Mack v City of New York
2017 NY Slip Op 31100(U)
May 18, 2017
Supreme Court, New York County
Docket Number: 452586/15
Judge: William Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.W. FRANC PERRY, J.S.C. PART 5

IVY J. MACK,

Plaintiff,

-against-

THE CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Defendants

INDEX NO. 452586/15

MOT. DATE May 2, 2017
MOT. SEQ. NO. 001

The following papers were read on this Motion to Amend City's Answer and Dismiss the Complaint

Notice of Motion/ Affidavit —	Exhibits A through H	ECFS DOC No(s). 1-19
Answering Affidavit in Opposition	Exhibits I through 8	ECFS DOC No(s). 1-21
Reply Affidavit	Exhibit I	ECFS DOC No(s). 1-8

This is a personal injury action arising out of a trip and fall that occurred on July 23, 2014 when Plaintiff tripped on raised carpet while entering her place of employment at 10 Hogan Place, New York, New York. Defendants the City of New York and New York City Department of Citywide Administrative Services, (hereinafter Defendants and/or City) move pursuant to CPLR §3025, permitting the City to amend its Answer to assert a defense that Plaintiff's action against the City is barred by the Workers' Compensation Law; and pursuant to CPLR § 3211(a)(7), dismissing the complaint for failure to state a cause of action.

Factual/Procedural Background and Contentions

Plaintiff filed a Notice of Claim against the City on or about October 15, 2014. On or about February 15, 2015, Plaintiff commenced this action by filing a Summons and Verified Complaint. The City served an Answer on or about March 4, 2015. Plaintiff served a Verified Bill of Particulars and a Supplemental Bill of Particulars and the parties thereafter engaged in discovery and conducted depositions. The City now moves to amend its complaint, *nunc pro tunc,* to assert an affirmative defense that "this action is barred by reason of the fact that Workers' Compensation is the exclusive remedy of the plaintiff" and moves to dismiss the complaint pursuant to CPLR § 3211(a)(7), for failure to state a claim.

Plaintiff alleges that defendants were negligent in placing a taped down carpet/rug at the entranceway at 10 Hogan Place and that it constituted a "defective, dangerous, hazardous and unsafe condition" that caused plaintiff to trip and fall, sustaining serious injuries. Plaintiff alleges that she was engaged in her employment as a secretary with the New York County District Attorney's Office, Special Victim's Bureau, at the time of the incident.

According to plaintiff's deposition testimony, she tripped and fell forward, extending her arms to brace her fall and struck her elbows on the stairs. She was diagnosed with an elbow injury and subsequently underwent surgery for an open reduction of the fractures. Plaintiff remained out of work until January 19, 2016. Plaintiff filed a workers' compensation claim for the above described incident and her claim was approved.

In her Supplemental Bill of Particulars, plaintiff provided information concerning her employment and the workers' compensation benefits she received, noting that, "plaintiff received her regular and customary pay under her accrued work benefits from the accident date, ... On November 6, 2015, plaintiff was awarded indemnity benefits by Workers' Compensation at a rate of $808.65 per week until her return to work on January 19, 2016." (Gibek Aff., Ex. C).

On October 23, 2015 at a hearing held before Workers' Compensation Law Judge Bernard Twomey, he found that plaintiff sustained a work related injury and authorized benefits. (Gibek Aff., Ex. G). On November 30, 2015, Judge Twomey rendered the following decision and findings; "AWARD: The employer or insurance carrier is directed to pay the following awards, less payments already made by the employer or carrier, for the periods indicated below, unless employer or carrier files an application within 30 days after the date on which the decision was duly filed and served." (Id.). Based on the record before the court, no appeal was taken by plaintiff's employer.

Finally, in support of its motion to amend and dismiss, defendants submit the Affidavit of John Sweeney, who confirms that after conducting a search for claims filed by plaintiff, IVY J. MACK, pertaining to an on the job accident that occurred on July 23, 2014, the Workers' Compensation benefits award was accepted by the City and that the City has expended approximately $37,000 in wage replacement and medical benefits as of November 7, 2016. In addition, Mr. Sweeney, Deputy Division Chief of the City's Workers' Compensation Division, states under oath that "employees of the New York County District Attorney's Office, including secretaries, are City employees who are covered by the City of New York under the Workers' Compensation Law. This is the policy now and on July 23, 2014, at the time of the incident." (Gibek Aff., Ex. H).

