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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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PILAR RAMIREZ, YEDMY BATISTA PERALTA and DELIO POLANCO, as administrator of the estate of PAULINA CORTORREAL HICIANO,

Plaintiffs,

- against -

JOSE ELIAS-TEJADA, MICHAEL P. THOMAS and PAUL CHARLES YOVINO,

Defendants.

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DECISION AND ORDER

Action #1

Index No. 300174/2012

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JOSE A. CORCHADO,

Plaintiff,

- against -

MICHAEL P. THOMAS and PAUL CHARLES YOVINO,

Defendants.

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Action #2

Index No. 300885/2013

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PAUL CHARLES YOVINO,

Third-Party Plaintiff,

- against -

JOSE ELIAS-TEJADA,

Third-Party Defendant.

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Third-Party Index No. 83861/2013

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JOSE ELIAS TEJADA,

Plaintiff,

- against -

MICHAEL P. THOMAS and PAUL CHARLES YOVINO,

Defendants.

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Action #3

Index No. 21702/2013E

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated November 30, 2016 of defendant Jose Elias-Tejada and the affirmation and exhibits submitted in support thereof; the affirmation in opposition dated February

15, 2017 of plaintiff Delio Polanco and the exhibits submitted therewith; movant's affirmation in reply dated March 10, 2017 and the exhibit submitted therewith; the affirmation in opposition dated March 15, 2017 of Pilar Ramirez and Yedmy Batista Peralta and the exhibit submitted therewith; and due deliberation; the court finds:

Defendant Jose Elias-Tejada ("Tejada") moves for leave to amend his answers to assert the exclusivity of Workers' Compensation Law §§ 11, 29 on the ground that he and the plaintiffs, all of whom were passengers in the vehicle Tejada operated, were fellow employees in the course of employment. It is undisputed that all parties worked for the same employer and were on their way to work at the time of the accident.

A meritorious amendment, even if sought after the filing of the note of issue, may be permitted in the absence of a claim of prejudice or surprise. *See Lettieri v. Allen*, 59 A.D.3d 202, 873 N.Y.S.2d 39 (1st Dep't 2009); *Byrne v. Fordham University*, 118 A.D.2d 525, 500 N.Y.S.2d 253 (1st Dep't 1986). Despite the laxity of CPLR 3025(b), the court may examine the merit of a proposed amendment in the interest of the conservation of judicial resources, see *Non-Linear Trading Co. v. Braddis Assocs.*, 243 A.D.2d 107, 675 N.Y.S.2d 5 (1st Dep't 1998), and the amendment may be denied in the absence of a demonstration of merit, s*ee Eighth Ave. Garage Corp. v. H.K.L. Realty Corp.*, 60 A.D.3d 404, 875 N.Y.S.2d 8 (1st Dep't 2009), *lv dismissed*, 12 N.Y.3d 880, 910 N.E.2d 1003, 883 N.Y.S.2d 174 (2009); *American Theatre for the Performing Arts, Inc. v. Consolidated Credit Corp.*, 45 A.D.3d 506, 846 N.Y.S.2d 60 (1st Dep't 2007).

Unless the "alleged insufficiency or lack of merit is clear and free from doubt," the proposed amendment should be permitted. *Miller v. Staples the Off. Superstore E., Inc.*, 52 A.D.3d 309, 313, 860 N.Y.S.2d 51, 55 (1st Dep't 2008). The proponent of the motion need not establish the defense as on a motion for summary judgment; the amendment may be permitted even where questions as to its precise application remain. *See e.g. Ifafore v. Lebron*, 111 A.D.3d 570, 976 N.Y.S.2d 44 (1st

Dep't 2013); *Babcock v. Mann*, 167 A.D.2d 572, 563 N.Y.S.2d 204 (3d Dep't 1990).

"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." *Macchirole v. Giamboi*, 97 N.Y.2d 147, 150, 762 N.E.2d 346, 348, 736 N.Y.S.2d 660, 662 (2001); *see* Worker's Compensation Law § 29(6). In such a situation, an injured employee's suit against a co-employee tortfeasor is barred. *See Braham v. Country Life Realty Co.*, 9 Misc.3d 88, 801 N.Y.S.2d 110 (App Term 2d Dep't 2005); *Silva v. HRCF-LDR Lexington LLC*, 23 Misc.3d 1116(A), 2009 NY Slip Op 50787(U) (Sup Ct N.Y. County Apr. 20, 2009). "An employee's acceptance of workers' compensation payments does not alone trigger the statute's exclusivity provision. Instead, the Workers' Compensation Law immunizes a fellow employee from suit, and becomes a plaintiff's exclusive remedy, only when both plaintiff and defendant are in the same employ." *Id.*, 97 N.Y.2d at 149-50, 762 N.E.2d at 348, 736 N.Y.S.2d at 662. It is not the application for or receipt of benefits but the "availability" of benefits that is determinative. *See* Workers' Compensation Law § 29(6).

