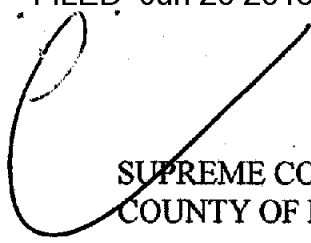


<b>Duran v City of New York</b>
2013 NY Slip Op 33984(U)
June 11, 2013
Supreme Court, Bronx County
Docket Number: 302420/10
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

\_\_\_\_\_ X

LYNNETTE DURAN,

Plaintiff,

**DECISION/ORDER**

-against-

Index No.: 302420/10

THE CITY OF NEW YORK, THE CITY OF NEW  
YORK HUMAN RESOURCES ADMINISTRATION,  
and NADEAN A. BLACKWOOD,

Defendants.

\_\_\_\_\_ X

The following papers numbered 1 to 5 read on the below motion noticed on January 14, 2013 and duly submitted on the Part IA15 Motion calendar of **January 25, 2013**:

<u>Papers Submitted</u>	<u>Numbered</u>
Def's NOM, exhibits	1,2
Pl.'s Aff. in Opp., exhibits	3,4
Def.'s aff. In Reply	5

Upon the foregoing papers, the defendant City of New York ("Defendant") seeks: (1) an Order pursuant to CPLR 3025 granting leave to serve an amended answer *nunc pro tunc* to include the worker's compensation bar as an affirmative defense; and (2) an Order pursuant to CPLR 3211(a)(7) and/or CPLR 3212 dismissing the plaintiff's complaint without prejudice on the grounds that there is a jurisdictional issue as to whether the plaintiff was acting within the scope of her employment at the New York City Human Resources Administration when she was allegedly injured, and therefore the Workers' Compensation Board has primary jurisdiction over this issue; and/or (3) in the alternative, dismissing all claims against the defendant Nadean A. Blackwood ("Blackwood") for failure to comply with General Municipal Law § 50-e. The plaintiff Lynette Duran ("Plaintiff") opposes the motion.

I. Background

This matter seeks monetary damages for personal injuries allegedly sustained by Plaintiff, an employee of co- defendant New York City Human Resources Administration, (hereinafter "HRA") as a result of a motor vehicle accident which allegedly occurred on October 2<sup>nd</sup> 2009. On the date, Plaintiff alleges that she was struck by a vehicle owned by Defendant and operated by Blackwood, on Grand Concourse and East 176<sup>th</sup> Street, Bronx County, New York .

In support, Defendant provide (1) Plaintiff's Notice of Claim dated December 3, 2009 attached with an uncertified Police Accident Report; (2) The transcript of Plaintiff's Examination Under Oath (hereinafter "EUO") conducted February 24, 2010; (3) Plaintiff's summons and verified complaint; (4) Defendant's Answer and Demands dated April 14, 2010 on behalf of defendants City of New York and HRA; (5) Defendant's Amended Answer and Demands dated July 8, 2010 on behalf of the defendants City of New York, HRA, and Blackwood; (6) Plaintiff's verified Bill of Particulars dated May 14, 2010; (7) Plaintiff's unaffirmed medical records; (8) Plaintiff's responses to Defendants' discovery demands dated May 14, 2010; (9) Preliminary Conference Order dated August 17, 2010; (10) Compliance Conference Order dated August 9, 2011; (11) Plaintiff's Note of Issue filed on August 14, 2012.

Paragraph five of Plaintiff's verified complaint alleges that "defendant 'BLACKWOOD' was an agent and/or servant of defendant "City" and Defendant "HRA". In response, Defendant's Answer dated April 14, 2010, on behalf of both the City and HRA, states in Paragraph (2) two that they "[d]eny knowledge or information sufficient to form a belief with respect to the truth of the allegations set forth in paragraph(s)... 5 (five)" of Plaintiff's verified complaint. Thereafter, on July 8, 2010, without leave of Court, Defendant served an Amended Answer on behalf of the City, Defendant HRA's and also Defendant Blackwood. In Paragraph (6) six of their Amended Answer, Defendants state that they "[d]eny each allegation set forth in paragraph...5, inclusive, except that the City of New York is a municipal corporation which employed Nadean A. Blackwood and maintains a Human Resources Administration pursuant to law."

## II. Applicable Law and Analysis

### *Leave to Amend*

At the outset, Defendant never sought leave to amend its answer. Under CPLR 3025(a), “[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.” Here, Defendant served an amended answer without leave of Court, approximately two months beyond the time where an amendment could have been made as of right. Plaintiff contends that Defendant’s amended answer dated July 8, 2010, is a “nullity” since it was untimely served without leave. However, Plaintiff waived any objection to the pleading on that basis by failing to reject it when initially served (*see First Wis. Trust Co. v. Hakimian*, 237 A.D.2d 249 [2<sup>nd</sup> Dept. 1997]).

Now, Defendant seeks leave of court to amend their answer again, this time to include the worker’s compensation bar as an affirmative defense to the instant action.

