SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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MOHANIE SUKHU,

Plaintiff,

Index No.:307060/2013

-against-

UNITED PARCEL SERVICE, INC., JAMES JIGGETS, JOHN MANNION and ADELIS INTERNATIONAL SECURITY, INC.,

Defendants.
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HON. HOWARD H. SHERMAN:

Plaintiff MOHANIE SUKHU moves to dismiss the Affirmative defenses in the Answers of Defendants, UNITED PARCEL SERVICE, INC., JOHN MANNION, and JAMES JIGGETS, respectively, pursuant to CPLR 3211(b).

Defendants UNITED PARCEL SERVICE, INC., and JOHN MANNION, Cross Move to dismiss the Plaintiff's First Cause of Action against them, pursuant to CPLR 3211(a)(7).

This is an action brought by Plaintiff to recover damages from Defendants, based upon allegations of hostile work environment and retaliation, in violation of Human Rights Laws of New York City (NYC Administrative Code §8-107) and New York State (Executive Law §290-97); negligent hiring and retention against UPS; and assault and battery against Defendant JIGGETS.

In relevant part, the facts alleged by Plaintiff include that she was employed

by Defendant, ADELIS INTERNATIONAL SECURITY, INC., as a security guard commencing in May 2013. ADELIS had a contract to provide security for Defendant UNITED PARCEL SERVICE, INC. Plaintiff was working at the UPS Customer Center located on Brush Avenue in the Bronx. JAMES JIGGETS was employed by UPS.

On August 26, 2013, Plaintiff alleges that she was called into JIGGETS' office, and that he hugged her and that his arms touched her breasts. After she left the office, she only told her coworker, Akbar, about the incident.

On the next day, August 27, 2013, near the end of her shift, Plaintiff was called into JIGGETS' office again. Although she allegedly told Akbar that she did not want to go, she did go to JIGGETS' office alone. At that time, she alleges that JIGGETS made sexual advances towards her. After she left JIGGETS' office, she told her ADELIS Supervisor, Mr. Lakenlal Singh.

Singh quickly arranged a meeting with Mr. Adelis, JOHN MANNION (a manager for UPS), a secretary, and a policeman. The next day, she helped them set up a phone call with JIGGETS.

After this conversation, MANNION took Plaintiff to the Police Station where she filed a report. About one week later, Plaintiff was transferred to another UPS location in Mount Vernon, NY. Thereafter, upon her request, she was

transferred back to the Brush Avenue location.[1]

CPLR 3211(b) "Motion to Dismiss Defense" provides that "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." It is well-established that:

> "**On a motion to dismiss affirmative defenses pursuant to CPLR 3211 (b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law** (see e.g.Vita v New York Waste Servs., LLC, 34 AD3d 559, 559, 824 NYS2d 177 [2006]; Santilli v Allstate Ins. Co., 19 AD3d 1031, 1032, 797 NYS2d 226 [2005]). **In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed** (Warwick v Cruz, 270 AD2d 255, 255, 704 NYS2d 849 [2000]). **A defense should not be stricken where there are questions of fact requiring trial** (see e.g. Atlas Feather Corp. v Pine Top Ins. Co., 128 AD2d 578, 578-579, 512 NYS2d 844 [1987])." [emphasis added]

534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick, 90 A.D.3d 541, 541-542 (1st Dept. 2011).

In Defendants' First Affirmative Defense, they all, respectively, allege the failure to state a cause of action. In this regard, the parties cite case law for the principle that "such a defense may be dismissed only if **all** the other affirmative defenses are found to be legally insufficient. (See Riland v Todman & Co., 56 AD2d 350.)" [emphasis added] Raine v. Allied Artists Productions, Inc., 63

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[1] (See Plaintiff's Complaint; and Plaintiff's Affidavit, dated October 31, 2014, annexed to Plaintiff's Affirmation in Opposition to Defendants' Cross Motion).

A.D.2d 914 (1st Dept. 1978). In the case at bar, since some affirmative defenses are found to be legally sufficient, that part of Plaintiff's Motion, seeking to dismiss this defense (which is mere surplage), is denied.

In their Second Affirmative Defense, all Defendants, respectively, allege that the Plaintiff's claims are barred by the applicable statute of limitations.

