

Bayer v CG Maiden Member, LLC

2023 NY Slip Op 32404(U)

July 17, 2023

Supreme Court, New York County

Docket Number: Index No. 154201/2018

Judge: James d'Auguste

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. James E. d'Auguste **PART 55**

Justice

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JOHN BAYER,

Plaintiff,

- v -

CG MAIDEN MEMBER, LLC, 65 BROADWAY OWNER,
LLC, 65 BROADWAY OWNER II, LLC, 65 BROADWAY
OWNER III, LLC, CF 65 MEMBER, LLC, THE CHETRIT
GROUP, LLC

Defendants.

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INDEX NO. 154201/2018
MOTION DATE 12/21/2022
MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 124, 126, 127, 128, 129, 130, 131, 132, 133 were read on this motion to/for AMEND CAPTION/PLEADINGS.

In Motion Sequence 006, defendants seek to amend their answer under CPLR 3025(b) to add CG Maiden Member LLC, 65 Broadway Owner II, LLC, 65 Broadway Owner III, LLC, and CF 65 Member, LLC (collectively, "defendants"), to the sixth affirmative defense. Defendants assert the defense is founded on the fact that plaintiff John Bayer's ("Bayer") exclusive remedy for the alleged injury comes under the Workers' Compensation Law ("WCL") that applies to all defendants. Defendants, also, seek dismissal of Bayer's Labor Law action pursuant to CPLR 3211(a)(7), or, alternatively, CPLR 3211(c), contending Bayer's suit is barred by WCL Sections 11 and 29(6). For the reasons set forth below, the motion is denied.

Defendants assert 65 Broadway (the "subject building") is jointly owned and operated by three defendants: 65 Broadway Owner, LLC, 65 Broadway Owner II, LLC and 65 Broadway Owner III LLC ("owner defendants"), as tenants in common (NYSCEF Doc. No. 113).

Defendants claim that under their arrangement, 65 Broadway Owner is responsible for hiring and paying building maintenance employees, including Bayer—employed as a building engineer—on behalf of all three owner entities. Defendants contend the owner defendants are so intertwined as to constitute a single, integrated entity. Additionally, 65 Broadway Owner is the sole subsidiary of CG Maiden Member LLC (“CG”), and 65 Broadway Owner II LLC is the sole subsidiary of CF 65 Member LLC (“CF”). As such, defendants argue that they are alter egos of one another, hence, Bayer’s lawsuit against them is barred by WCL Sections 11 and 29(6) (NYSCEF Doc. No. 113). Defendants allege Bayer was employed by 65 Broadway Owner—the entity that procured the Workers’ Compensation insurance on behalf of all owner defendants, without mention of the owner entities—and sought leave to amend the sixth affirmative defense to ensure there were no ambiguities that the Workers’ Compensation bar applies to all defendants (NYSCEF Doc. No. 113).

Defendants argue mere lateness is not a barrier to amendment, as lateness must be coupled with significant prejudice to plaintiff, the “very elements of the laches doctrine.” *Edenwald Contr. Co. v. City of New York*, 60 N.Y. 2d 957 (1983). Yet, defendants note that a simple lapse of time without a showing of prejudice will not sustain a laches defense. *Skrodelis v. Norbergs*, 272 A.D. 2d 316 (2d Dep’t 2000). Defendants assert the only prejudice would be to defendants if the Court does not grant their motion as they would be forced to compensate Bayer twice – once via the Workers’ Compensation benefits, and again via a finding of civil liability (NYSCEF Doc. No. 133). Defendants claim Bayer fails to show any prejudice or surprise on his part as he was aware he was employed by 65 Broadway Owner, and all defendants jointly owned the subject building, thus, he was working for the owner defendants (NYSCEF Doc. Nos. 113, 133).

