Nouel v 325 Wadsworth Realty LLC
2012 NY Slip Op 32506(U)
September 25, 2012
Sup Ct, New York County
Docket Number: 116438/06
Judge: Paul Wooten
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SCANNED ON 10/2/2012

[* 1]

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

CAMILA NOUEL, an infant by her mother and natural guardian, MARIA NOUEL, and MARIA NOUEL, individually,

Plaintiffs,

-against-

325 WADSWORTH REALTY LLC, SOLAR REALTY MANAGEMENT CORP., INWOOD ASSETS LLC and JOSE LUIS RIVERA,

Defendants.

INDEX NO. 116438/06

MOTION SEQ. NO. 002

FILED
OCT 02 2012
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 5, were read on this motion by defendants for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits (Memo)	4
Replying Affidavits (Reply Memo)	5

Cross-Motion: ☐ Yes ■ No

Motion sequence number 002 in the herein action and motion sequence number 001 in a related action entitled *325 Wadsworth Realty, LLC v J. Klein Associates*, Index No. 603339/09 (Wadsworth action), are hereby consolidated for disposition.

BACKGROUND

Plaintiffs Camila Nouel, a four-year-old child, and her mother, commenced the herein action against Jose Luis Rivera (Rivera), 325 Wadsworth Realty LLC, the owner of the building, Solar Realty Management Corp., the managing agent, and Inwood Assets LLC (Inwood), the former owner of the building, to recover damages for sexual battery that took place in the basement of their apartment building which was committed by Rivera, a registered sex offender.

325 Wadsworth Realty LLC and Solar Realty Management Corp. (collectively 325

Wadsworth) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and all cross-claims. In support of the motion, 325 Wadsworth argue that Rivera's actions were outside the scope of his employment, were not done in furtherance of the employer's business, and that a background check of Rivera was not conducted when 325 Wadsworth purchased the building from Inwood because Rivera was already working at the premises and came with a recommendation. Moreover, 325 Wadsworth argue that there was no legal duty to conduct a background check of Rivera before hiring him because they had no notice of his propensities to commit the sexual acts. In opposition, the plaintiffs allege that Rivera was a registered sex offender, and argue that 325 Wadsworth was negligent for hiring Rivera without conducting a background check.

In the Wadsworth action, 325 Wadsworth Realty LLC (325 Wadsworth) alleges that its insurance broker, J. Klein, allowed an 18-day gap in umbrella coverage to occur. The first cause of action seeks a judgment declaring that J. Klein is obligated to defend and indemnify 325 Wadsworth, to the extent that the umbrella insurer's disclaimer is upheld. J. Klein, in turn, has impleaded its wholesale insurance broker, Program Brokerage Corporation (Program).

Defendants J. Klein Associates, J. Klein Associates, LLC and J. Klein Associates, Inc., and the third-party plaintiff J. Klein Associates, LLC (collectively J. Klein) move, pursuant to CPLR §§ 3211(a)(10) and 1003, for an order dismissing the complaint on the ground that the plaintiff 325 Wadsworth has failed to join a necessary party, and pursuant to CPLR 3211(a)(7), for an order dismissing the first cause of action for a declaratory judgment on the ground that it fails to state a cause of action upon which relief may be granted. In support of their motion, J. Klein argues that the complaint against it should be dismissed due to 325 Wadswoth's failure to join its umbrella insurer, American International Specialty Lines Insurance Company (AISLIC), as a party to the action. J.Klein also argues that the first cause of action for a declaratory judgment should be dismissed because 325 Wadsworth has an adequate remedy at law. In