In response to Plaintiff's Motion, Defendants UPS and MANNION agree to withdraw this statute of limitations defense, without prejudice. Therefore, as to that part of Plaintiff's Motion which seeks to dismiss this defense as to Defendants UPS and MANNION, it is deemed moot.

As far as Defendant JIGGETS, his Counsel opposes this part of Plaintiff's Motion by alleging that Plaintiff did not file this lawsuit within one year of the time that it is alleged that the assault and battery by JIGGETS allegedly occurred. However, the Plaintiff alleges that the facts constituting the assault and battery occurred in August 2013.[2] The pleadings show that this action was commenced by the filing of the Summons and Complaint in November 2013. Defendant JIGGETS had served his Answer to the Second Amended Complaint in July 2014. Thus, it appears that this action would have been commenced within one year of

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[2] (See Plaintiff's Complaint, and Plaintiff's Affidavit, dated October 31, 2014).

the date of the occurrence of the allegations complained of, so it is not barred by the statute of limitations invoked by JIGGETS. Thus, that part of Plaintiff's Motion that seeks to dismiss Defendant JIGGETS' affirmative defense of statute of limitations is granted.

In their Third Affirmative Defense, they all, respectively, allege that Plaintiff's claims are barred, in whole or in part, by the doctrines of res judicata, waiver, estoppel, and/or unclean hands.

As far as "res judicata", the doctrine would bar litigation between the same parties on matters that were already judicially decided between them. See Siegel, New York Practice, §442-456 (5th Ed. 2011).

"Collateral estoppel" precludes re-litigation of issues decided in a prior action. See Siegel, New York Practice, §443 (5th Ed. 2011). If the doctrine of equitable estoppel is being referred to, then it has been defined as follows:

> "In order for estoppel to exist, three elements are necessary: "'(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts.' (21 NY Jur, Estoppel, § 21.)" (Matter of Carr, 99 AD2d 390, 394.) The party asserting estoppel must show with respect to himself: "(1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position". (Airco Alloys Div. v Niagara Mohawk Power Corp., 76 AD2d 68,

81-82)."

BWA Corp. v. Alltrans Express U.S.A., Inc., 112 A.D.2d 850 (1st Dept. 1985).

Defendants do not substantially oppose this part of Plaintiff's Motion, and so the part of Plaintiff's Motion, which seeks to dismiss the defenses of res judicata, and estoppel, is granted.

As to the doctrine of "unclean hands", it may be "available where plaintiff is guilty of immoral or unconscionable conduct directly related to the subject matter, and the party seeking to invoke the doctrine is injured by such conduct." Frymer v. Bell, 99 A.D.2d 91 (1st Dept. 1984).

In the case at bar, Defendant JIGGETS denies committing the allegations alleged by Plaintiff, so alleges that Plaintiff is not entitled to punitive damages or attorneys fees; and also alleges that, if there was physical contact, it was consensual. (See JIGGETS' Fourth and Fifth Affirmative Defense). Given the sharp factual disputes, Defendants' Third Affirmative Defense of unclean hands, and JIGGETS' aforesaid Fourth and Fifth Affirmative Defenses, cannot be dismissed as a matter of law at this time – especially since discovery has not been exchanged. "In reviewing a motion to dismiss an affirmative defense, this Court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference." Greco v.

Christoffersen, 70 A.D.3d 769 (2d Dept 2010).

The Affirmative Defense of "waiver" will be analyzed in conjunction with the Fifth, Sixth, Thirteenth, and Nineteenth Affirmative Defenses of Defendants UPS and MANNION, and JIGGETS' Eighth and Fourteenth Affirmative Defenses, discussed infra. "[W]aiver "is an intentional relinquishment of a known right." EchoStar Satellite L.L.C. v. ESPN, Inc., 79 A.D.3d 614 (1st Dept. 2010).

In their Fifth Affirmative Defense, Defendants UPS and MANNION allege that they exercised reasonable care to prevent, and promptly correct, any discriminatory, retaliatory, or harassing behavior, by having anti-discrimination, anti-retaliation, and anti-harassment polices, with a complaint procedure.

In their Sixth Affirmative Defense, Defendants UPS and MANNION allege that Plaintiff unreasonably failed to take action pursuant to Defendants' policies and procedures prohibiting discrimination, retaliation, and harassment.

