

**Vanwagenen v Sark Wire Corp.**

2012 NY Slip Op 32515(U)

October 3, 2012

Supreme Court, Albany County

Docket Number: 1629-12

Judge: Joseph C. Teresi

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

STATE OF NEW YORK  
SUPREME COURT  
DONALD J. VANWAGENEN,

COUNTY OF ALBANY

Plaintiff,

-against-

**DECISION and ORDER**  
**INDEX NO. 1629-12**  
**RJI NO. 01-12-107259**

SARK WIRE CORPORATION,  
SARK-USA, INC. and TOLGA K.  
ISIK,

Defendants.

Supreme Court Albany County All Purpose Term, September 21 2012  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

D’Orazio Peterson LLP  
Giovanna A. D’Orazio, Esq.  
*Attorneys for Plaintiff*  
125 High Rock Avenue  
Saratoga Springs, New York 12866

Bond, Schoeneck & King, PLLC  
Stuart F. Klein, Esq.  
*Attorneys for Defendants*  
111 Washington Avenue  
Albany, New York 12210

**TERESI, J.:**

The defendants move for an Order dismissing the Amended Complaint against the corporate defendants and dismissing the intentional infliction of emotional distress cause of action against defendant Tolga Isik pursuant to CPLR 3211 (a)(1) and CPLR 3211 (a)(7). The plaintiff opposes the motion.

The plaintiff was employed as a laborer by defendant Sark Wire and/or Sark-USA (“Sark”). Defendant Isik (“Defendant”) was plaintiff’s direct supervisor and a Vice-President of the defendant corporations. On March 21, 2011, the plaintiff while in the office of the defendant, asked Mr. Isik

for a pay raise. Plaintiff claims the defendant became enraged at plaintiff's request for a pay raise and grabbed the plaintiff by the neck and slammed plaintiff's head against a wall. The plaintiff claims Mr. Isik then shoved the plaintiff into a closet and shut the door preventing him from escaping. The plaintiff alleges he escaped from the closet when the defendant left the closet to answer the telephone. The plaintiff contends he suffered severe bodily and emotional injuries including a concussion, post-concussion disorder and post-traumatic stress disorder. The plaintiff maintains he was fired the next day by the defendants. Mr. Isik was subsequently arrested and charged in connection with the assault of the plaintiff.

Plaintiff commenced this action against the defendants on May 1, 2012. Plaintiff filed an Amended Complaint on July 27, 2012. The Amended Complaint alleges four causes of action against defendant Isik: 1) assault and battery, 2) false imprisonment, 3) negligence and 4) intentional infliction of emotional distress. The Amended Complaint asserts six claims against the corporate defendants: 1) assault and battery, 2) false imprisonment, 3) negligence, 4) intentional infliction of emotional distress, 5) vicarious liability and 6) negligent hiring. The defendants have not served an Answer and no discovery has been held in this action.

The Sark defendants allege plaintiff's exclusive remedy is a claim pursuant to New York Workers' Compensation Law as an employee cannot sue their employer for workplace injuries. Sark alleges the tortious conduct of Mr. Isik was not in furtherance of Sark's interest nor within the scope of the Mr. Isik's employment. Stark maintains the actions of Mr Isik were not an intentional tort and was not done at Sark's direction. Sark claims the negligence action should be dismissed as the plaintiff failed to plead factual allegations in support of his negligence claim. Stark alleges plaintiff's claim for negligent hiring and supervision should also be dismissed for failing to detail his claim. Stark also alleges plaintiff's tort claims of assault, battery and false imprisonment are time barred

as they are subject to a one year statute of limitations. The defendants allege the plaintiff's Amended Complaint was filed on March 21, 2012, which was over one year from the date of the incident and is therefore untimely. The defendants contend the cause of action for intentional infliction of emotional distress must be dismissed as the allegation is essentially a wrongful termination claim which is not a recognized tort in New York State. The defendants maintain since the plaintiff is an employee at will, his Amended Complaint failed to allege the required elements of a claim for intentional infliction of emotional distress.