The City now moves to amend its Answer to assert a defense that Workers' Compensation is plaintiff's sole remedy and also moves to dismiss the complaint on the basis of said defense. In opposition, plaintiff contends that she was not an employee of the City, but rather was employed by the New York County District Attorney, and therefore this action is not barred by plaintiff's workers' compensation claim and the City's motion to amend its complaint, *nunc pro tunc*, should be denied.

Discussion of Legal Standard and Analysis

1. City's Motion to Amend its Answer

It is well-settled that leave to amend a pleading pursuant to CPLR §3025(b) should be freely granted absent prejudice or surprise to the opposing party resulting directly from the delay, or where the proposed defense lacks merit. See, e.g., *Thomas Crimmins Contracting Co. v. City of New York*, 74 NY2d 166, 170 (1989); *Edenwald Contracting Co. v City of New York*, 60 NY2d 957,959 (1983); *Cseh v New York Citv Transit Auth.*, 240 AD2d 270, 271 (1st Dept. 1997); *Barbour v. Hospital for Special Surgery*, 169 AD 2d 385, 386 (1st Dept. 1991). *Murray v. City of New York*, 43 NY2d 400, 405 (1977) (leave to amend pleading can be granted during a trial).

Mere lateness of a request to amend is not a barrier to the amendment in the absence of prejudice to the plaintiff. *Edenwald Contracting Co. v. City of New York*, 60 NY2d 957,959 (1983); *McCaskey, Davis and Associates Inc. v. NYC Health and Hospitals Corp.*, 59 NY2d 755,757 (1983); *Fahey v. County of Ontario*, 44 NY2d 934, 935 (1978). The affirmative defense is waived "only by a defendant ignoring the issue to the point of final disposition itself". *Murray*, 43 NY2d at 407. The fact that a proposed amendment may defeat the plaintiff's cause of action is insufficient to deny leave to amend. *DeGradi v. Coney Island Medical Group*, 172 AD2d 583 (2d Dept. 1991); *Burak v. Burak*, 122 AD2d 101, 103 (2d Dept. 1986).

A party is not prejudiced by allowing the amendment of an answer to correctly assert a defense pursuant to applicable law that barred the plaintiff from ever bringing the action. *Myung Soon Kim v. Hyunchul Chong*, 8 AD3d 456 (2d Dept. 2004); *Quiros v. Polow*, 735 AD2d 697, 699 (2d Dept. 1987). Absent a showing of prejudice, a defendant must be permitted to assert a workers' compensation defense. *Murray*, 43 NY2d at 400; *Carceras v. Zorbas*, 148 AD2d 339 (1st Dept.), *affd.* 74 NY2d 884 (1989). [Plaintiff required to establish prejudice as a result of defendant's failure to timely assert defense of workers' compensation].

Given the important policy considerations underlying the exclusivity of the remedy under the workers' compensation law, leave to amend an answer to assert such a defense should be freely permitted. *Jones v. R.S.R. Com.*, 135 AD2d 900, 901 (3rd Dept. 1987). The Court of Appeals in *Carceras* held that the plaintiff could not "claim prejudice or surprise because he was aware of his employment status from the outset and had received workers' compensation benefits." *Carceras*. 74 NY2d at 885. Additionally, the court in the interest of judicial economy, and particularly in view of the contingent motion to dismiss, is required to review the relative merits of the proposed amendment. *Vaughn v. New York*, 108 Misc2d 994, 995 *affd* 89 AD2d 944 (1st Dept. 1982), citing, *East Asiatic Co. v. Corash*, 34 AD2d 432.

The Court of Appeals reiterated a trial court's broad discretion to grant a motion to amend a pleading in *Kimso Apts., LLC v. Gandhi*, 24 NY3d 403, 411 (2014). The Court confirmed the wide latitude afforded a court reviewing such motions, noting: "Courts are given "considerable latitude in exercising their discretion, which may be upset by us only for abuse as a matter of law" (*Matter of Von Bulow*, 63 NY2d 221, 224, 470 NE2d 866, 481 NYS2d 67 [1984]; *see also Murray*, 43 NY2d at 405 [courts considering motions to conform pleadings pursuant to CPLR 3025 are afforded "the widest possible latitude" in allowing such an amendment]). Nevertheless, we have found such an abuse of discretion where the Appellate Division reversed a trial court's grant of an amendment and the record established that the opposing party suffered "no operative prejudice" as a result of the mere omission to plead a defense (*id.*).". *Kimso*, 24 NY3d at 411.

Here, the City argues that plaintiff cannot establish prejudice as it is no surprise to her that she filed for and received workers' compensation benefits for the exact incident that forms the basis for her complaint. Plaintiff argues prejudice and surprise in opposing the City's motion to amend, claiming that she was employed by the District Attorney's Office and therefore had no reason to believe that such a claim could be made.

The identical arguments were raised by the plaintiff in *Williams v. City of New York*, 2008 NY Misc. LEXIS 10956 (NY County 2008), and were rejected by the court noting that "plaintiff would not be prejudiced by the amendment as he was aware since the commencement of his lawsuit that he was entitled to claim Worker's Compensation benefits. Indeed, plaintiff took advantage of those benefits by filing such a claim." *Williams v. City of New York*, presented the same facts at issue here; plaintiff worked for the New York County District Attorney's Office and tripped and fell during his work hours

while he was walking back to his office. *Id.* In allowing the City to amend its answer to assert the defense of workers' compensation and granting the City summary judgment on the basis of that defense, the court found that plaintiff could not establish prejudice because he filed a claim for workers' compensation benefits, took advantage of those benefits and "yet he consciously chose to pursue litigation against the City." *Id.*

Similarly, here, based on the record, it is clear that there is "no operative prejudice" to plaintiff, resulting from the City's omission to plead a Workers' Compensation defense. The City has demonstrated that plaintiff would not be prejudiced by the amendment as she was aware since the commencement of this lawsuit that she was entitled to claim workers' compensation benefits by filing such a claim, yet she "consciously chose to pursue litigation against the City." *Williams v. City of New York,* 2008 NY Misc. LEXIS 10956.

Perhaps realizing that she cannot demonstrate prejudice, plaintiff's opposition appears to rest mainly on her contention that the defense sought to be asserted is "palpably insufficient as a matter of law" is "totally devoid of merit" and thus should be denied. For the reasons that follow, the court finds that the City has demonstrated that its proposed workers' compensation defense has merit and plaintiff has failed to demonstrate any prejudice. Thus, the court grants the City's motion to amend its answer, *nunc pro tunc,* and permits the City to assert a workers' compensation defense. *Carceras v. Zorbas,* 148 AD2d 339 (1st Dept.), *affd.* 74 NY2d 884 (1989).

2. City's Motion to Dismiss

On a motion to dismiss pursuant to CPLR §3211, the Court must accept as true, the facts alleged in the pleading and accord the party making the allegations "the benefit of every possible inference" determining only "whether the facts as alleged fit within any cognizable legal theory." *See. J.P. Morgan Securities Inc. V. Vigilant Ins. Co.,* 21 NY3d 324, 334 (2013); *Nonnon v. City of New York,* 9 NY3d 825, 827 (2007). The Court is not to decide whether the allegations can ultimately be proven in determining the motion, as the resolution of factual issues is inappropriate on a motion pursuant to CPLR §3211. *J.P. Morgan v. Vigilant Ins. Co.,* supra, 21 NY3d at 334. However, where the allegations consist of factual claims that are flatly contradicted by the documentary evidence, the facts pleaded in the compliant will not be presumed true or accorded favorable inferences. *Ullmann v. Norma Kamali, Inc.,* 207 AD2d 691 (1st Dept. 1994).

The City maintains that workers' compensation is the plaintiff's exclusive remedy. The City argues that plaintiff was acting within the scope of her employment when the incident occurred and that plaintiff was employed by the City and received benefits under the workers' compensation law; thus, the City claims that the instant action is barred and the complaint must be dismissed. In support of its motion to dismiss, the City relies on the decision issued by the Workers' Compensation Board authorizing plaintiff's benefits, various sections of the New York City Charter and Administrative Code and the Affidavit of John Sweeney, Deputy Division Chief of the City's Workers' Compensation Division, who states under oath that "employees of the New York County District Attorney's Office, including secretaries, are City employees who are covered by the City of New York under the Workers' Compensation Law. This is the policy now and on July 23, 2014, at the time of the incident." (Gibek Aff., Exs. G and H).

Plaintiff argues, however, that the City was not her employer and claims that all indicia of employment demonstrate that the District Attorney's office employed her, not the City. Specifically, plaintiff argues that because the District Attorney's office determined her rate of pay, hired her, had the exclusive right to discipline or terminate her and determined her work hours and responsibilities, the evidentiary record

proves that the District Attorney is her employer. As such, plaintiff claims that there is no competent evidence to suggest that the City was her employer.

Additionally, plaintiff argues that the mere acceptance of compensation benefits paid by the City on behalf of the District Attorney's office does not permit the City to claim immunity form suit under the Workers' Compensation law. In support of her argument, plaintiff relies on the holding in *Vaughn v. City of New York*, 108 Misc2d 994, *affd* 89 AD2d 944 (1st Dept. 1982). *Vaughn*, however, is inapposite and has no relevance to the issues presented by plaintiff here, because Vaughn was an employee of the New York City Health and Hospitals Corporation, (HHC), not an employee of the City, thus, her lawsuit against the City was permitted to proceed.

In *Vaughn v. City of New York*, plaintiff was an employee of HHC when she was struck by a portion of falling facade from Bellevue Hospital Nurse's Residence, a building allegedly owned and operated by the City. On the eve of trial, the City filed a motion for leave to amend its answer to assert the affirmative defense of workers' compensation and to dismiss the complaint. In denying its motion, the trial court reviewed numerous factors, which are not present here, to support its conclusion that HHC was intended to function as an independent entity and was "created in order to transfer from the City to the new corporation the operating responsibility for the municipal health and medical facilities in New York City." (*Id.*, 108 Misc2d at 997.

Plaintiff's reliance on *Vaughn v. City of New York*, is misplaced due to the significant differences between HHC and the New York County District Attorney's Office. Unlike HHC, the District Attorney's Office is not an incorporated entity, it is a non-suable entity and serves as an agency of the City of New York. Additionally, the Office of Corporation Counsel, which represents the City of New York and its municipal agencies, represents the New York County District Attorney's Office, as an agency of the City.[1]

Moreover, contrary to plaintiff's contention, the New York County District Attorney's Office is considered to be a local agency and not a state agency. *See, In re AJ Contracting Co., Inc. v. City of New York, et al.*, 300 B.R.182 (2003). [The Court held that the New York County District Attorney's Office was not entitled to Eleventh Amendment immunity because it is a local agency, not a state agency and therefore it was not acting as an arm of the state.] In reaching its conclusion, the Court in *AJ Contracting Co., Inc. v. City of New York*, reasoned that "the only specific reference in the Constitution to the nature of the office of District Attorney as State or local is phrased in terms implicitly recognizing its character as *local, or county, in nature. Id.* at 197.

Plaintiff's assertion that Article XIII, §13 of the New York State Constitution supports her argument that the New York District Attorney's Office is a state agency, is incorrect. Indeed, the Court's holding in *AJ Contracting Co., Inc. v. City of New York*, and the sections of the New York State Constitution cited therein, make it clear that the New York County District Attorney's Office is a local agency and it therefore follows that the people who work in that Office are considered employees of the City, not the State. *See, e.g., Fisher v. State of New York*, 10 NY2d 60 (1961) (holding that Assistant District Attorneys are local officers of the county in which they serve.); *Morris v. City of New York*, 198 AD2nd 35 (1st Dept. 1993) (holding that ADA's are local officers and that the City of New York can be held liable for torts committed by ADA's).

[1] NYC Administrative Code §7-110 provides that "the district attorney and the employees of his or her office in each of the counties with the city shall be entitled to legal representation by the corporation counsel and indemnification by the city pursuant to the provisions of, and subject to the conditions, procedures and limitations contained in section fifty-k of the general municipal law.

Plaintiff's reliance on the "indicia of employment" to sustain her claim that she is not a City employee for purposes of workers' compensation being her exclusive remedy, ignores an important distinction that formed the basis of the court's decision and analysis in *Vaughn v. City of New York.* Integral to the court's decision in *Vaughn,* was the independent character of HHC as demonstrated by the statute which declared it to be a "public benefit corporation". 108 Misc.2d at 997. No such declaration can be attributed to the District Attorney's Office. The New York County District Attorney's Office is not an incorporated entity and has no independent legal existence. In that regard, plaintiff here is more akin to the plaintiff in *Davis v. City of New York,* 10 Misc3d 234, *affd* 35 AD2d 240 (1st Dept. 2006).