All Defendants, respectively, allege that Plaintiff's claims may be barred in whole, or in part, by her failure to make reasonable efforts to mitigate her alleged damages. (See Thirteenth Affirmative Defense of Defendants UPS and MANNION, and JIGGETS' Eighth Affirmative Defense).

All Defendants, respectively, allege that any harm was caused in whole, or in part, by Plaintiff's own conduct. (See Nineteenth Affirmative Defense of

Defendants UPS and MANNION, and JIGGETS' Fourteenth Affirmative Defense).

With regard to the aforesaid Fifth, Sixth, Thirteenth, and Nineteenth Affirmative Defenses of Defendants UPS and MANNION, and JIGGETS' Eighth and Fourteenth Affirmative Defenses, these are viable, based upon allegations made. Defendants UPS and MANNION maintain that, by her course of conduct, Plaintiff did not give them the opportunity to address the situation at the earliest opportunity, on August 26, when they could have prevented the event from occurring on the next day of August 27. In this regard, Plaintiff herself alleges that, after the first incident on August 26, 2013, which involved hugging and touching, she had merely informed a coworker, named Akbar. Despite being uncomfortable with what had occurred, she did not inform any supervisor at ADELIS or UPS. Instead, she again voluntarily went to JIGGETS' office, alone, the next day, when the more serious sexual advances allegedly occurred. It is Defendants' position that, by her unreasonable failure to promptly take action pursuant to Defendants' policies and procedures prohibiting harassment, Plaintiff may be deemed to have waived some rights.

Also, Defendant JIGGETS maintains that Plaintiff willingly participated in the alleged actions that are the subject matter of this case. Alternatively, even if

the allegations were true, Defendants contend that Plaintiff could have thereafter mitigated any damages, by seeking appropriate treatment, such as psychiatric treatment, for any alleged suffering. Thus, Defendants should be allowed to maintain the aforesaid Affirmative Defenses.

Further, even assuming that Defendant JIGGETS did allegedly make the unwelcome sexual advances, then Defendants UPS and MANNION are allowed to maintain their Fourteenth Affirmative Defense, alleging that their liability, "if any, to Plaintiff for non-economic loss is limited to [their] equitable share, determined in accordance with the relative culpability of all persons or entities contributing to the total liability for economic loss", pursuant to CPLR Art. 16. Likewise, JIGGETS liability for non-economic loss shall not exceed his equitable share of liability pursuant to CPLR Art. 16, pursuant to his Ninth Affirmative Defense.

In their Seventh Affirmative Defense, Defendants UPS and MANNION allege that they did not aid, abet, ratify, condone, encourage, or acquiesce, in any alleged harassing, discriminatory, or retaliatory conduct. In this regard, Defendants had denied Plaintiff's allegations, thereby disputing her version of the events.

In support of their position, Plaintiff merely cites to DeVito v. Sears, Roebuck & Co., 40 Misc. 3d 1206(A) (N.Y. Sup. Ct. 2013), which decided a

motion for summary judgment, rather than a motion to dismiss. Nevertheless, therein, similar to the case at bar, the defendant had maintained that it had not "acquiesced in, condoned, or approved homo phobic behavior on the part of its employees"; and that it had "an anti harassment policy in place and responded promptly when [plaintiff] made his formal complaints about the alleged harassment". DeVito v. Sears, Roebuck & Co., 40 Misc. 3d 1206(A) (N.Y. Sup. Ct. 2013). Therein, the Court denied summary judgment on the ground that there were questions of fact, stating that plaintiff's "account of persistent and severe words and actions on the part of his co-workers raises an issue of fact as to whether Sears in fact did [acquiesce in or condone a hostile work environment, and] ... whether Sears' corrective actions were reasonable as a matter of law, which must be adjudicated by a fact finder at trial." DeVito v. Sears, Roebuck & Co., 40 Misc.3d 1206(A) (N.Y. Sup. Ct. 2013). Likewise, in the case at bar, such issues of fact must be adjudicated at trial.

In Defendants' Ninth Affirmative Defense, Defendants UPS and MANNION allege that Plaintiff would not be entitled to punitive damages and attorneys' fees, because the alleged conduct of JIGGETS was contrary to the good faith efforts to comply with the law by Defendants UPS and MANNION. Defendants are entitled to maintain this affirmative defense with respect to their

own actions– even assuming that JIGGETS engaged in the sexual advances as alleged.

It is also noted that N.Y.C. Administrative Code "Section 8-107(13)(e) allows an employer to plead and prove various factors where liability for discriminatory conduct is based "solely on the conduct of an employee, agent, or independent contractor." Among the factors that can be pleaded is a "meaningful and responsive procedure for investigating complaints" and a "firm policy against such practices which is effectively communicated." See N.Y.C. Admin. Code § 8-107(13)(d)(1) and (2)." Thompson v. American Eagle Airlines, Inc., 2000 U.S. Dist. LEXIS 14932, 31-32 (S.D.N.Y. Oct. 4, 2000). Defendants may plead this defense, since said factors, set forth in NYC Admin Code Section 8-107(13), are "to be "considered in mitigation of civil penalties or punitive damages which may be imposed." N.Y.C. Admin. Code § 8-107(13)(e)" – even if they may not be a total defense to a claim for punitive damages. Thompson v. American Eagle Airlines, Inc., 2000 U.S. Dist. LEXIS 14932, 31-32 (S.D.N.Y. Oct. 4, 2000).

The Eleventh, Tenth, and Eighth Affirmative Defenses of Defendants UPS and MANNION will be analyzed together with JIGGETS' Sixth Affirmative Defense. In the Eleventh Affirmative defense of Defendants UPS and MANNION and in JIGGETS' Sixth Affirmative Defenses, Defendants allege that Plaintiff did

not suffer a materially adverse employment action. In their Tenth Affirmative Defense, Defendants UPS and MANNION allege that, even assuming that the alleged conduct occurred, such conduct occurred for legitimate non-discriminatory reasons. In their Eighth Affirmative defense, Defendants UPS and MANNION allege that they would have taken the same actions, even if discrimination or retaliation were motivating factors in Plaintiff's alleged adverse treatment.

These Affirmative Defenses are made in response, for example, to Plaintiff's allegation that it was an act of retaliation for Defendants to cause Plaintiff to be transferred, right after the incident, from the UPS location in the Bronx to the one in Mount Vernon; and for Defendants to seek to videotape Plaintiff sleeping on the job.

However, as far as the transfer, "the law is clear that the transfer of an employee from one facility to another does not rise to the level of adverse employment action unless accompanied by ... such [things] as demotion in title or reduction in benefits. Smalls v. Allstate Ins. Co., 396 F. Supp. 2d 364, 371 (S.D.N.Y. 2005) (citing Pimentel v. City of New York, 74 Fed. App'x 146, 148 [2d Cir. 2003]). **As a matter of law, a transfer that results in a longer commute is an inconvenience, not an adverse employment action**." [emphasis added] George v. New York City Dep't of Corr., 2015 U.S. Dist. LEXIS 126883, 13-14,

16 Accom. Disabilities Dec. (CCH) P16-183 (E.D.N.Y. Sept. 22, 2015).

As far as Plaintiff's allegations that Defendants sought to videotape Plaintiff in the performance of her job, Defendants deny that any actions on their part were made for discriminatory, or retaliatory, motives; and so they are entitled to maintain the aforesaid Affirmative defenses.

All Defendants, respectively, allege that Plaintiff's claims may be barred by the Workers Compensation Law. (See Twelfth Affirmative Defense of Defendants UPS and MANNION, and JIGGETS' Seventh Affirmative Defense).

In this regard, it is noted that CPLR 3014 provides that "defenses ... may be stated regardless of consistency... defenses may be stated alternatively or hypothetically." Thus, even though Defendants deny that Plaintiff was an employee of UPS, they are entitled to plead this defense in the alternative. This defense would apply to Plaintiff's cause of action for negligent hiring and retention against UPS, because "negligent hiring and retention claims brought by an employee are barred by Workers' Compensation". Walker v. Weight Watchers Int'l, 961 F. Supp. 32 (E.D.N.Y. 1997).

