

**Garcia v Colaiacomo**

2024 NY Slip Op 34846(U)

September 25, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 619796/2019

Judge: Linda Kevins

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SHORT FORM ORDER

INDEX No. 619796/2019  
CAL. No. 202301631MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 29 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. LINDA J. KEVINS  
Justice of the Supreme Court

MOTION DATE 2/5/24 (006)  
MOTION DATE 3/29/24 (007)  
ADJ. DATE 5/28/24  
Mot. Seq. # 006 MotD  
Mot. Seq. # 007 MG

-----X  
ROBERTO PEREZ GARCIA,  
  
Plaintiff,  
  
- against -  
  
F.P. COLAIACOMO, SR., F.P. COLAIACOMO,  
JR., DELEA SOD FARMS, INC. and VICTOR  
A. PEREZ, DELEA LEASING CORP.  
  
Defendants.  
-----X

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Upon the following papers read on this e-filed motion to amend the pleadings and for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendants Delea Leasing Corp. and Victor A. Perez, filed on January 14, 2024; Notice of Cross-Motion and supporting papers by defendant F.P. Colaiacomo, Jr., filed on March 25, 2024; Answering Affidavits and supporting papers by defendant F.P. Colaiacomo, Jr., filed on January 26, 2024; by plaintiff, filed on February 26, 2024 and April 2, 2024; and by defendants Delea Leasing Corp. and Victor A. Perez, filed on May 16, 2024; Replying Affidavits and supporting papers by defendants Delea Leasing Corp. and Victor A. Perez, filed on March 22, 2024 and March 24, 2024; Other   ; it is

**ORDERED** that the motion by defendants Delea Leasing Corp. and Victor A. Perez is granted to the extent set forth herein, and is otherwise denied; and it is further

**ORDERED** that the cross motion by defendant F.P. Colaiacomo, Jr. is granted; and it is further

Perez Garcia v Colaiacomo  
Index No. 619796/2019  
Page 2

**ORDERED** that upon Entry of this Order, movants are directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff Roberto Perez Garcia commenced this action to recover damages for injuries he allegedly sustained on May 27, 2019, when the vehicle in which he was a passenger, operated by defendant Victor A. Perez and owned by defendant Delea Leasing Corp., collided with a vehicle owned and operated by defendant F.P. Colaiacomo, Jr., while traveling on Middle Country Road, at or near its intersection with Edwards Avenue, in the Town of Riverhead, New York. By order dated March 23, 2021, the Court granted motions by defendant F.P. Colaiacomo, Sr. and defendant Delea Sod Farms for summary judgment dismissing the complaint against them. Further, the Court granted a motion by plaintiff for leave to serve a supplemental summons on Delea Leasing Corp., as an additional defendant and to amend the complaint.

Defendants Delea Leasing Corp. and Victor A. Perez (the Delea defendants) now move for an order granting leave to serve an amended answer to plaintiff's amended complaint asserting a seventh affirmative defense that plaintiff's action is barred pursuant to the Workers' Compensation Law, granting summary judgment in their favor contending that plaintiff's claims are barred under the exclusivity provisions of the Workers' Compensation Law, and dismissing defendant Colaiacomo's cross claims against them. In support of their motion, the Delea defendants submit, among other things, the proposed amended answer and the transcripts of the deposition testimony of the plaintiff, defendant Perez, and Frank Beyrodt, executive vice president of Delea Sod Farms. Defendant F.P. Colaiacomo, Jr., opposes the motion and submits, among other things, the affirmation of counsel. Plaintiff also opposes the motion and submits, among other things, the transcript of the deposition testimony of the defendant F.P. Colaiacomo, Jr., and the November 9, 2021 and August 15, 2023 medical reports of Dr. Aric Hausknecht, M.D.

Defendant Colaiacomo cross moves for an order granting leave to serve an amended answer that includes a cross claim for common-law indemnification and contribution against all defendants. In support of his motion, defendant Colaiacomo submits the affirmation of counsel and the proposed amended answer and cross claims to plaintiff's amended complaint. Plaintiff joins in defendant Colaiacomo's motion and submits the affirmation of counsel. The Delea defendants oppose the motion, arguing that the court has not determined that plaintiff sustained a grave injury, and that Colaiacomo's negligent actions preclude him from obtaining common-law indemnification from the Delea defendants. In opposition, they submit the affirmation of counsel and refer to the August 9, 2023 independent medical examination (IME) report of Howard B. Reiser, M.D., previously e-filed as NYSCEF court document number 111.