Bayer argues this nearly five-year old litigation clearly reflects that 65 Broadway Owner is his employer, noting the Workers' Compensation documents revealed this, as did documents produced in pre-trial disclosure (NYSCEF Doc. No. 126). Also, Bayer asserts defendants collectively interposed an answer to his Labor Law claims in which only one defendant—65 Broadway Owner—is alleged to be Bayer's employer. Bayer claims discovery closed more than 14 months ago, and he filed a Note of Issue on January 3, 2022, and a motion for summary judgment on liability under Labor Law Section 240(1) against 65 Broadway Owner II and 65 Broadway Owner III, but not 65 Broadway Owner, as his employer. Bayer contends that the proposed owner defendants made no mention in their opposition to his summary judgment motion that they were also his employers (NYSCEF Doc. No. 126).

Moreover, Bayer argues defendants' claims are based only on undisclosed witnesses' affidavits and provide no documentary evidence to support their alleged alter ego theory. Bayer notes the owner defendants entered into a Tenant in Common Agreement in which the owner entities specifically deny forming a partnership or joint venture in their joint ownership of the subject building (NYSCEF Doc. Nos. 126, 129). Also, the Agreement requires each Tenant in Common to file taxes separately, permits each tenant to sell or transfer their share of the property without the others' consent, and contemplates litigation amongst the parties (NYSCEF Doc. Nos. 126, 129).

Further, Bayer claims prejudice has been found whether "defenses sought to be asserted in prospective amended answer could readily have been pleaded either in original answer or by more prompt application to amend, all disclosure proceedings had been completed, case was presently awaiting trial and plaintiff prepared his case based upon answer interposed nearly five years previously." *Fulford v. Baker Perkins, Inc.*, 100 A.D. 2d 861 (2d Dep't, 1984). Bayer

asserts defendant could easily have pleaded the Workers' Compensation affirmative defense in the original answer or a prompt application to amend, as they were in possession of all such information required to assert the defense at the time the initial answer was interposed, but failed to do so (NYSCEF Doc. No. 126). Additionally, Bayer argues no reasonable excuse is proffered by defendants for this nearly four-year delay in asserting their new theory in their motion for leave to amend the answer (NYSCEF Doc. No. 126). Bayer contends that while discovery was open, he did not demand any documents or materials to overcome the defense defendants are now seeking to assert by them all as he was never "put on notice" that all defendants were asserting a Workers' Compensation affirmative defense (NYSCEF Doc. No. 126).

Bayer cites to *Civil Service Employees Ass'n v. County of Nassau*, 144 A.D. 3d 1075 (2d Dep't, 2016) as a case with facts similar to the one here. In that case, defendant moved for leave to amend its answer to assert a statute of limitations defense and for summary judgment dismissing the complaint as time-barred, after discovery was completed and a Note of Issue was filed. The Supreme Court granted the motion, but the Second Department, on appeal, found that the Supreme Court improvidently exercised its discretion in granting the County's motion. The Second Department held that as the motion was not made until nearly six years after service of an answer, after discovery was completed and a Note of Issue was filed, plaintiffs suffered significant prejudice from the delay in defendants asserting the statute of limitations as a defense. The Court also noted the facts set forth by the County to support its proposed defense were known to the County at the time it served its answer, and the County offered no excuse for the delay. *Id.*

Also, Bayer asserts defendants' motion should be denied based on the doctrine of laches, "which may be involved to defeat a motion for leave to amend pleadings." *Corsale v. Pantry*

Pride Supermarket, Inc., 197 A.D. 2d 659 (2d Dep't, 1993). He notes that in deciding whether a Court should grant a motion to serve an amended pleading in a long-pending action, it should consider how long the amending party was aware of the facts on which the motion was predicated, if the amendment is meritorious and if a reasonable excuse was offered. *Boyd v. Trent*, A.D. 2d 301 (2d Dep't, 2002). Bayer argues that defendants were aware of the facts on which their motion for leave to amend is predicated from the onset, but failed to make such claims in any papers. Also, Bayer contends that the amendment is neither meritorious, nor was any reasonable excuse for the delay proffered.

