

Fraser v City of New York
2024 NY Slip Op 35387(U)
July 30, 2024
Supreme Court, Queens County
Docket Number: Index No. 703044/2021
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10



-----X
Roy Fraser,

Index

Number: 703044/21

Plaintiff,

- against -

Motion

Date: 7/29/24

Motion Seq. No.: 1

The City of New York, New York City Fire
Department and Elliot C. Haynes,

Defendants.
-----X

The following papers numbered E14-E38 & E40-E41 read on this motion by Plaintiff for an order to compel discovery and to preclude Defendants from testifying at trial; and cross-motion by Defendants, The City of New York and New York City Fire Department, for an order to permit them to amend their answer and to dismiss the compliant.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	E14-24
Affirmation in Opposition.....	E25-26
Notice of Cross-Motion-Affirmation-Exhibits.....	E27-38
Affirmation in Opposition.....	E40
Reply.....	E41

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Plaintiff for an order to compel discovery and to preclude Defendants from testifying at trial is denied as moot in light of the cross-motion. Cross-motion by Defendants, The City of New York and New York City Fire Department, for an order to permit them to amend their answer and to dismiss the compliant is granted.

Plaintiff allegedly sustained injuries as a result of a motor vehicle accident which occurred on 59th Street at or near its intersection with 52nd Road in Queens County on November 13, 2019.

Plaintiff alleges that he was a passenger in a parked New York City Department of Sanitation ("DOS") vehicle which was struck by an ambulance owned by the Defendant, New York City Fire Department ("FDNY") ambulance and operated by Defendant, Elliot C. Haynes.

The Court notes that Haynes never appeared in this action. The City avers that the time to move for default judgment against Haynes has now expired (see CPLR §3215[c]). However, the Court cannot confirm, as the affidavit of service establishing valid service upon Haynes was never electronically filed on the New York Courts Electronic Filing System or annexed as an exhibit to the motion or cross-motion.

The FDNY, although named as Defendant in this matter, is not a corporate entity and has no independent legal existence, but is merely an agency of the City (see NY City Charter §§481-494). All actions and proceedings must be brought in the name of the City and not in that of any agency (see NY City Charter §396). Therefore, since the FDNY is not a cognizable legal entity that can sue and be sued, it is not a proper party defendant.

Pursuant to CPLR 3025(b), leave to amend the pleadings "shall be freely given..." In the absence of a showing of prejudice, leave to amend the answer to plead the Workers' Compensation Law as an affirmative defense should be granted (see Lanpont v. Savvas Cab Corp., Inc., 244 A.D.2d 208 [1st Dept 1997]). Plaintiff has not appeared to claim or demonstrate that the amendment would result in prejudice. Indeed, since Plaintiff was aware of his employment status from the outset and received Workers' Compensation benefits, he could not claim prejudice or surprise (see Caceras v. Zorbas, 74 N.Y.2d 884 [1989]).

In Plaintiff's Bill of Particulars, he provides that he received Worker's Compensation benefits under "special damages" and that he was employed by the DOS. The Workers' Compensation bars suits by an employee against his employer and applies only where the employee was acting within the scope and course of his employment at the time of the accident (see Workers Compensation Law §29[6]). Here, Plaintiff concedes that he was working within the scope and course of his employment at the time of the collision. Moreover, it appears undisputed that Plaintiff applied for and received Workers' Compensation benefits, evidenced by the affirmation of Paul M. Zaragoza, Deputy Chief of the Workers' Compensation Division at the Office of the Corporation Counsel. Indeed, it appears Plaintiff received Workers' Compensation benefits totaling \$103,085.05, inclusive of medical benefits.

Plaintiff argues in opposition that the instant action is not

barred by Workers' Compensation because the operator of the ambulance was not a co-employee of the Plaintiff at DOS, but rather an employee of the FDNY. As noted above, the FDNY is a City agency and is not a cognizable legal entity. Similarly, the DOS is a City agency and is not a cognizable legal entity (see NY City Charter §§751-755). Any suit against either entity must be brought in the name of the City of New York (see NY City Charter §396). Since the Plaintiff was a City employee working within the scope and course of his employment when he was injured after being struck by an FDNY ambulance allegedly operated by an FDNY employee, any action against the City is barred by operation of the Workers' Compensation Law §11, which limits Plaintiff's remedy to a Workers' Compensation claim.

The additional argument that the instant motion is premature because discovery should be conducted with respect to the severe injuries sustained by Plaintiff is without merit, to the extent that Plaintiff avers he has suffered a grave injury.

Section 11 of the Workers' Compensation Law provides, *inter alia*, "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury'. . ." Thus, the "grave injury" exception to Workers' Compensation applies only to cross-claims by Co-Defendants for contribution or indemnification and, therefore, is not a defense to summary judgment against Plaintiff-employee himself. An employee is barred from maintaining an action against his employer for any injury whatsoever, including death. There are no such cross-claims here. In any event, Plaintiff does not allege in his complaint or Bill of Particulars that he sustained a grave injury at all.

Plaintiff's Counsel further avers that the motion should be denied as premature because depositions are outstanding is without merit. In the first instance, the mere hope that future discovery might yield evidence beneficial to plaintiff is not grounds for denial of summary judgment (see JP Morgan Chase Bank v Agnello, 62 A.D.3d 662 [2d Dept. 2009]), even in a suit not involving the plaintiff's employer and Workers' Compensation is not involved. In any event, since Plaintiff is seeking damages from his employer and such action is barred by Workers' Compensation as a matter of law, the issue sought by Plaintiff to be explored in deposition of the Defendants regarding how the accident occurred is irrelevant and the averment that prejudice would result is without merit.

Accordingly, the motion by Plaintiff for an order to compel discovery and to preclude defendants from testifying at trial is denied as moot in light of the cross-motion. Cross-motion by Defendants, The City of New York and New York City Fire Department, for an order to permit them to amend their answer is granted. The proposed amended answer annexed to the moving papers as Exhibit "H" is deemed served and filed, nunc pro tunc. The branch of the cross-motion to dismiss the complaint as barred by Workers' Compensation is granted.

Serve a copy of this order with notice of entry upon all parties without undue delay.

Dated: July 30, 2024



KEVIN J. KERRIGAN, J.S.C.

