIVEL

Plaintiff,

-against-

LAND & SEA DEVELOPMENT CORPORATION and ONYX JAMAICA, INC.,

Defendants.

Index No. 30194/08

Motion Date December 14, 2010

Motion Cal. No. 8

Motion Sequence No. 1

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Upon the foregoing papers it is ordered that the branch of the motion by defendant, Land & Sea Development Corporation ("Land & Sea") for an order pursuant to CPLR 3025(b) granting Land & Sea leave to serve an amended answer to the Summons and Complaint adding an affirmative defense based on the exclusivity of the remedy provided pursuant to the Workers' Compensation Law is hereby granted.

It is well-settled law that motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR 3025[b]; *Wirhouski v. Armoured Car & Courier Serv.*, 221 AD2d 523 [2d Dept 1995]). The trial court has discretion to grant the motion to amend pleadings and "[i]n exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom" (*Branch v. Abraham & Strauss Dept. Store*, 220 AD2d 474 [2d Dept 1995]). Moving defendant established that plaintiff will not be prejudiced by the amendment as he asked multiple questions during the deposition of Land & Sea regarding the relationship between Land & Sea and World Wide. Furthermore, moving defendant

established a reasonable excuse for the delay in that although it was known that Land & Sea and World Wide were owned by the same individual, the very fact specific information required to establish an "alter ego" defense were unknown until the completion of discovery including depositions.

Accordingly, moving defendant is granted leave to file and serve an Amended Answer within thirty (30) days from the date of service of a copy of this order with notice of entry.

That branch of the motion by Land & Sea for an order pursuant to CPLR 3212 granting Land & Sea summary judgment dismissing plaintiff's Summons and Complaint based on the fact that Land & Sea is entitled to the exclusivity provisions of the Workers' Compensation Law § 11 is hereby denied without prejudice since the moving defendant has not yet served upon plaintiff its Amended Answer asserting the affirmative defense based on the exclusivity provisions of the Worker's Compensation Law.

That branch of the motion by defendant Land & Sea for an order pursuant to CPLR 3212 dismissing the plaintiff's negligence and Labor Law §§ 240(1), 241(6) and 200 is hereby granted.

Plaintiff, Jorge Equivel maintains that on October 22, 2008 at 7:30 a.m., he was on the premises located at 147-07 94th Avenue, Jamaica, New York, in his capacity as a laborer, employed by World Wide Food Products, Inc. ("World Wide"). Plaintiff further maintains that he was caused to be seriously injured when, due to the negligence of defendants, he was caused to fall from a hi-lo approximately 20 feet to the ground while in the process of unloading boxes of shrimp from shelves onto pallets in a freezer during the course of his employment with World Wide. Plaintiff commenced this action to recover for serious injuries. Plaintiff argues liability against defendants pursuant to Labor Law §§ 200, 240(1), and 241(6) and under common-law negligence theories. Defendant, Land & Sea Development Corp. moves for summary judgment pursuant to CPLR 3212 dismissing the plaintiff's complaint.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see*, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not

issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee' s Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]).

Moving defendant established a prima facie case that the claim under Labor Law § 200 must be dismissed. Labor Law § 200 codifies the common law duty of owners and general contractors to provide construction site workers with a safe working environment (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). In order for a defendant to be liable under this section, "the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (*Damiani v. Federated Department Stores, Inc.*, 23 AD3d 329 [2d Dept 2005][internal citations omitted]). Liability is dependent upon the amount of control or supervision exercised over the plaintiff's work. (*Id*).

In support of this branch of the motion, defendant submits inter alia, an affidavit of the President of Land & Sea Development Corporation and World Wide Food Products Inc., Ron Romeo, avers that on October 22, 2008 and prior thereto, Land & Sea did not supply plaintiff or any employees of World Wide with equipment with respect to work being performed by World Wide Food Products at the premises known as 147-07 94th Avenue, Jamaica, New York; that on October 22, 2008, and prior thereto, Land & Sea did not have any involvement whatsoever with respect to the work being performed by plaintiff or any other employees of World Wide Food Products at the premises known as 147-07 94th Avenue, Jamaica, New York 11435; that on October 22, 2008 and prior thereto, Land & Sea did not direct, supervise, control or inspect that work being performed by plaintiff and other employees of World Wide at the premises known as 147-07 94th Avenue, Jamaica, New York at the time of the incident; and the examination before trial transcript testimony of plaintiff himself, wherein he testified that he received all of his instructions and directions from employees of World Wide on the date of the incident and prior thereto and he never received any instruction or directions from anyone other than employees of World Wide during his course of employment with World Wide.

Defendant, Land & Sea Development Corporation established a prima facie case that the claim under Labor Law § 240(1) must be dismissed. To fall within the confines of Labor Law § 240(1), the task in which an injured employee was engaged must have been performed during the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure.

Martinez v. City of New York, 93 NY2d 322 [1999]). Movant defendant established that plaintiff was not engaged in any of these enumerated activities. The examination before trial transcript testimony of plaintiff indicates that he was not performing any type of construction work at the time of the incident, but rather he was in the process of loading a pallet with seafood products that were eventually going to be distributed.

In opposition, plaintiff concedes that the activity plaintiff was engaged in was not protected by Labor Law § 240(1) and does not oppose this branch of the motion.

Defendant, Land & Sea Development Corporation established a prima facie case that the claim under Labor Law § 241(6) must be dismissed. Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (*see, Toefer v. Long Island R.R.*, 4 NY3d 399 [NY 2005];*Bland v. Manocherian*, 66 NY2d 452 [1985]; *Kollmer v. Slater Electric, Inc.* 122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care." *(Rizzuto v. LA Wenger Contracting*, 91 NY2d 343 [NY 1998]). In order to support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards," but rather must establish "concrete specifications." (*See Mancini v. Pedra Construction*, 293 AD2d 453 [2d Dept 2002]; *Williams v. Whitehaven Memorial Park*, 227 AD2d 923 [4th Dept 1996])

In order to recover under this statute, plaintiff must establish that plaintiff or his employer was hired by the general contractor to perform construction work on the building and plaintiff was permitted to work on the building (*Mordkofsky v. V.C.V. Dev. Vorp.*, 76 NY2d 573 [1990]; *Paradise v. Lehrer, McGovern & Bovis, Inc.*, 267 AD2d 132 [1st Dept 1999]). Plaintiff in the instant case testified that he did not perform any type of construction work at the time of the incident.

In opposition, plaintiff concedes that the activity plaintiff was engaged in was not protected by Labor Law § 241(6) and does not oppose this branch of the motion.

Accordingly, that branch of the motion by Land & Sea for an order pursuant to CPLR 3212 dismissing the plaintiff's negligence and Labor Law §§ 240(1), 241(6) and 200 is hereby granted and the complaint is dismissed as to said defendant only.

This constitutes the decision and order of the Court.

Dated: February 23, 2011

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Howard G. Lane, J.S.C.