Ramirez, Peralta and Delio Polanco all argue that the motion is inexcusably late; however, they do not claim any prejudice or surprise, and it is apparent that the topic has been explored throughout discovery. *See Babcock*, *supra*. No party contests that Tejada, Hiciano, Peralta, Ramirez and Corchado were co-employees. *See Alatorre v. Hee Ju Chun*, 44 A.D.3d 596, 848 N.Y.S.2d 174 (2d Dep't 2007). "The affirmative defense of workers' compensation is waived 'only by a defendant ignoring the issue to the point of final disposition itself.'" *Raptis v. Juda Constr., Ltd.*, 26 A.D.3d 153, 155, 810 N.Y.S.2d 22, 25 (1st Dep't), *lv denied*, 7 N.Y.3d 716, 859 N.E.2d 921, 826 N.Y.S.2d 181 (2006). While plaintiff filed a note of issue in October 2016, discovery was not certified complete and the action ready for trial until March 20, 2017. Plaintiffs have not claimed that they would be hampered in their preparation for trial or in their response to the defense.

Polanco, Ramirez and Peralta also argue that there is no proof that they were "on the job" and argue that unlike the other plaintiffs, whose transport was arranged by the employer, Hiciano and Peralta arranged such transport for their own convenience and paid Tejada themselves. Tejada testified that his employer requested that he drive the other employees to and from work and that the employer reimbursed him for tolls and mileage. Corchado testified that Tejada was reimbursed to pick "all of us" up. Polanco concedes that Tejada was in the scope of his employment.

Although the plaintiffs attempt to differentiate between "key" and "rank and file" employees, the compensation carrier's finding that Ramirez's injuries were sustained in the course and scope of her employment was not made dependent upon such a differentiation; the conclusion was made upon the finding that "she was deviating from her normally assigned store location and should be afforded portal to portal coverage." Ramirez testified that Corchado normally worked at her location and the store to which they were going was not their regular assignment; accordingly, the rationale available to Ramirez may have applied to Corchado as well in the determination of availability of Worker's Compensation benefits.

Polanco submitted Peralta's affidavit in which she averred that she arranged for transportation to the store directly with Tejada for convenience and that he "required" her to pay him to do so. Peralta's affidavit, however, also established that the store to which she was being transported was not her regular assignment; accordingly, the rationale available to Ramirez may have applied to Peralta as well. Peralta's claim that she was told she was ineligible for Worker's Compensation benefits is unsupported hearsay. Polanco submitted a similar affidavit - that Hiciano's arrangement with Tejada was for personal convenience, that she paid Tejada and was not reimbursed. It is unclear from the context of the affidavit, however, whether Hiciano was permanently transferred to the new store or was temporarily reassigned to the new store from her regular assignment. Accordingly, the rationale for Ramirez's collection of benefits could apply to

Hiciano. The closure of Hiciano's Worker's Compensation file was not as a result of a determination on the merits but rather the lack of submission of medical information despite request and the lack of an application to process a claim.

That plaintiffs were not actually working at their place of business at the time of accident is not determinative of the availability of benefits; portal-to-portal coverage may apply during a worker's transit when, as here, a worker goes to an alternate work location at the employer's request. *See Charak v. Leddy*, 23 A.D.2d 437, 261 N.Y.S.2d 486 (3d Dep't 1965); *see also Solomon v. Russo*, 20 N.Y.2d 688, 229 N.E.2d 231, 282 N.Y.S.2d 554 (1967). The proof suggests that all passengers were being transported to an alternate work location for a new store's grand opening. Thus, as the proposed amendment is not entirely without merit, it may be allowed.

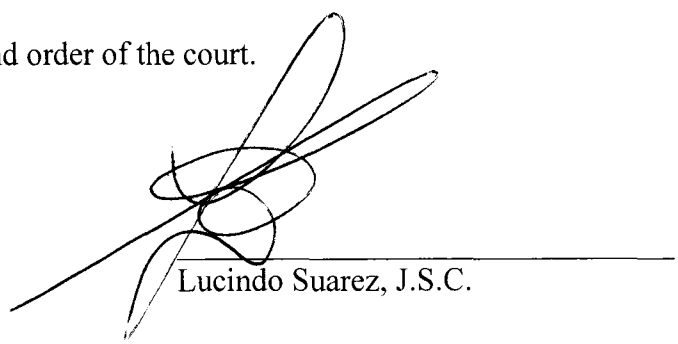
Accordingly, it is

ORDERED, that the motion of defendant and third-party defendant Jose Elias-Tejada to amend his answers in the actions entitled *Ramirez v. Elias-Tejada*, Index No. 300174/2012 and *Corchado v. Thomas*, Index No. 300885/2013 to assert an affirmative defense premised upon Worker's Compensation Law §§ 11, 29 is granted; and it is further

ORDERED, that the amended answers appended to the motion papers at Exhibit S are deemed served upon the parties.

This constitutes the decision and order of the court.

Dated: April 26, 2017



Lucindo Suarez, J.S.C.