opposition to J. Klein' motion, 325 Wadsworth consents to adding AISLIC as a party defendant, and argues that a declaratory judgment is a proper vehicle to determine the rights of the parties.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Turning first to 325 Wadsworth's motion for summary judgment, a sexual assault perpetrated by an employee is not in furtherance of the master's business and is a clear departure from the scope of employment, because it is clearly perpetrated for the employee's own purposes, and is a departure from service to the employer (*see RJC Realty Holding Corp. v Republic Franklin Ins. Co.*, 2 NY3d 158 [2004]); *Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]). Although an employer cannot be held vicariously liable "for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business" (*Fernandez v Rustic Inn, Inc.*, 60 AD3d 893, 896 [2d Dept 2009]), the employer may be held liable for negligent hiring, supervision, and retention of the employee (*see Peter T. v Children's Vil., Inc.*, 30 AD3d 582, 586 [2d Dept 2006]; *Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599, 600 [2d Dept 2006]). However, a necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury (*see G.G. v Yonkers Gen. Hosp.*, 50 AD3d 472, 472 [1st Dept 2008] ["In order to recover against an employer for negligent retention of an employee, a plaintiff must show that the employer was on notice of a propensity to commit the alleged acts"]; *White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243 [1st Dept 2006]; *Gomez v City of New York*, 304 AD2d 374, 374 [1st Dept 2003] ["recovery on a negligent hiring and retention theory requires a showing that the employer was on notice of the relevant tortious propensities of the wrongdoing employee"]; *Jackson v New York Univ. Downtown Hosp.*, 69 AD3d 801, 801 [2d Dept 2010]; *Sandra M. v St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875, 878 [2d Dept 2006]; *Doe v Rohan*, 17 AD3d 509 [2d Dept 2005] *appeal denied* 6 NY3d 701 [2005]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159,161 [2d Dept 1997] *cert denied* 522 US

967 [1997] *lv dismissed* 91 NY2d 848 [1997]). In addition, "'there is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee'" (*Jackson*, 69 AD3d at 801-802 [2d Dept 2010), quoting *Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599, 600 [2d Dept 2006], quoting *Doe v Whitney*, 8 AD3d 610, 612 [2d Dept 2004]; *T.W. v City of New York*, 286 AD2d 243, 245 [1st Dept 2001] ["An employer has a duty to investigate a prospective employee when it knows of facts that would lead a reasonably prudent person to investigate that prospective employee"]).

The Court notes that there are public policy considerations wherein the law "certainly recognizes a *policy of preventing future harm* of the kind alleged here. One of society's highest priorities is to protect children from sexual or physical abuse" (*Randi W. v Muroc Joint Unified School District*, 14 Cal.4th 1066, 1078-79 [1997]). However, 325 Wadsworth has met their *prima facie* burden of establishing their entitlement to summary judgment dismissing the cause of action alleging negligent hiring, supervision, and retention by presenting evidence that they had no specific knowledge or notice of Rivera's propensity for sexual misconduct (*see White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243 [1st Dept 2006]; *Gomez v City of New York*, 304 AD2d 374 [1st Dept 2003]; *Ghaffari v North Rockland Cent. School Dist.*, 23 AD3d 342 [2d Dept 2005]). In the instant case, there is no proof on the record demonstrating that 325 Wadsworth were aware of any prior conduct on the part of Rivera that would put them on notice of the foreseeability of such incidents as are alleged here (*see Bowman v State of New York*, 10 AD3d 315 [1st Dept 2004]), which would trigger 325 Wadsworth's duty to conduct an investigation (*cf. T.W. v City of New York*, 286 AD2d 243 ["A jury could reasonably conclude that [defendant] had a duty to conduct an investigation of [employee's] background given its *actual knowledge* that he had a conviction] [emphasis added]). In opposition, plaintiff failed to submit evidence raising a triable issue of fact as to whether 325 Wadsworth had notice of

conduct by Rivera demonstrating a propensity for the sexual misconduct alleged against him (*see White*, 35 AD3d at 244; *Gomez*, 304 AD2d at 375; *Mataxas v North Shore Univ. Hosp.*, 211 AD2d 762 [2d Dept 1995]; *cf. G.G.*, 50 AD3d at 472 ["plaintiff raised a triable issue of fact based on the testimony of a nursing aide who had previously reported that the [employee at issue] had offered a patient medication in exchange for sex"]).