In opposition to the motion, the plaintiff contends the Workers' Compensation Law does not bar plaintiff's claims as the law applies to accidental injuries and not to intentional injuries caused by or at the direction of the employer. The plaintiff maintains he was assaulted by Mr. Isik in his capacity as Vice-President, Chairman and Chief Executive of Sark Wire and as Vice-President of Sark-USA. The plaintiff claims, given Mr. Isik's high level positions in the companies, his actions should be imputed to Sark Wire rendering the Workers' Compensation Law inapplicable. The plaintiff also alleges since Sark-USA is not plaintiff's employer, the Workers' Compensation Law is not applicable to this situation. In addition, plaintiff claims Sark had to know that Mr. Isik was known by the employees as a dangerous individual and therefore owed a duty of care to its employees. The plaintiff alleges the allegations in the Amended Complaint are timely pursuant to the relation back doctrine. The plaintiff also alleges he has adequately pleaded his claims for intentional tort, vicarious liability, negligence and intentional infliction of emotional distress.

The Workers' Compensation Law provides the exclusive remedy for an employee who seeks damages for unintentional injuries which he or she incurs in the course of employment. (see, Workers' Compensation Law §§ 10, 11, 29; Reich v. Manhattan Boiler & Equip. Corp., 91 NY2d 772 [1998]). To be compensable under the Workers' Compensation Law, an injury must have arisen

both out of and in the course of a claimant's employment. (McFarland v. Lindy's Taxi, Inc., 49 AD3d 1111 [3<sup>rd</sup> Dept. 2008]). While an intentional tort may give rise to a cause of action outside the ambit of Workers' Compensation Law, the complaint must allege an intentional or deliberate act by the employer directed at causing harm to this particular employee. (Pereira v. St. Joseph's Cemetery, 54 AD3d 835 [2<sup>nd</sup> Dept. 2008]; Oben v. Charmer Industries, 37 AD3d 791 [2<sup>nd</sup> Dept. 2007]).

The plaintiff has not applied nor is he receiving Workers' Compensation benefits. Although no discovery has been had in this matter and the defendants have not answered the complaint, the Court finds the exclusivity provisions of the Workers' Compensation Law do not apply to bar an action by an employee to recover for an intentional tort, committed, instigated or authorized by the employee's employer. (Randall v. Tod-Nik Audiology, Inc., 270 AD2d 38 [2<sup>nd</sup> Dept. 2000]). Since Mr. Isik is the Vice-President of the corporations, the record indicates that there may be grounds to impute the complained of conduct by Mr. Isik to the corporations based upon his high level positions as an officer of both corporations. (Randall v. Tod-Nik Audiology, Inc., 270 AD2d at 39). The unprovoked assault of the plaintiff in the office of Mr. Isik is not an accidental work related injury contemplated by the Worker's Compensation Law. "It would be abhorrent to our sense of justice to hold that an employer may assault his employee and then compel the injured workman to accept the meager allowance provided by the Workmen's Compensation Law." (Lavin v. Goldberg Building Material Corp., 274 AD 690 [3<sup>rd</sup> Dept. 1949]). As a result, the Workers' Compensation Law does not bar plaintiff's claims against the defendants.

The defendants maintain plaintiff's intentional tort claims are untimely as the Amended Complaint was served over one year after the date of the assault on March 19, 2011. The plaintiff contends he amended the Complaint to change the name of the defendant Sark Wire, Inc. to Sark Wire Corporation in the caption. The plaintiff alleges the Sark defendants were on notice of this action and the allegations therein.

The relation back doctrine enables a plaintiff to correct a pleading error by adding either a party or a new claim after the statute of limitations has expired. (see, CPLR § 203(f); Xavier v. RY Management Co., Inc., 45 AD3d 677 [2<sup>nd</sup> Dept. 2007]). The plaintiff must demonstrate that: (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining its defense on the merits, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well. (Buran v. Coupal, 87 NY2d 173 [1995]).

Generally, relation back of a claim will be permitted when that party is imposing claims which are “the same as or similar to” those set forth in the original complaint. (State of New York v. General Electric Co., 199 AD2d 595 [3<sup>rd</sup> Dept. 1993]). The fact that one of the parties is vicariously liable for the conduct of the other creates a unity of interest. (Mondello v. New York Blood Center, 80 NY2d 219 [1992]). A party is vicariously liable for the other if it exerts authority or control over the alleged wrongdoer. (Hiliard v. Roc-Newark Assoc., 287 AD2d 691 [2<sup>nd</sup> Dept. 2001]). The “relation back” statute provides, for statute of limitations purposes, that a claim in an amended pleading will be deemed to relate back to the time the claim in the original pleading was interposed as long as the original claim gives notice of the transaction or occurrence out of which the claim in the amended pleading arises. (Bank of New York v. Midland Avenue Development Co., 248 AD 2d 342 [2<sup>nd</sup> Dept. 1998]).

The plaintiff has met his burden establishing the applicability of the relation back doctrine. (Rivera v. Fishkin, 48 AD3d 663 [2<sup>nd</sup> Dept. 2008]). Since the statute of limitations expired for the battery, assault and false imprisonment cause of actions against the defendants (see, CPLR § 215 (3)), the plaintiff may utilize CPLR § 203(f) as the original claim gave the defendants notice of the allegations or occurrences to be proved.

In response to a motion pursuant to CPLR 3211, the pleadings shall be liberally construed, the facts alleged and accepted as true, and every possible favorable inference given to plaintiff. (Leon v. Martinez, 84 NY2d 83 [1994]). On such a motion, the court is limited to examining the pleading to determine whether it states a cause of action. (Guggenheimer v. Ginzburg, 43 NY2d 268 [1977]). A motion to dismiss pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law. (AG Capital Funding Partners, L.P. v. State St. Bank and Trust Co., 5 NY3d 582 [2005]). The Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory. (Leon v. Martinez, 84 NY2d at 87-88). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of the motion to dismiss. (EBC I, Inc. v. Goldman, Sachs & Co., 5 NY3d 11 [2005]; Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34 [2<sup>nd</sup> Dept 2006]).

Defendants' motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) is denied. A review of the Amended Complaint reveals, *inter alia*, a cause of action for negligence, negligent hiring and supervision and intentional infliction of emotional distress and supported by allegations by the plaintiff. The Court must accept the alleged facts as true and give every favorable inference to the plaintiff. The role of the court on a motion to dismiss is to determine only whether the facts as alleged fit within any cognizable legal theory and the complaint must be declared legally sufficient if the court determined that the plaintiff is entitled to relief on any reasonable view of the facts stated. (Hallman v. Kantor, 72 AD3d 895 [2<sup>nd</sup> Dept. 2010]). Accepting as true the factual averments of the amended complaint, the plaintiff adequately pleaded cognizable causes of action alleging intentional torts. (Kruger v. EMFT, LLC, 87 AD3d 717 [2<sup>nd</sup> Dept. 2011]). The plaintiff has sustained his burden and the motion to dismiss is denied.

Accordingly, the motion to dismiss the Amended Complaint is denied.

This Decision and Order is being returned to the attorneys for plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 3, 2012  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion dated August 21, 2012;
2. Affirmation of Stuart F. Klein, Esq. dated August 21, 2012 with attached exhibits A-C;
3. Defendants' Memorandum of Law dated August 21, 2012;
4. Affirmation of Giovanna A. D'Orazio, Esq. dated September 14, 2012 with attached exhibits A-D;
5. Plaintiff's Memorandum of Law dated September 14, 2012;
6. Defendants' Memorandum of Law dated September 20, 2012.