Plaintiff testified that he was injured on May 27, 2019, when the golf cart-like vehicle in which he was a passenger, driven by defendant Perez, was struck by a vehicle operated by defendant Colaiacomo. Plaintiff testified that he was a passenger in the rear driver side of the cart, which was traveling eastbound on the shoulder of Middle Country Road. Plaintiff stated that he was not wearing his seatbelt at the time of the accident because the vehicle was moving slowly as it was following a

Perez Garcia v Colaiacomo  
Index No. 619796/2019  
Page 3

tractor towing farm equipment. He testified that he and defendant Perez were employed by Delea Sod Farms and that they both were working at the time of the accident. Plaintiff described the impact from defendant Colaiacomo's vehicle as heavy and testified that he did not see the vehicle before the collision.

Defendant Colaiacomo testified that he was traveling eastbound on Middle Country Road from Coram to Riverhead on the morning of the collision. He was traveling approximately forty miles per hour and was listening to music connected to the radio in his car via Bluetooth connection from his cellular phone. He testified that he looked down to change the song on his phone, and that when he looked up he saw the vehicle in which plaintiff was a passenger in front of him and slammed on his brakes. He testified that as there was traffic heading towards him in the opposing lane of travel, he could not swerve into the other lane to avoid colliding with plaintiff's vehicle. He testified that as he applied the brakes, he turned his steering wheel to the right, which caused him to head onto the eastbound shoulder of Middle Country Road, where he collided with the vehicle in which plaintiff was a passenger.

According to the affirmed reports dated November 9, 2021 and August 15, 2023, Dr. Hausknecht diagnosed plaintiff as suffering from a mild traumatic brain injury with significant limitation of function of his neurological systems. Dr. Hausknecht noted that plaintiff "has persistent headaches, dizziness, memory and comprehension difficulties as well as anxiety, depression and insomnia. These are expected medical consequences of a head injury of this nature." The affirmed reports indicate that a causal relationship exists between the accident and the neurological diagnoses. Dr. Hausknecht concludes that plaintiff is totally disabled from all forms of gainful employment.

According to the IME report prepared by Dr. Reiser, plaintiff suffers from ongoing symptoms residual from the injury which include "generalized pain in the mid and low back which is constant, and interferes with his ability to sleep at night." The report states plaintiff "describes pain in the right shoulder as well as pain in both knees. He experiences coughing, nocturnal dry throat and pain in the right rib cage, which he relates to initial right rib injuries. He does not report any loss of power, sensation, or sphincter function. At the present time, he is not under a doctor's care with reference [to] his injuries." Dr. Reiser opines that "[c]urrently, there is no deficit to suggest dysfunction of the brain, spinal cord, or spinal nerve roots. Although his initial injuries were substantial, his recovery appears to have been quite good, and there is not an ongoing objective neurological deficit caused by the incident of May 27, 2019."

As the Court of Appeals has explained, "absent prejudice, courts are free to permit amendment" of pleadings (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411, 998 NYS2d 740, 745 [2014]; see CPLR 3025). Generally, leave to amend a pleading "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient as a matter of law, devoid of merit, or would prejudice or surprise the opposing party (see *Denisco v 405 Lexington Ave., LLC*, 203 AD3d 1025, 166 NYS3d 183 [2d Dept 2022]; *Lennon v 56th and Park (NY) Owner, LLC*, 199 AD3d 64, 153 NYS3d 535 [2d Dept 2021]). "No evidentiary showing of merit is required under CPLR 3025 (b), and a court shall not examine the legal sufficiency or merits of a pleading unless the insufficiency or lack of merit is clear and free from doubt" (*Krakovski v Starvos Assoc., LLC*, 173 AD3d 1146, 1148, 103 NYS3d 553, 556 [2d

