

Barber v Checo

2013 NY Slip Op 30231(U)

January 24, 2013

Sup Ct, New York County

Docket Number: 112482/2007

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 112482/2007

BARBER, BARBARA G.

vs.

CHECO, EDWIN R.

SEQUENCE NUMBER : 002

AMEND SUPPLEMENT PLEADINGS

CAL: #14

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

FEB 04 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1-24-13
JAN 24 2013

 J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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
BARBARA G. BARBER,

Plaintiff,

-against-

EDIN R. CHECO,,

Defendant.

DECISION/ORDER
Index No. 112482/2007
Seq. No. 002

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

-----X
EDWIN R. CHECO,

Third-Party Plaintiff,

-against-

VICTOR M. SHANNON and NYC HEALTH &
HOSPITALS CORP.,

Third-Party Defendants.

FILED
FEB 04 2013
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-3.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....4.....
REPLYING AFFIDAVITS.....5.....
EXHIBITS.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Third Party defendants' Victor M. Shannon (hereinafter "Shannon), and the City of New York Health and Hospitals Corporation (hereinafter, "HHC"), move for an Order: 1) pursuant to CPLR§ 3025 permitting them to amend their Answer to assert a defense that Third-Party Plaintiff Edwin R. Checo's (hereinafter, "Checo") action against them is barred by the Workers' Compensation Law, and 2) pursuant to CPLR§ 3211(a)(5) dismissing the instant action against them as it is barred by the Workers' Compensation Law, or in the alternative, pursuant to CPLR§ 3212, granting them summary judgment, dismissing the third-party complaint.

Defendant/Third-Party plaintiff Checo, opposes. After a review of the papers presented, all relevant statutes and case law, the Court grants summary judgment and dismisses the complaint against Third-Party Defendants, Shannon and HHC.

Factual and procedural background:

Plaintiff Barber commenced a suit against Defendant/Third-Party Plaintiff, Checo, for liability emanating from a motor vehicle collision occurring on September 15, 2004. Plaintiff, an employee of HHC, was a passenger in an HHC vehicle that was driven by HHC employee Shannon. It is alleged that as Shannon made a left turn into an HHC hospital emergency entrance at West 156th Street and 8th Avenue, a taxicab operated by Checo collided with Shannon's vehicle. Both Barber and Shannon were operating in the capacity and scope of their employment at the time of the accident. Barber sustained physical injuries and as such, received Worker's Compensation benefits in the amount of \$74,378.00.

Positions of the parties:

HHC and Shannon argue that they should be permitted to amend their Answer to assert plaintiff's receipt of Workers' Compensation benefits as her exclusive remedy. Checo argues that

HHC and Shannon have failed to establish that at the time of the accident, Barber and Shannon were both employed by HHC, were on duty, and were acting within the scope of their employment. Checo also argues that discovery is still outstanding in that neither Barber or Shannon have appeared for depositions. Thus, Checo asserts that he does not oppose permitting HHC and Shannon to amend their Answer, provided that the issue of whether Workers' Compensation is even applicable.

Barber and Shannon respond that Checo's opposition is "meritless and frivolous." They append to their moving papers as Exhibit "E," an affidavit of Mindy Roller, Esq., Deputy Chief of the Worker's Compensation Division of the New York City Law Department. In her affidavit, Ms. Roller avers that she has reviewed Barber's Workers' Compensation file relating to the subject accident. She affirms the aforementioned amount of benefits Barber has received and avers that "this amount includes the medical expenses in the amount of \$23,177.69 and indemnity payments in the amount of \$51,200.10. These benefits were paid as a result of the injuries Ms. Barber sustained in a motor vehicle accident while in the course of her employment as a Community Liaison Worker with the Health & Hospital Corporation on September 15, 2004" (Roller Aff. ¶ Exhibit "E").

Conclusions of law:

Summary judgment is considered a "drastic" remedy (*see* Andre v. Pomeroy, 35 N.Y.2d 361 [1974]; Martin v. Briggs, 235 A.D.2d 192 [1st Dept. 1997]; Chemical Bank v. West 195th Street Development Corp., 161 A.D.2d 218 [1st Dept. 1990]). In order to prevail on a summary judgment motion, the movant must submit evidentiary proof in admissible form sufficient to establish a prima facie showing of entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie

showing (Bethlehem Steel Corp. v. Solow, 51 N.Y.2d 870, 872 [1989]). In opposing such a motion, the party must lay bare its evidentiary proof. “Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture, or speculation” (Morgan v. New York Telephone, 220 A.D.2d 728, 729 [2d Dept. 1995]; Zuckerman v. City of New York, *supra*).

Pursuant to CPLR§ 3025[b], a party may amend its pleading at any time by leave of court, and leave shall be freely given upon such terms as may be just. It is within the court’s discretion whether to permit a party to amend its complaint (*see* Peach Parking Corp. v. 345 W. 40th Street, LLC, 43 A.D.3d 82 [1st Dept. 1997]; Mayers v. D’Agostino, 58 N.Y.2d 696 [1982]; Lanport v. Sayvas Cab Corp. Inc., 244 A.D.2d 208 [1st Dept. 1997]). On a motion for leave to amend, a plaintiff need not establish the merit of its proposed new allegations (Lucindo v. Mancuso, 49 A.D.3d 220, 227 [1st Dept. 2008], but must show that the proffered amendment is not palpably insufficient, is not clearly devoid of merit, and has merit (Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 A.D.3d 363, 366 [1st Dept. 2007]; MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499 [1st Dept. 2010]; Helene-Harrisson Corp. v. Moneyline Networks, Inc., 6 A.D.3d 151 [1st Dept. 2004]).

Sections 11 and 29(6) of the Workers’ Compensation Law provide that workers’ compensation benefits shall be an employee’s exclusive remedy for injuries arising out of and in the course of employment (*see* Ott v. Steingart Woodcrafters, Inc., 2012 WL 3314655 (N.Y. Sup.)). Therefore, “[a]n injured person who is entitled to receive Workers’ Compensation benefits from his or her general employer is barred from maintaining a personal injury action against his or her special employer (Soto v. Akam Assoc., Inc., 61 A.D. 3d 665).

In the case at bar, Shannon and HHC have established, prima facie, that Barber is an employee of HHC, and that she received Workers' Compensation benefits. Indeed, the law is clear that receipt of said benefits now precludes her from seeking additional damages against them via the instant suit. Moreover, the various exhibits appended to the instant motion, ie. police reports, hospital records, the affidavit of Ms. Roller, are evidentiary proof in admissible form that both Barber and Shannon were employed by HHC at the time of the incident. These clearly undermine Checo's absurd contention that it has never been established with any semblance of certainty that Barber and Shannon were HHC employees.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that Third-Party Defendants' Victor M. Shannon and NYC Health & Hospitals' motion for summary judgment is granted and the complaint and any cross claims are hereby severed and dismissed as to them, and the Clerk is directed to enter judgment in favor of them; and 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. Defendant HHC shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: January 24, 2013

JAN 24 2013

FILED
 FEB 04 2013 ENTER:
 NEW YORK
 COUNTY CLERK'S OFFICE
 Hon. Kathryn E. Freed
 HON. KATHRYN E. FREED
 JUDGE OF THE COURT