Generally, leave to amend a pleading is freely given and discretion and decision of whether to do so is committed to the discretion of the trial court, the exercise of which will not be lightly set aside (*see* CPLR 3025[b]). It is improvident, however, for a court to grant such leave if there is prejudice to the nonmoving party, the amendment plainly lacks merit, or where the new causes of action are palpably insufficient on their face (*see, Centrifugal Associates, Inc. V. Highland Metal Industries, Inc.*, 193 AD 2d 385 [1<sup>st</sup> Dept. 1993]). However, “[o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment” (*Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 40 AD 3d 363, 365 [1<sup>st</sup> Dept. 2007] citing *Hospital for Joint Orthopaedic Inst. v. James Katsikis Environmental Contractors, Inc.*, 173 AD 2d 210 [1st Dept. 1991]). Indeed, a movant seeking to amend must “simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit” ( *See, MBIA Ins. Corp. V. Greystone & Co., Inc.*, 74 AD 3d 499, 500 [1<sup>st</sup> Dept. 2010]). In fulfilment of this requirement, plaintiff is required to furnish the court with a proposed new pleading and affidavits indicating facts to support the amended pleading (*Id.* citing *Souveran Fabrics Corp. v. Virginia Fibre Corp.*, 37 AD 2d 925 [1<sup>st</sup>

Dept. 1971]; *Loehner v. Simmons*, 224 AD 2d 591 [2<sup>nd</sup> Dept.1996]).

Here, that portion of Defendants' motion seeking to amend their answer is not supported by a formal affidavit of merit (*see, Jebran v. LaSalle Bus. Credit, LLC*, 33 AD 3d 424 [1<sup>st</sup> Dept. 2006]). However, the movant is simply required to show that the proffered amendment is not palpably insufficient or clearly devoid of merit (*MBIA Ins. Corp. v. Greystone & Co., Inc., supra.*) In this matter, the motion is supported by a sufficient showing of merit through the submission of an affirmation by counsel, along with a transcript of Plaintiff's sworn testimony (*see, MBIA Ins. Corp* at 500; *see also Schron v Grunstein*, 39 Misc.3d 1213[A] [Sup. Ct., N.Y. Cty., 2013]) Still, the motion is procedurally defective since the movant does not submit a proposed amended answer (*see, Pollak v Moore*, 85 A.D.3d 578, 579 [1<sup>st</sup> Dept. 2011]). Since the proposed amendment will not surprise or otherwise prejudice Plaintiff, however, (*Sunset Park Redevelopment Comm. v. Bowery Sav. Bank*, 224 A.D.2d 608, 609 [2<sup>nd</sup> Dept. 1996]), the motion to amend will be conditionally granted so long as the amended pleading is served within 10 days of this Order.

Defendants' also seek to dismiss all claims against Defendant Blackwood for failure to comply with General Municipal Law § 50-e. Defendants contend that Plaintiff failed to specifically name Defendant Blackwood in the notice of claim as mandated by General Municipal Law § 50-e. It is true that a notice of claim must identify any City employee against which a plaintiff intends to bring a cause of action, and the failure to do so requires dismissal of the cause of action (*Tannenbaum v City of New York*, 30 AD3d 357 [1<sup>st</sup> Dept. 2006]). Nevertheless, in the case at bar, it should be noted that Defendant Blackwood is identified by name in the body of the Notice of Claim as the alleged offending motorist. Thus, Plaintiff's notice of claim is sufficient (*Kushnir v. City of New York*, 2012 WL 6550191 [Sup. Ct. New York County 2012]).

#### *Dismissal Motion*

Defendant seeks an order for summary judgment pursuant to CPLR 3211(a)(7) and/or CPLR 3212 dismissing Plaintiff's complaint, without prejudice, on the grounds that there is a jurisdictional issue as to whether Plaintiff was acting within the scope of her employment at

Defendant HRA when she was allegedly injured, and therefore the Workers' Compensation Board has primary jurisdiction.

In support, Defendants submit a transcript of Plaintiff's EUO conducted on February 24, 2010. Plaintiff testified, *inter alia*, that on the date of the accident she was employed as a supervisor with Defendant HRA which is affiliated with Defendant City. Plaintiff's office is located on 1775 Grand Concourse, Bronx, New York between 175<sup>th</sup> Street and 176<sup>th</sup> Street, The accident occurred when Plaintiff was struck by a vehicle that was backing up. On the day of the accident, before getting to work, she stopped at a "[n]eighborhood store" or deli on Eastburn Avenue nearby her job to get a sandwich. When she arrived at work she was there for "fifteen, twenty minutes" when she realized she may have left her cell phone at the deli. She testified that she retrieved her phone and then intended to return to work. On her way back to work, she was struck by a van that was double-parked. Plaintiff testified that after the accident she did not fill out an accident report and was not contacted by Defendant HRA regarding the incident.