Perez Garcia v Colaiacomo  
Index No. 619796/2019  
Page 4

Dept 2019] [quotation marks and citations omitted]; see *Ferrer v Go N.Y. Tours Inc.*, 221 AD3d 499, 198 NYS3d 345 [2d Dept 2023]). The burden is on the party opposing a motion to amend a pleading to demonstrate prejudice (*Krakovski v Starvos Assoc., LLC*, 173 AD3d 1148, 103 NYS3d 553; *Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 998 NYS2d 740). “Prejudice is more than the mere exposure of the party to greater liability. Rather, there must be some indication that the party has been hindered in the preparation of the party’s case or has been prevented from taking some measure in support of its position” (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411, 998 NYS2d 740, 745 [quotation marks, citations, and alterations omitted]; see *Catnap, LLC v Cammeby’s Mgt. Co., LLC*, 170 AD3d 1103, 97 NYS3d 686 [2d Dept 2019]; *Betz v Blatt*, 160 AD3d 689, 75 NYS3d 217 [2d Dept 2018]). “Mere lateness is not a barrier to the amendment”; it is only “lateness coupled with significant prejudice to the other side” that requires denial of a motion to amend a pleading (*Cioffi v S.M. Foods, Inc.*, 178 AD3d 1015, 1016, 116 NYS3d 68, 70 [2d Dept 2019]; see *Krakovski v Starvos Assoc., LLC*, 173 AD3d 1146, 103 NYS3d 553; *Vidal v Claremont 99 Wall, LLC*, 124 AD3d 767, 2 NYS3d 186 [2d Dept 2015]).

Here, the proposed amendment by the Delea defendants cannot be characterized as palpably devoid of merit or insufficient as a matter of law, and plaintiff and defendant Colaiacomo did not oppose the motion alleging prejudice or surprise by the proposed amendment (see *Cortes v Jing Jeng Hang*, 143 AD3d 854, 40 NYS3d 434 [2d Dept 2016]; *Guinta’s Meat Farms, Inc. v Pina Constr. Corp.*, 80 AD3d 558, 914 NYS2d 641 [2d Dept 2011]). The affirmative defense that plaintiff’s cause of action is barred by the Workers’ Compensation Law was included in the initial answer of defendant Perez and was inadvertently omitted from the Delea defendants’ answer to the amended complaint after Delea Leasing Corp. was added as an additional defendant in this action. As such, the Delea defendants’ motion for leave to serve an amended answer is granted.

Likewise, the proposed amendment by defendant Colaiacomo cannot be characterized as palpably devoid of merit or insufficient as a matter of law, and plaintiff and the Delea defendants did not oppose the motion alleging prejudice or surprise by the proposed amendment (see *Cortes v Jing Jeng Hang*, 143 AD3d 854, 40 NYS3d 434; *Guinta’s Meat Farms, Inc. v Pina Constr. Corp.*, 80 AD3d 558, 914 NYS2d 641). Defendant Colaiacomo’s counsel affirms that the cross claim for common-law indemnification and contribution against all defendants was omitted due to a clerical error. The Delea defendants do not assert that such amendment is prejudicial or a surprise. The Delea defendants’ remaining arguments in opposition are unavailing as there is no evidentiary showing of merit required under CPLR 3025 [b] (*Krakovski v Starvos Assoc., LLC*, 173 AD3d 1146, 103 NYS3d 553). As such, defendant Colaiacomo’s motion for leave to serve an amended answer is granted.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). Once such proof has been offered, the burden then shifts to the opposing party

