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| Jacobs v Fieldstone Realty, LLC |
| 2016 NY Slip Op 32888(U) |
| December 12, 2016 |
| Supreme Court, Rockland County |
| Docket Number: 030230/2016 |
| Judge: Thomas E. Walsh II |
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| This opinion is uncorrected and not selected for official publication. |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
LYSA GALLAGHER JACOBS and ROBERT W. GALLAGHER,

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 030230/2016

FIELDSTONE REALTY, LLC, GIBRALTAR MANAGEMENT
COMPANY, INC. And CARDIOLOGY CONSULTANTS OF
ROCKLAND, P.C.

(Motion # 1)

Defendants.

-----X
Thomas E. Walsh, II, A.J.S.C.

The following papers, numbered 1 to 4, were considered in connection with Defendant CARDIOLOGY CONSULTANTS OF ROCKLAND, P.C. (hereinafter CCOR) Notice of Motion for an Order, (a) pursuant to Civil Practice Law and Rules § 3211(a)(1) dismissing this action as against CCOR because documentary evidence shows Plaintiff's exclusive remedy is Worker's Compensation and/or, (b) pursuant to Civil Practice Law and Rules § 3211(a)(7) dismissing this action as against CCOR because the Complaint shows Plaintiff's exclusive remedy is Worker's Compensation and (c) for such other and further relief as the Court deems just and proper:

| <u>PAPERS</u> | <u>NUMBERED</u> |
|--|-----------------|
| NOTICE OF MOTION/AFFIRMATION OF ERIC DRANOFF, ESQ./ EXHIBITS (A-B) | 1 |
| AFFIRMATION IN OPPOSITION OF HEATHER M. NAPPI, ESQ./ AFFIDAVIT OF LYSA H. JACOBS/EXHIBITS (A-D) | 2 |
| REPLY AFFIRMATION OF ERIC DRANOFF, ESQ./EXHIBIT 1 | 3 |
| LETTER FROM VALEIRE J. CROWN DATED NOVEMBER 28, 2016/MEMORANDUM OF BOARD PANEL DECISION FOR PLAINTIFF'S WORKER'S COMPENSATION CLAIM DATED OCTOBER 27, 2016 | 4 |

Upon a careful and detailed review of the foregoing papers, the Court now rules

as follows:

Plaintiffs filed a Summons with Notice on December 28, 2015 through the NYSCEF system. Plaintiff served a Supplemental Summons and Amended Complaint dated March 4, 2016. Defendant CCOR filed the instant pre-answer motion on June 17, 2016. According to the Amended Complaint Plaintiff LYSA GALLAGHER JACOBS (hereinafter JACOBS) was an employee of Defendant CCOR's at the time of the injury. This instant action arises from injuries suffered by Plaintiff JACOBS on February 10, 2014 at 7:00 a.m. in which she slipped and fell on an icy walkway while entering the employee entrance to CCOR at 12 Liberty Square Stony Point, New York.

Defendant CCOR filed the instant motion to dismiss arguing that documentary evidence and the Complaint demonstrate that the Plaintiff's exclusive remedy in the instant action is Worker's Compensation. Plaintiff's Complaint refers to the Worker's Compensation Board's Decision in which a portion of Plaintiff JACOBS claim was denied. Defendant CCOR has provided a copy of the Worker's Compensation Board's Decision dated February 26, 2016 and argues that the decision along with the statements of Plaintiff in her Complaint support dismissal of the action.

This Court issued a Decision and Order dated November 23, 2016 directing Plaintiff's counsel to provide the decision on the appeal of the Worker's Compensation Board before FRIDAY JANUARY 20, 2017. This Court received a letter dated November 28, 2016 from Plaintiff's counsel, Valerie J. Crown, Esq., which included a Memorandum of Board Panel Decision from the Worker's Compensation Board dated October 27, 2016 in the Matter of LYSA JACOBS (MCB Case # G140 3391).