Turning to the insurance dispute in the Wadsworth action, CPLR 3211(a)(10) permits dismissal when it is demonstrated that an entity indispensable to the action has not been, and cannot be made a party (*see* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B CPLR C3211:34). Here, the indispensable party can be made a party, and the plaintiff 325 Wadsworth consents to adding AISLIC as a party defendant. Therefore, the motion to dismiss the complaint on the ground that the plaintiff 325 Wadsworth Realty has failed to join a necessary party should be granted only to the extent of ordering AISLIC joined.

An insurance broker has a duty either to obtain the coverage specifically requested by a customer or to inform the customer of its inability to do so (*see Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152 [2006]; *Murphy v Kuhn*, 90 NY2d 266 [1997]). When a broker agrees to obtain insurance and fails to do so, without notifying the insured, the broker is personally liable for the amount that could have been recovered from the insurer had the proper insurance been obtained (*see Am. Ref-Fuel Co. v Res. Recycling, Inc.*, 281 AD2d 574 [2d Dept 2001]; *Humphrey & Vandervoort v C-Kitchens*, 198 AD2d 840 [4th Dept 1993]).

"Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009]; *see* CPLR 3001). The general purpose "is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*Thome*, 70 AD3d at 99, citing *James v Alderton Dock Yards*, 256 NY 298, 305 [1931]). Declaratory relief may be joined with demands for any other relief to which plaintiff may

be entitled (*see* CPLR 3017[b]). The declaration "can be sought in an almost unlimited array of contexts and subject matters" (*see* Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B CPLR C3001:8). Most commonly the declaratory judgment is used to resolve insurance disputes (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B CPLR C3001:10), and many disputes are resolved by a mere judicial statement.

In this case, the dispute between the insured, 325 Wadsworth, and its insurance broker, J. Klein, over whether or not J. Klein obtained the insurance, is a classic insurance controversy, resolvable by a mere judicial statement. 325 Wadsworth appropriately seeks declaratory relief, and therefore, J. Klein's motion to dismiss the first cause of action for a declaratory judgment on the ground that it fails to state a cause of action, must be denied.

CONCLUSION

Accordingly, it is

ORDERED that the defendants 325 Wadsworth Realty LLC and Solar Realty Management Corp.'s motion for summary judgment (mction sequence 002) is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further,

ORDERED that defendants J. Klein Associates, J. Klein Associates, LLC, and J. Klein Associates, Inc.'s motion to dismiss (motion sequence 001 in the related action *325 Wadsworth Realty, LLC v J. Klein Associates*, Index No. 603339/09) is granted only to the extent that American International Specialty Lines Insurance Company is joined in that action as a party defendant; and it is further,

ORDERED that the summons and complaint in the related action, *325 Wadsworth Realty, LLC v J. Klein Associates*, Index No. 603339/09, be amended by adding American

International Specialty Lines Insurance Company thereto as a party defendant; and it is further,

ORDERED that the new caption shall bear the following form:

----------x

325 WADSWORTH REALTY, LLC,

Plaintiff,

- v -

J. KLEIN ASSOCIATES, J. KLEIN ASSOCIATES, LLC,

J. KLEIN ASSOCIATES, INC. and AMERICAN INTERNATIONAL

SPECIALTY LINES INSURANCE COMPANY,

Defendants.

----------x

J. KLEIN ASSOCIATES, LLC,

Third-Party Plaintiff,

- v -

PROGRAM BROKERAGE CORPORATION,

Third-Party Defendant.

----------x

And it is further,

ORDERED that a supplemental summons and amended complaint shall be served, in accordance with the Civil Practice Law and Rules, upon the additional party in this action within 30 days after service of a copy of this order with notice of entry; and it is further,

ORDERED that the attorney for 325 Wadsworth shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the

caption herein; and it is further,

ORDERED that counsel in the action *325 Wadsworth Realty, LLC v J. Klein Associates* are directed to appear for a status conference in Part 7, 60 Centre Street, Room 341, on Wednesday November 14, 2012 at 11:00 A.M.

This constitutes the Decision and Order the Court.

Dated: 9/25/2012

PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**