Perez Garcia v Colaiacomo  
Index No. 619796/2019  
Page 5

who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

“Under the Workers’ Compensation Law, an employee’s recovery of workers’ compensation benefits is his or her exclusive remedy against his or her employer or coworkers for injuries sustained in the course of his or her employment” (*Olivera-Perez v B.A.M. Bldrs., Inc.*, 229 AD3d 709, 711, 215 NYS3d 477 [2d Dept 2024], quoting *Zielinski v New Jersey Tr. Corp.*, 170 AD3d 927, 928, 96 NYS3d 78 [2d Dept 2019]; Workers’ Compensation Law §§ 11, 29 [6]). Here, the Delea defendants have established Delea Leasing Corp.’s prima facie entitlement to summary judgment based on the exclusivity provisions of the Workers’ Compensation Law by submitting the deposition transcript of the plaintiff along with the affidavit of Richard Delea, president of Delea Leasing Corp., which affirms that Delea Leasing Corp. was the plaintiff’s employer at the time of the alleged accident and that plaintiff received workers’ compensation benefits under a policy affording coverage to their employee (*see Olivera-Perez v B.A.M. Bldrs., Inc.*, 229 AD3d 709, 215 NYS3d 477; *Zielinski v New Jersey Tr. Corp.*, 170 AD3d 927, 96 NYS3d 78; *Paguay v Cup of Tea, LLC*, 165 AD3d 964, 86 NYS3d 584 [2d Dept 2018]). The Delea defendants also have established prima facie entitlement to summary judgment dismissing the claims against defendant Perez. Their submission of the deposition transcript of the plaintiff along with Richard Delea’s affidavit establishes that plaintiff and Perez were coemployees who were acting in the course of their employment at the time of the accident, and that plaintiff received benefits under the Workers’ Compensation policy affording coverage to their employer (*see Workers’ Compensation Law* §§ 11, 29 [6]; *Zielinski v New Jersey Tr. Corp.*, 170 AD3d 927, 96 NYS3d 78; *Power v Frasier*, 131 AD3d 461, 15 NYS3d 382 [2d Dept 2015]). In opposition, plaintiff failed to raise a triable issue of fact (*see Zielinski v New Jersey Tr. Corp.*, 170 AD3d 927, 96 NYS3d 78). Accordingly the branch of the Delea defendants’ motion for summary judgment dismissing plaintiff’s claims against them is granted.

Although there is no longer a direct action pending against the Delea defendants, defendant Colaiacomo’s cross claims may be maintained in a third-party action. Accordingly, defendant Colaiacomo’s cross claims are converted into third-party causes of action against the Delea defendants (*Olivera-Perez v B.A.M. Bldrs., Inc.*, 229 AD3d 709, 215 NYS3d 477; *Soodoo v LC, LLC*, 116 AD3d 1033, 985 NYS2d 258 [2d Dept 2014]). The Delea defendants established their prima facie entitlement to summary judgment dismissing the third-party causes of action for contribution and common-law indemnification. Workers’ Compensation Law § 11 prohibits third-party claims against an employer for contribution and indemnification against an employer unless its employee sustained a “grave injury” within the meaning of the statute, or there is a written agreement by which the employer expressly agreed to contribution to or indemnification of the third-party claimant (*see Velazquez-Guadalupe v Ideal Bldrs. & Constr. Servs., Inc.*, 216 AD3d 63, 188 NYS3d 537 [2d Dept 2023]; *McIntosh v Ronit Realty, LLC*, 181 AD3d 580, 121 NYS3d 330 [2d Dept 2020]). “Grave injury” is defined in Workers’ Compensation Law § 11 as follows:

“[O]ne or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and

Perez Garcia v Colaiacomo  
Index No. 619796/2019  
Page 6

permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability”

(see *Cioffi v S.M. Foods, Inc.*, 178 AD3d 1006, 116 NYS3d 306). A “permanent total disability” within the meaning of the statute requires a showing that the injured employee is no longer employable in any capacity (see *Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 788 NYS2d 292 [2004]; *Cioffi v S.M. Foods, Inc.*, 178 AD3d 1006, 116 NYS3d 306). The Delea defendants demonstrated, through their submission of the IME report by Dr. Reiser, that plaintiff did not sustain a grave injury within the meaning of Workers’ Compensation Law § 11 (*McIntosh v Ronit Realty, LLC*, 181 AD3d 580, 121 NYS3d 330; *Owens v Jea Bus Co.*, 161 AD3d 1188, 77 NYS3d 141 [2d Dept 2018]).

In opposition, the affirmed reports by Dr. Hausknecht are sufficient to raise a triable question of fact as to whether plaintiff suffered a “grave injury” (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 788 NYS2d 292; *Cioffi v S.M. Foods, Inc.*, 178 AD3d 1006, 116 NYS3d 306; *Bush v Mechanicville Warehouse Corp.*, 79 AD3d 1327, 912 NYS2d 768 [3d Dept 2010]). Dr. Hausknecht diagnosed plaintiff with a mild traumatic brain injury with significant limitation of function of his neurological systems. The affirmed reports indicate that a causal relationship exists between the accident and the neurological diagnoses, and Dr. Hausknecht concludes that plaintiff is totally disabled from all forms of gainful employment.

Accordingly, the Delea defendants’ motion for summary judgment dismissing the third-party causes of action is denied.

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the Decision and **Order** of the Court.

Dated: 9.25.24

  
LINDA KEVINS, JSC

FINAL DISPOSITION      X      NON-FINAL DISPOSITION