The basis of Defendant CCOR's motion to dismiss is that Plaintiff JACOBS instant claims are barred by the exclusivity provisions of the Worker's Compensation Law. Defendant asserts that Plaintiff JACOBS cannot avoid applying the exclusivity provisions of the Worker's Compensation Law by claiming a breach of fiduciary duty or based on Defendant CCOR's alleged

misstatement of whether Plaintiff JACOBS claim was covered by Worker's Compensation Law. Based on the exclusivity provisions of the Worker's Compensation Law, Defendant CCOR avers that Plaintiff is mandated to proceed with her claim through the Worker's Compensation Board as it is the exclusive remedy in a situation where an employee is suing an employer for on the job injuries.

In opposition, Plaintiff argues that CCOR breached a fiduciary duty to Plaintiff JACOBS by not submitting an incident report or other documents to the Worker's Compensation Board in a timely fashion and misleading her that her claim was not covered by Workers' Compensation. Plaintiff specifically argues that the Worker's Compensation Law is not Plaintiff JACOBS' sole remedy in this instance since her claim was denied. Further, Plaintiff avers that the injury suffered by Plaintiff occurred as a result of an intentional/deliberate act of CCOR, specifically that Plaintiff JACOBS was told by a supervisor not to file a worker's compensation claim and to submit her claim to the property management company instead.

The exclusivity provision of the Worker's Compensation Law prohibits suing an employer for on-the job injuries. [*North Shore University Hospital at Manhasset v. Coyle*, 820 NYS2d 705, 706 (Dist. Ct. Nassau Cty. 2006)]. An exclusivity provision will not be upheld in a circumstance in which the employer had exclusive possession of the records, did not produce the records and the Plaintiff therefore did not get the opportunity to proceed with a Worker's Compensation claim. [*Id.*]. Determinations made by the Worker's Compensation Board as to questions of fact are final. [*Worker's Compensation Law* §§ 20, 23; *O'Rourke v. Long*, 41 NY2d 219 (1976)]. Specifically, "[w]here workmen's compensation provides a remedy, the remedy that it provides, save for the rare case is exclusive." [*O'Rourke*, 41 NY2d at 221]. Further, findings are final due to "settled principles of res judicata," which apply to administrative hearings and determinations when an agency involved is acting in a quasi-judicial capacity. [*Werner v. State of New York*, 53 NY2d 346 (1981); *Samba v. Delligard*, 116 AD2d 563 (2d Dept 1986)].

Plaintiff, albeit eighteen (18) months after the alleged incident, made an application based on Worker's Compensation in relation to the alleged fall. Defendant CCOR challenged the application stating they did not believe that the accident was one covered by Worker's Compensation, in that Plaintiff JACOBS was outside working and was just arriving at the rear employee entrance to CCOR's office. The Worker's Compensation Board in its February 2016 decision found after testimony from Plaintiff JACOBS, a CCOR employee witness, Dr. Semble (Plaintiff's doctor) and the Independent Medical Examiner (Dr. Krishnamurthy), that Plaintiff JACOBS sustained injuries that were from a work related accident on February 10, 2014. Further, the decision found that since she was not instructed to stop working by a physician, that other issues had caused her to leave her employ with CCOR, that she had intervening medical conditions which may have caused her to leave work, and Dr. Semble's testimony stating that the injuries were originally not significant and the Plaintiff did not return for treatment to him for almost one year after he first saw her that no award could be granted as to casually related lost time. Plaintiff alleged in her opposition that she has appealed the aforementioned decision and that appeal remains pending at this time.

The Court has received and reviewed the Memorandum of Board Panel Decision of the Worker's Compensation Board in the matter of Defendant LYSA JACOBS issued October 27, 2016. The panel decision indicates that Plaintiff JACOBS and the "carrier" (the insurance carrier for CCOR) both sought review of the Worker's Compensation Law Judge's (hereinafter WCLJ) Reserved Decision filed on February 26, 2016. Within the decision the panel indicates that they were presented with three questions for administrative review: (1) [w]hether the establishment of the claim for a right elbow injury should be rescinded, (2) [w]hether additional development of the record was necessary before the WCLJ ruled on the issue of awards for casually related lost time and (3) [w]hether the claimant should have been found to have causally related lost time, and should have received wage replacement benefits, for the period commencing on May 29, 2014. Subsequent to the review by the panel, they modified the

WCLJ's Reserved Decision filed on February 26, 2016 (1) rescinding the establishment of a claim for a right elbow injury, (2) upholding the finding of no causally related lost time or entitlement to loss of wage benefits found without prejudice pending Plaintiff JACOBS' submission of additional medical evidence supporting a finding of causal relationship and (3) finding that the issue of voluntary removal from the labor market and attachment have not been raised or litigated despite them being "tangentially" discussed in the Reserved Decision. Further, the panel decision reflects that "[n]o further action is planned by the Board at this time." [Memorandum of Board Panel Decision, p. 8].