Incidentally, Bayer also argues that determinations rendered by quasi-judicial administrative agencies may qualify for collateral estoppel effect, if the requirements of the doctrine are satisfied (NYSCEF Doc. No. 126). He notes "...determinations of the Workers' Compensation Board are within the scope of the doctrine." *Roserie v. Alexander's Kings Plaza, LLC*, 171 A.D. 3d 822 (2d Dep't, 2019). Bayer argues the Workers' Compensation Board ("WCB") determined that 65 Broadway Owner was his employer (NYSCEF Doc. Nos. 126, 131), while there is no WCB decision holding that 65 Broadway Owner II or 65 Broadway Owner III are Bayer's employer, or that an applicable Paramount Insurance Company policy was issued in their favor as the carrier issuing the Workers' Compensation policy to 65 Broadway Owner (NYSCEF Doc. No. 126). In fact, documents 65 Broadway Owner submitted to the WCB confirm that only 65 Broadway Owner was Bayer's employer, with an "Employers Statement of Wage Earnings" indicating Bayer was only employed by 65 Broadway Owner, not any other entity on the date of the subject accident (NYSCEF Doc. Nos. 126, 132). Of note, Bayer asserts that none of the alleged ownership entities challenged or appealed the WCB's decision concerning who employed him on the date of his accident, claiming, therefore,

defendants are collaterally and equitably estopped from relitigating this issue herein (NYSCEF Doc. No. 126).

Defendants argue that an employee may have more than one employer. *Bradford v. Air La Carte, Inc.*, 798 A.D. 2d 553 (1st Dep't 1980). They assert, "It is not necessary for an employer to be the direct, 'paper' employer of an injured worker for that employer to benefit from the protection of the [Workers' Compensation Law]. Rather, [m]any factors were weighed in deciding whether a special employment relationship exists." *Fuller v. KFG L & I, LLC*, 189, A.D. 3d 667 (1st Dep't 2020), citing *Thompson v. Grumman Aerospace Corp.*, 78 N.Y. 2d 553 (1991). However, Bayer asserts the Court of Appeals, in *Thompson, supra*, stated, "A special employee is described as one who is transferred for a limited time of whatever duration to the service of another" ... "General employment is presumed to continue, but this presumption is overcome upon a clear demonstration of surrender of control by the general employer and assumption of control by the special employer." *Id.* Here, Bayer notes that defendants fail to establish that his services were transferred from one defendant to another, or that 65 Broadway Owner surrendered control over him. Thus, no finding should be made that he was a special employee to proposed owner defendants. Additionally, Bayer states the Second Department in *Pena v. Automatic Data Processing, Inc.*, 105 A.D. 3d 924 (2d Dep't, 2013) held, "Where, as here, elements of the employment bespeak both general and special employment, a person's categorization as a special employee is a question of fact for the jury to determine," citing *Schramm v. Cold Spring Harbor Lab.*, 17 A.D. 3d 661 (2nd Dep't, 2005).

Notably, Bayer was awarded summary judgment on liability under Labor Law Section 240(1) against moving defendants 65 Broadway Owner II and 65 Broadway Owner III in a decision and order dated September 8, 2023 (NYSCEF Doc. Nos. 103, 126, 128). Additionally,

this motion for leave to amend and add defendants to the sixth affirmative defense was filed more than three months after summary judgment on liability was granted to Bayer. Further, a motion seeking to reargue the granting of summary judgment to Bayer was denied in a recent decision and order dated July 12, 2023.

Finally, the Court finds defendants failed to present a scintilla of evidence establishing the alter-ego theory, and failed to proffer a reasonable excuse for the lateness of the motion. Moreover, the Court finds this motion for leave to amend to add defendants to the sixth affirmative defense is woefully untimely, thus, it is denied, as is dismissal of Bayer’s complaint against all defendants. The Court considered defendants’ remaining arguments and found them to be unavailing.

Accordingly, it is hereby,

ORDERED, that defendants’ motion is denied in its entirety.

This constitutes the decision and order of this Court.

7/17/2023
DATE

James d’Auguste, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE