Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Leonard Livote IA Part 33
Acting Justice

x

Michael Denisco,

Plaintiff,

- against -

405 LEXINGTON AVENUE LLC, TS 405 LEXINGTON OWNER, / L.L.C., TISHMAN SPEYER PROPERTIES, INC., CLUNE CONSTRUCTION COMPANY, L.P. and DFL INTERIORS GROUP, g LLC.,

Defendants.

x

CLUNE CONSTRUCTION COMPANY, g L.P.,

Third-Party Plaintiff,

- against -

DFL INTERIORS, INC.,

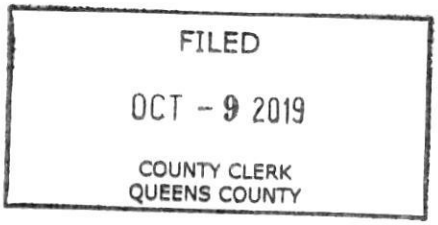
Third- Party Defendant.

x

Index Number 712627/2016

Motion Date March 5, 2019

Motion Seq. Nos. 9-11



The following papers read on these separate motions by defendant/third-party plaintiff Clune Construction Company, L.P. (Clune), third-party defendant DFL Interiors Inc. (DFL), and defendants TS 405 Lexington Owner, L.L.C. and Tishman Speyer Properties, Inc. (the Tishman Owners, collectively) for summary judgment dismissing the complaint under the Labor Law; and a cross motion by plaintiff to consolidate or join this action with another matter pending in Supreme Court, Queens Court, captioned Denisco v Uysal, et al., index no. 708495/2018 (the Malpractice Action).

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	EF 155-157, 165-175,

192-202
Notice of Cross Motion - Affidavits - Exhibits.. EF 158-159
Answering Affidavits - Exhibits..... EF 160-164,
177-189,
205-206
Reply Affidavits..... EF 176, 203,
207-211

Upon the foregoing papers it is ordered that these motions and this cross motion are determined as follows:

In this action, plaintiff alleges that he sustained personal injuries on July 30, 2015 while working for DFL at a construction site owned by the Tishman Owners, due to the alleged negligence of another subcontractor, Clune. According to plaintiff, he was injured while climbing a ladder to perform sheet rock framing work. He claims he fell from the ladder when it either moved or shifted, causing him to hit his head twice, first on an exposed pipe, then on a protruding sprinkler, before falling on the ground and landing on his back and neck. Plaintiff avers that after bandaging the wound, he left the work site about an hour later and went by train to his home in New Jersey, and then by bus to his girlfriend's home to have her drive him to the hospital. He did not remember anything afterwards until he woke up in the hospital.

Such testimony contrasts starkly with that of evidence presented during plaintiff's Workers Compensation Board (WCB) proceedings, which reflected that plaintiff's girlfriend told staff at Hackensack University Medical Center (where plaintiff was transferred after his discharge from Holy Name Hospital/Medical Center) that she and plaintiff had an argument while she was driving, and plaintiff jumped out of her car from the passenger seat without warning. The doctor who treated plaintiff at the Holy Name Hospital emergency room testified that his examination of plaintiff revealed injuries inconsistent with what plaintiff told him was the cause thereof, that is, that he hit his head while framing sheet rock at work. The doctor who treated plaintiff at Hackensack University Medical Center after the accident testified that his injuries could have been caused by someone hitting his head on sheet rock, but could also have been caused by exiting a moving vehicle. Plaintiff's employer testified that he received a telephone call from plaintiff's brother on the day of the accident indicating that plaintiff was injured when he fell out of a car, and then received another telephone call from plaintiff about ten days later notifying him that he hit his head at work. The employer asked the foreman about plaintiff's accident, and was told that he had no knowledge

thereof. Furthermore, the foreman said that plaintiff had worked for approximately two weeks, but then missed a few days of work prior to the accident, and was replaced due to his absence.

Clune, DFL and the Tishman Owners move for summary judgment dismissing the respective claims against them on the ground that they are collaterally estopped by the decision of the WCB filed September 16, 2016 (the WCB Decision). In its administrative review of the prior determination by the Workers Compensation Law Judge (WCLJ) filed February 19, 2016, the WCB found that the record sufficiently supported a finding that plaintiff's injuries were due to leaving a moving vehicle rather than from a work-related incident earlier in the day, and that the claim was therefore disallowed.

In opposing the motions for summary judgment, plaintiff argues that the WCB Decision was merely a review of the prior determination by the WCLJ, and it is unclear what evidence was actually considered and what issues were actually litigated. In particular, plaintiff maintains that his alleged spinal injuries were not addressed by the WCB, insofar as the claim set forth in plaintiff's C-3 employee accident claim form pertained only to head injuries. Moreover, they assert that even if the WCB Determination did dispose of all of plaintiff's claims, then it was only the result of plaintiff's Workers Compensation counsel's incompetence, including failure to secure eyewitnesses to testify in the WCB proceedings, which is the subject of the Malpractice Action which plaintiff seeks to consolidate or join with the instant action.

As a preliminary matter, leave to amend is generally freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party (CPLR 3025[b]; *see Watkins-Bey v MTA Bus Co.*, 174 AD3d 553, 554 [2019]; *Lucido v Mancuso*, 49 AD3d 220, 222 [2008]). As movants argue, plaintiff will not be prejudiced because they are already apprised of the WCB Decision, and the proposed amendment arises out of the same facts as those set forth in the complaint (*see Rocha v GRT Constr. of N.Y.*, 145 AD3d 926, 929 [2016]). Plaintiff's vague contentions are insufficient to demonstrate that the proposed amendment is "palpably insufficient or patently devoid of merit." Thus, the court grants the Tishman Owners leave to amend their answer to include the affirmative defenses of collateral estoppel and res judicata, and accordingly, the answer may be deemed amended in the form proposed.

Turning to the merits, "[t]he quasi-judicial determinations

of administrative agencies are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal" (*Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255 [2013]). Here, the WCB determined that plaintiff's injuries were caused by an incident that was not work-related, and therefore, plaintiff's claim would not be allowed. The issue in this action, whether plaintiff was injured in the course of employment on the construction project at the premises owned by the Tishman Owners, is undisputedly identical to the issue in the WCB proceedings. Despite plaintiff's contentions that his spinal injuries were not considered and that his former counsel did not represent him zealously, the WCB Decision is entitled to preclusive effect in the absence of triable issues regarding whether he received a full and fair opportunity to litigate before the WCB, warranting dismissal of plaintiff's complaint given the finding that plaintiff sustained no work-related injuries (*see Roserie v Alexander's Kings Plaza, LLC*, 171 AD3d 822 [2019]; *Emanuel v MMI Mech., Inc.*, 131 AD3d 1002 [2015]; *McRae v Sears, Roebuck & Co.*, 2 AD3d 419 [2003]).

With respect to plaintiff's cross motion, the court has broad discretion in determining whether to order the consolidation or joint trial of this action and the Malpractice Action under CPLR 601 or 602, respectively (*Hanover Ins. Group v Mezansky*, 105 AD3d 1000 [2013]; *J & A Vending v Eagle & Fein*, 268 AD2d 505 [2000]). Where common questions of law or fact exist, consolidation or joint trial is warranted unless the opposing party demonstrates prejudice to a substantial right (*see Moses v. B & E Lorge Family Trust*, 147 AD3d 1043, 1045 [2017]; *Oboku v New York City Tr. Auth.*, 141 AD3d 708, 709 [2016]).

Although these actions arise from the same incident (plaintiff's accident), the pertinent facts on which issues turn in each action differ; this action requires examination of the circumstances of plaintiff's accident itself, while the Malpractice Action involves examination of plaintiff's former counsel's actions in their representation of plaintiff in the underlying proceedings. Moreover, they implicate different questions of law insofar as this action involves whether plaintiff's injuries fall under the Labor Law, while the Malpractice Action involves whether plaintiff's counsel deviated from the standard of care expected of members in the legal profession. The issues of professional negligence in the Malpractice Action are irrelevant to this action (*County of Westchester v White Plains Ave., LLC*, 105 AD3d 690 [2013]). The

court further notes that the two actions are at very different procedural stages (this action has completed or is nearing completion of discovery, while the Malpractice Action is pre-discovery or perhaps in early discovery), and it would not be prudent to consolidate or join them for trial. Despite plaintiff's contentions to the contrary, no inconsistency results from a jury finding no liability in this action, while a jury in the Malpractice action finds that the plaintiff's former counsel breached its duty to zealously represent plaintiff in prior proceedings. Thus, neither consolidation nor joint trial is warranted given the limited commonalities between the two actions both factually and legally, the different procedural stages at the time the motion was made, and the resulting jury confusion and prejudice that would jeopardize the opposing parties' right to a fair trial (*see e.g. Cromwell v CRP 482 Riverdale Ave., LLC*, 163 AD3d 626 [2018]; *Weiss v Biheller, MDSE, Corp. v Preciosa USA, Inc.*, 127 AD3d 1176 [2015]; *County of Westchester*, 105 AD3d 690).

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, the branch of the Tishman Owners' motion seeking leave to amend their answer is granted and such answer is deemed amended. The respective motions by Clune, DFL, and the Tishman Owners for summary judgment dismissing the complaint are likewise granted. Plaintiff's cross motion to consolidate or join for trial this action with the Malpractice Action is denied.

Dated: September 24, 2019

A.J.S.C.

FILED
OCT - 9 2019
COUNTY CLERK
QUEENS COUNTY