In the case at bar, Defendant contends that this Court does not have primary jurisdiction since her injuries were sustained in the scope of her employment, and therefore this issue should be reserved to the Workers' Compensation Board. Defendant contends that in their discovery demands they requested for authorizations regarding Plaintiff's Workers' Compensation file. Plaintiff's response dated August 15, 2010 to the Preliminary Conference Order dated August 17, 2010, stated that Defendants' request for authorizations to her Workers' Compensation file is not "applicable as plaintiff did not apply and/or receive Worker's Compensation benefits". Plaintiff contends that the issue is not whether Plaintiff was in the scope of her employment when the accident occurred but rather, that Defendant Blackwood was not and therefore pursuant to Vehicle and Traffic Law § 388, the driver (Defendant Blackwood) and owner (Defendant City and Defendant HRA) are liable for the negligent operation of the vehicle that struck plaintiff when she was a pedestrian.

Workers' Compensation qualifies as an exclusive remedy when both the plaintiff and the defendant are acting within the scope of their employment, as coemployees, at the time of injury and the defendant did not act engage in a willful or intentional tort (*Macchirole v. Giamboi*, 97 N.Y.2d 147, 150 [2001] citing *Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535, 543 [1980]).

Furthermore, “generally, traveling to and from work is not deemed to be within the scope of employment, as an employee approaches the site of his employment, there develops a gray area where the risks of street travel merge with the risks attendant with employment” (*Ortiz v. Lynch*, 105 A.D.3d 584 [1<sup>st</sup> Dept. 2013] citing *Husted v. Seneca Steel Service, Inc.*, 41 N.Y.2d 140, 144 (1976)). The test of compensability is whether there is a causal relationship between the employment and the accident and whether the employee was exposed to a particular risk not shared by the public generally. *Ortiz, supra*, citing *Husted* at 145.

In the case at bar, whether Plaintiff was in the course of her employment at the time of the accident must be resolved by the Workers Compensation Board (*Valenziano v. Niki Trading Corp.*, 21 A.D.3d 818 [1<sup>st</sup> Dept. 2005]). “Where the availability of workmen's compensation hinges upon the resolution of questions of fact or upon mixed questions of fact and law, the plaintiff may not choose the courts as the forum for the resolution of such questions” (*O'Rourke v. Long*, 41 N.Y.2d 219, 228 [1976], see also *Liss v Trans Auto Sys.*, 68 NY2d 15, 20-21[1986]; *Arvatz v Empire Mut. Ins. Co.*, 171 AD2d 262, 267 [1<sup>st</sup> Dept. 1991]; *Mattaldi v. Beth Isr. Med. Ctr.*, 297 A.D.2d 234, 235 [1<sup>st</sup> Dept. 2002]). The question whether Plaintiff has a “valid tort claim for damages or is relegated to workers' compensation benefits is a factual determination for the Workers' Compensation Board and such body may not be circumvented by resort to the courts nor can a plaintiff elect to waive workers' compensation benefits and proceed on a tort cause of action” (*Mattaldi v. Beth Isr. Med. Ctr.*, 297 A.D.2d 234, 235 [1<sup>st</sup> Dept. 2002] citing *Corp v State of New York*, 257 AD2d 742, 743 [3<sup>rd</sup> Dept. 1999]; see also *Manetta v. Town of Hempstead Day Care Ctr.*, 248 A.D.2d 517 [2<sup>nd</sup> Dept. 1998], *Botwinick v Ogden*, 59 NY2d 909, 911 [1983]). Thus, the portion of Defendants' motion seeking summary judgment is denied and the matter is referred to the Workers' Compensation Board for a hearing and determination as to the availability of workers' compensation (see, *Nepomuceno v City of New York*, 94 A.D.3d 453, 454 [1<sup>st</sup> Dept. 2012]; *Liss*, 68 NY2d 15, 20-21[1986]; *Mattaldi*, 297 A.D.2d 234 [1<sup>st</sup> Dept. 2002]).

III. Conclusion

Accordingly, it is hereby

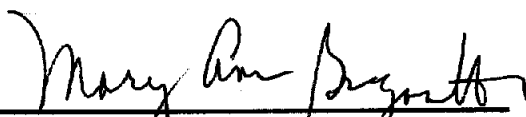
ORDERED, that Defendants' motion to amend is granted with the condition that Defendants must serve an amended answer in accordance with the CPLR, with the proposed affirmative defense, within ten (10) days after service of a copy of this Order with Note of Entry, and it is further,

ORDERED, that upon service of this amended pleading, this matter is transferred to the Workers' Compensation Board for a hearing and determination of the availability of workers' compensation, and it is further,

ORDERED, that this matter will be stayed pending resolution by the Workers' Compensation Board, and it is further,

ORDERED, that if Defendants do not serve the amended answer as detailed above, the instant motion is denied in its entirety.

Dated: June 11, 2013

  
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Hon. Mary Ann Brigantti-Hughes, J.S.C.