In this regard, Plaintiff argues that 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 A.D.2d 38 (1st Dept. 2000). In a case cited by Plaintiff, for example, the Court held that "the action is not barred by the exclusivity provisions of the Workers' Compensation Law (see, Workers' Compensation Law §§ 11, 29 [6]), since a factual issue has been raised as to whether [defendant] American authorized an intentional tort on the part of its employee." Spoon v. American Agriculturalist, Inc., 120 A.D.2d 857 (3d Dept. 1986). Thus, where, as here, there are factual issues as to whether Defendant UPS can be deemed to have authorized JIGGETS' actions, Defendants are entitled to maintain this defense.

As far as Plaintiff's Motion to dismiss the Sixteenth Affirmative Defense, by Defendants UPS and MANNION, of failure to name necessary parties, Plaintiff's Counsel acknowledges that it may seek to add a party if "through the course of discovery ... it becomes clear that" that Plaintiff should do so.[3] Based upon this acknowledgment by Plaintiff, it appears that discovery needs to be exchanged before Counsel can conclusively determine whether other parties may need to be added; and so that part of Plaintiff's Motion which seeks to dismiss this defense is denied.

Plaintiff does not effectively address the Seventeenth and Fifteenth

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[3] (See Laufer Reply Aff, dated Oct. 27, 2014, ¶ 66).

Affirmative Defenses of UPS and MANNION, and JIGGETS' Tenth and Eleventh Affirmative Defense, and so does not meet her burden to dismiss these, pursuant to CPLR 3211(b). All Defendants allege that they would be entitled to a set-off, pursuant to General Obligations Law § 15-108.[4] (See Seventeenth Affirmative Defense of Defendants UPS and MANNION, and JIGGETS' Eleventh Affirmative Defense). All Defendants, respectively, allege that any verdict would be reduced by those amounts which would indemnify Plaintiff from any collateral source, pursuant to CPLR 4545(c). (See Fifteenth Affirmative Defense of Defendants UPS and MANNION, and JIGGETS' Tenth Affirmative Defense).

It is noted that Defendants UPS and MANNION withdrew, without prejudice, their Eighteenth Affirmative Defense – which alleged, inter alia, that Plaintiff failed to exhaust administrative remedies. Thus, that part of Plaintiff's Motion which seeks to dismiss this defense, as to Defendants UPS and

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[4] General Obligations Law § 15-108, "Release or covenant not to sue" provides as follows: "(a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it **reduces the claim of the releasor against the other tortfeasors to the extent of** any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest." [emphasis added]

MANNION, is deemed moot.

In JIGGETS' Twelfth Affirmative Defense, he alleges that Plaintiff's claims may be barred "since Plaintiff failed to exhaust the administrative remedies and/or comply with and satisfy all of the procedural, administrative, statutory and/or jurisdictional prerequisites for bringing and maintaining said action."

In this regard, for instance, NYC Administrative Code §8-502(c) provides that the plaintiff shall serve a copy of the complaint upon the city commission on human rights, and the corporation counsel, within 10 days after having commenced a civil action pursuant to the New York City Human Rights Law. Plaintiff's Counsel has not shown that they actually complied therewith; and provided no Affidavits of Service relative thereto. Plaintiff would have to show proper compliance with applicable law if she seeks dismissal of this Affirmative Defense, especially at this early stage of these proceedings – (even if, as alleged, the Plaintiff's failure to comply may not result in a consequence such as dismissal).

In his Twentieth Affirmative Defense, Defendant MANNION alleges that he "is not subject to individual liability for one or more of Plaintiff's claims against him". Plaintiff has not addressed this Affirmative Defense, and so has not met her burden to demonstrate that the defense is without merit as a matter of law.

It is well-established that, "when moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" ". Greco v. Christoffersen, 70 A.D.3d 769 (2d Dept. 2010).

All Defendants, respectively, allege that, because Plaintiff was not an employee of UPS, certain claims under Title 8 of the Administrative Code of the City of New York, and under Sections 290-297 of the Executive Law of the State of New York, may be barred. (See Defendants UPS and MANNION's Fourth Affirmative Defense, and JIGGETS' Thirteenth Affirmative Defense).