In *Davis v. City of New York,* the court granted the City's motion to dismiss finding that City council members were City employees covered by workers' compensation, and thus, their surviving dependents were precluded from suing the City in tort under the exclusivity provisions of the Workers' Compensation Law §§11 and 29. The plaintiff in *Davis*, also cited *Vaughn v. City of New York,* in opposition to the City's motion to dismiss. The trial court in *Davis* found that the holding in *Vaughn,* "has no relevance to this matter" noting that "HHC was created by legislation specifically declaring it a separate 'body corporate and politic constituting a public benefit corporation'." 10 Misc3d at 238.

The *Davis* court rejected the argument, also made by plaintiff here, that the City acted merely as a workers' compensation carrier on behalf of the City Council, and not as decedent's employer. *Id.* Notably, the *Davis* court relied on the Workers' Compensation Board's decision and the affidavit of John Sweeney, Chief of the City's Workers' Compensation Division, which stated that the City "is a self-insured employer for payment of Workers' Compensation benefits, but is included within the definition of an 'insurance carrier' under Workers' Compensation Law §2 (12)." *Id.* at 238. The court found that workers' compensation provided the exclusive remedy for plaintiff, and granted the City's motion to dismiss, noting that "plaintiff cannot, as a threshold matter, show that this claim was not covered under the Workers' Compensation Law, [therefore] the complaint must be dismissed for failure to state a claim." *Id.* at 239.

Similarly, here, in seeking dismissal of the complaint, the City relies on documentary evidence confirming that plaintiff sustained a work related injury and on November 30, 2015 was awarded workers' compensation benefits. (Gibek Aff., Ex. G). The City has also submitted the Affidavit of John Sweeney to support its contention that plaintiff's claim for workers' compensation benefits with the City of New York was accepted by the City. (Gibek Aff., Ex. H). Mr. Sweeney's Affidavit also establishes that "employees of the New York County District Attorney's Office, including secretaries, are City employees who are covered by the City of New York under the Workers' Compensation Law." (Gibek Aff., Ex. H). The court finds plaintiff's attempts to cast Mr. Sweeney's Affidavit as "unsupported" and "self-serving", to be wholly without merit. To the contrary, the City has adequately demonstrated that plaintiff's employment as a secretary at the New York County District Attorney's Office serves as employment with the City and as such plaintiff is covered by the City under the workers' compensation law. Plaintiff has not offered any evidence to contradict Mr. Sweeney's affidavit or to demonstrate that for purposes of workers' compensation, the City is not plaintiff's employer.

Contrary to plaintiff's assertion, the City has met its burden, offering competent evidence to demonstrate that the City was plaintiff's employer for purposes of resolving the instant motion. The court finds that plaintiff's allegations consist of factual claims that are flatly contradicted by the documentary evidence, and thus, the facts pleaded in the compliant will not be presumed true or accorded favorable inferences. *Ullmann v. Norma Kamali, Inc.*, 207 AD2d 691 (1st Dept. 1994). Since plaintiff cannot, as a threshold matter, show that her claim was not covered under the Workers' Compensation law, the complaint must be dismissed for failure to state a claim. Plaintiff's recovery is thus limited to the award she received from the Workers' Compensation Board. *See. Davis v. City of New York,* 10 Misc3d 234, *affd* 35 AD2d 240 (1st Dept. 2006); *Williams v. City of New York,* 2008 NY Misc. LEXIS 10956.

All other arguments asserted by plaintiff have been considered by the court and are found to be without merit.

Conclusion

Defendants' motion to amend its answer, *nunc pro tunc*, to assert the affirmative defense of workers' compensation is granted. Moreover, the Court finds that Defendants have met their burden demonstrating that they are entitled to dismissal of the complaint. The record before the Court establishes that plaintiff was an employee of the City and received workers' compensation benefits for the injuries she sustained when she tripped and fell entering her place of employment. Plaintiff cannot, as a threshold matter, demonstrate that her claim was not covered under the Workers' Compensation Law. Accordingly, Defendants' motion is granted in its entirety, and the complaint is dismissed for failure to state a claim.

ORDERED, that Defendants', The City of New York and New York City Department of Citywide Administrative Services, motion to amend its answer is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served *nunc pro tunc* as of the date of the within motion; and it is further

ORDERED, that Defendants' motion to dismiss the complaint is granted, and the complaint is dismissed in its entirety with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

SO ORDERED:

Dated: May 18, 2017
New York, New York

HON.W. FRANC PERRY, J.S.C.

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**