A determination of whether a case is truly closed for purposes of Worker's Compensation is an issue of fact to be resolved by the Board, and its determination will not be disturbed if supported by substantial evidence. [*Matter of Jones v. HSBC*, 304 AD2d 864 (3d Dept 2003)]. The decision of the Worker's Compensation Board is final on all questions within their jurisdiction unless the decision is reversed or modified on appeal. [*Workers Compensation Law* § 23; *O'Rourke*, 41 NY2d at 227]. In the instant action the February 26, 2016 Reserved Decision of the WCLJ was marked final, but Plaintiff took an appeal. Subsequently, in October 2016 a Worker's Compensation Board Panel issued a decision on the appeal, modified the aforementioned Reserved Decision and clearly stated that there was no further action pending. Therefore, the Memorandum of Board panel Decision submitted by Plaintiff's counsel on November 28, 2016 demonstrates that Plaintiff's Worker's Compensation matter is resolved.

On a motion to dismiss for failure to state a cause of action [§ 3211(a)(7)], the Court initially must accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits. [*Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 318 (1995); *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *People v. New York City Transit Authority*, 59 N.Y.2d 343, 348 (1983); *Morone v. Morone*, 50 N.Y.2d 481 (1980); *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 274-275 (1977); *Cavanaugh v. Doherty*, 243

A.D.2d 92, 98 (3d Dept. 1989): Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821 (2d Dept. 1984)]. The complaint must be given a liberal construction and will be deemed to allege whatever cause of action can be implied by fair and reasonable reading of same. [Shields v. School of Law of Hofstra University, 77 A.D.2d 867 (2d Dept. 1980); Penato v. George, 52 A.D.2d 939 (2d Dept. 1976)].

On the record before the Court, and in light of the Memorandum of Board Panel Decision issued on October 27, 2016 in the regard to the matter of Plaintiff LYSA JACOBS, WCB Case # G140 3391, the Defendant CCOR's Motion to Dismiss is granted. The appeal taken by Plaintiff JACOBS was heard by the Worker's Compensation Board Panel and a decision was issued making a final determination of Plaintiff's Worker's Compensation matter. Plaintiff's instant action against CCOR is barred by the exclusivity provisions of Worker's Compensation Law. Based on the Worker's Compensation Panel Decision, Plaintiff has not demonstrated that she was prevented in proceeding with her Worker's Compensation claim. Further, based on the October 2016 decision on Plaintiff's appeal the panel determined that the Plaintiff's own actions prevented a finding of causal relationship between her injuries and the accident, not the actions of CCOR. Since determinations made by the Worker's Compensation Board are final as to questions of fact, this Court is bound by the October 2016 panel decision and Plaintiff's instant action against CCOR must be dismissed.

Accordingly, it is hereby

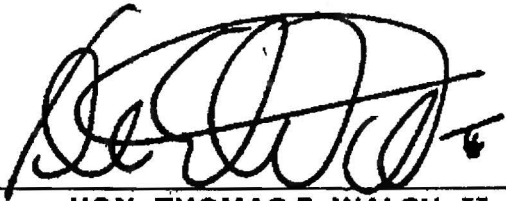
ORDERED that Defendant CARDIOLOGY CONSULTANTS OF ROCKLAND P.C.'s Notice of Motion to dismiss (Motion # 1) is granted in its entirety; and it is further

ORDERED that the matter is to be marked disposed as to Defendant CARDIOLOGY CONSULTANTS OF ROCKLAND P.C only; and it is further

ORDERED that the remaining parties are to appear for a status conference on **FRIDAY JANUARY 19, 2017 at 9:30 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York
~~November~~____, 2016
DEC. 12



HON. THOMAS E. WALSH, II
Acting Justice of the Supreme Court

TO:

by e-filing -

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