This will be analyzed in conjunction with the Cross Motion by Defendants, UPS and MANNION, to dismiss Plaintiff's First Cause of Action. Therein, Plaintiff alleges that Defendants' actions were in violation of NYC Administrative Code § 8-107, and NYS Executive Law § 296. In this regard, in support of their Cross Motion, Defendants allege that "these laws only govern discrimination in the traditional employer-employee relationship and not in the context of independent contractors." (Malley Aff, ¶ 6, p. 2, dated Oct. 2, 2014)

In the First Cause of Action, Plaintiff cites to NYC Administrative Code § 8-107, "Unlawful discriminatory practices" which provides as follows:

"1. Employment. It shall be an unlawful discriminatory practice:

> (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment." [emphasis added]

Also, in the First Cause of Action, Plaintiff cites to NYS Executive Law § 296 "Unlawful discriminatory practices" which, likewise, provides that:

> "1. It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." [emphasis added]

It has been established that "the determination of whether an employer-employee relationship exists rests upon evidence that the employer exercises either control over the results produced or over the means used to achieve the results." Murphy v. ERA United Realty, 251 A.D.2d 469 (2d Dept. 1998). In Murphy, although there was an agreement characterizing the plaintiff as an independent contractor, that was not deemed dispositive. Analyzing various factors, the Court held that summary judgment was properly denied, there being questions of fact as to whether the plaintiff was an independent contractor or an

employee. Murphy v. ERA United Realty, 251 A.D.2d 469, 470-471 (2d Dept. 1998).

Likewise, in the case at bar, there is a "Guard Services Agreement" between Defendants UPS and ADELIS, whereby "UPS desires to have [ADELIS] furnish uniformed guards... to provide security services... for UPS locations." (see "Guard Services Agreement", p. 1). While the Agreement does refer to ADELIS as an independent contractor, other relevant clauses include, for example, that: personnel may be removed if UPS deems them to be not qualified or suitable to perform the work, (see "Guard Services Agreement" ¶3[B)]); UPS would have to approve any wage increases and overtime, (see "Guard Services Agreement" ¶2[A][iii] and 2[B]); ADELIS representatives should be available to consult with UPS regarding the work rendered, (see "Guard Services Agreement" ¶4); UPS may ask Guards to perform duties other than those specified in writing, (see "Guard Services Agreement" ¶5).

Under the circumstances, the issue of whether there was an employer-employee relationship cannot be determined as a matter of law at this early stage of the proceedings. These motions were made prematurely, prior to the exchange

of relevant discovery, and even prior to ADELIS' appearance herein.[5] It is apparent that Defendant ADELIS would have knowledge of some pertinent facts. In this regard, it is noted that CPLR R 3211(d) "Facts Unavailable to Opposing Party" provides as follows:

> "Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, **allowing the moving party to assert the objection in his responsive pleading**, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just." [emphasis added]

Accordingly, Defendants' Motion to dismiss the Plaintiff's First Cause of Action is denied; however, Defendants UPS and MANNION are permitted to assert their Fourth Affirmative Defense, and Defendant JIGGETS is permitted to assert his Thirteenth Affirmative Defense, on this issue.

It is also noted that, in another recent case where the motion to dismiss was made pursuant to CPLR 3211 (a) (7), and plaintiffs argued that defendants' motion was premature since they had not yet had discovery, the Court held that:

> "**CPLR 3211 (a) (7) "limits [the court] to an examination of the pleadings to determine whether they state a cause of action"** (Miglino v Bally Total Fitness of Greater N.Y., Inc., 20 NY3d 342, 351, 985 NE2d 128, 961 NYS2d 364 [2013]; Rovello v Orofino Realty Co., 40 NY2d 633, 357

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[5] It appears, from the Court's file, that ADELIS Answered the Complaint on December 9, 2014.

> NE2d 970, 389 NYS2d 314 [1976]). **"Modern pleading rules are 'designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one' "** (id. at 636)." [emphasis added]

Lee v. Dow Jones & Co., Inc., 121 A.D.3d 548 (1st Dept. 2014). See Clarke v. Laidlaw Tr., Inc., 125 A.D.3d 920, 921-922 (2d Dept. 2015).

Accordingly, Plaintiff's Motion to dismiss Defendants' Affirmative Defenses is denied in part, and granted in part, to the extent set forth herein.

Defendants' Motion to dismiss Plaintiff's First Cause of Action is denied.

This constitutes the decision and order of this Court.

Dated: February 2, 2016

HON. HOWARD H. SHERMAN, JSC