Green v Himon
2016 NY Slip Op 31830(U)
September 26, 2016
Supreme Court, New York County
Docket Number: 161441-2014
Judge: George J. Silver

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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SIAN GREEN,

Plaintiff,

-against-

FAYSAL KABIR MOHAMMAD HIMON, NYC TAXI GROUP, INC., (D/B/A SHOE TAXI CORP), A+ COURIERS, KENNETH OLIVO, MITSUI FUDOSAN AMERICA, INC., NEW YORK CITY'S HEALTH AND HOSPITALS CORP. (BELLEVUE HOSPITAL CENTER), XYZ CORP. 1-99, ABC INC., 1-99, JOHN AND JANE DOES, 1-99,

Defendants.

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Index No. 161441-2014

DECISION/ORDER

Motion Sequence 003

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Affirmations, Memorandum of Law in Support & Collective Exhibits Annexed	1, 2, 3, 4
Answering Affirmation & Exhibits Annexed	5, 6
Reply Affirmation	7

This is an action for negligence and medical malpractice stemming from an incident where plaintiff Sian Green ("Plaintiff") was struck by a yellow taxi while she stood on a sidewalk near Rockefeller Plaza. Presently, defendant A Plus Messenger Service, Inc., sued herein as A+ Couriers ("Defendant" or "A Plus") moves to dismiss the action as against them pursuant to CPLR § 3211(a)(1), 3211(a)(7), and 3211(c). Plaintiff opposes the motion.

The incident occurred on August 20, 2013, when Plaintiff, visiting from Great Britain with a friend, was walking on the sidewalk on West 49th Street near 6th Avenue. According to Plaintiff, she witnessed a verbal altercation between a taxi driver, co-defendant Faysal Kabir Mohammad Himon ("Himon"), and a bike messenger, co-defendant Kenneth Olivo ("Olivo"), whereupon Olivo was banging on the hood of Himon's taxi (Green Tr. at 25:11-18). Thereafter, Olivo rode towards the sidewalk and Himon swerved his vehicle towards Olivo, accelerated, and

struck Olivo (*id.* at 25:15-21). The taxi then hopped the curb and struck Plaintiff, causing serious injuries. Specifically, Plaintiff's left leg was severed below the knee and she is now permanently disabled, and both her right leg and head were severely lacerated (Compl. at 8, 13). Plaintiff commenced suit by filing of a Summons and Complaint on November 18, 2014.

On January 21, 2015 defendants the City of New York, New York City Department of Transportation, and New York City Taxi & Limousine Commission (collectively "the City") moved to dismiss the action against itself. The City's motion was granted by this Court in an Order dated February 29, 2016 (*Green v City of New York*, Sup Ct. NY County, Feb. 29, 2016, Chan, J., index No. 161441/14). Defendant A Plus now seeks an Order, by way of Notice of Motion, dismissing the action as against them pursuant to CPLR § 3211(a)(1), 3211(a)(7), and 3211(c). Plaintiff opposes.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be construed liberally (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "The court must accept the facts alleged in the complaint as true and accord the plaintiffs the benefit of every possible favorable inference" (*Amaro ex rel. Almazan v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Further, "[a] motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Cives Corp. v George A. Fuller Co.*, 97 AD3d 713, 714 [2d Dept 2012] quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 83 [2d Dept 2010]). A motion to dismiss under CPLR 3211(a)(1) obliges the court "to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270 [1st Dept 2004]). Dismissal is appropriate only where the documentary evidence submitted "utterly refutes plaintiff's factual allegations," and conclusively establishes a defense to the asserted claims as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Amsterdam Hosp. Grp., LLC v Marshall-Alan Associates, Inc.*, 120 AD3d 431, 433 [1st Dept 2014]). "Factual affidavits, however, do not constitute documentary evidence within the meaning of the statute" (*Art & Fashion Grp. Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] citing *Flowers v 73rd Townhouse LLC*, 99 AD3d 431, 431 [1st Dept 2012]).

Here, Defendant submits an affidavit from Mehran Monessa, Vice President of A Plus and Controller of A Plus' sister company, Downtown Delivery Service, stating that A Plus does not employ bicycle messengers or any couriers and that at no point was Olivo employed by A Plus at any point in time (Monessa Aff. at ¶¶ 7-8). Monessa went on to state that A Plus retains Downtown Delivery Service, a company that hires employees to conduct deliveries, and that based on Monessa's review of Dowtown Delivery Service's records, Olivo's last date of employment with Downtown Delivery Service was in March 2011 (*id.* at ¶¶ 8-10). Defendant further submits a copy of Downtown Delivery Service's "Paid Courier Settlements" demonstrating Olivo last recorded payment was for services on March 16, 2011(Def. Ex. D) and a copy of Downtown Delivery Service's payroll summary for the week of the accident which demonstrates Olivo was not on their payroll (Def. Ex. E). In opposition, Plaintiff submits

affidavits from Plaintiff's attorney Daniel Marchese ("Marchese") and from Ronetta Britton ("Britton"), a paralegal with the law firm Windels Marx Lane & Mittendorf, LLP ("WMLM"). The affidavits were purportedly sworn to before a notary in New Jersey, but lack the authenticating certificate of conformity required by CPLR § 2309(c) (CPLR § 2309[c]). However, the certificate of conformity requirement is not a rigid one so long as the oath is duly given and the absence of such a certificate is a mere irregularity not a fatal defect (*Indemnity Ins. Corp. v A 1 Entertainment LLC*, 2013 NY Slip Op 04701; *Matapos Tech. Ltd. v Compania Andian de Comercio Ltda*, 68 AD3d 672 [1st Dept 2009]).

However, even without considering Plaintiff's affidavits in opposition, Defendant has failed to meet its burden. Plaintiff's contention that Olivo was employed by A Plus on the date of the accident is not "utterly refuted" by documentary evidence that Olivo was not employed with Downtown Delivery Service (*Goshen*, 98 NY2d at 326). Nor is it disputed by the Monessa Affidavit since factual affidavits "do not constitute documentary evidence within the meaning of [CPLR § 3211(a)(1)]" (*Art & Fashion Grp. Corp.*, 120 AD3d at 438). As such, Defendant's motion to dismiss pursuant to CPLR § 3211(a)(1) must be denied.

Defendant further requests for an Order dismissing the claim under CPLR § 3211(c), and requests that this Court treat Defendant's pre-answer motion as one for summary judgment. Under CPLR § 3211(c), this Court may convert a motion to dismiss into one for summary judgment provided the Court has given notice to the parties, or where parties have given adequate notice by "expressly seeking summary judgment or submitting facts and arguments clearly indicating that they were 'deliberately charting a summary judgment course'" *(Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988] citing *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]). Further, "the unilateral actions of a party in seeking summary judgment on a CPLR 3211(a)(7) motion cannot constitute 'adequate notice' to the other party in compliance with the requirement of CPLR 3211(c)" (*Mihlovan*, 72 N.Y.2d at 508). Here, after considering Defendant's arguments, the Court declines to treat Defendant's motion as one for summary judgment since there has been no notice to Plaintiff, and there has been no discovery conducted on the issue.

Thus, the Court now turns to the portion of Defendant's motion seeking an Order dismissing the claim under CPLR § 3211(a)(7) for failure to state a cause of action. CPLR 3211(a)(7) limits [the court] to an examination of the pleadings to determine whether they state a cause of action (*Lee v Dow Jones & Co.*, 121 AD3d 548, 549 [1st Dept 2014] citing *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). The Court must determine whether "from the [complaint's] four corners[,] factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*HSH Nordbank AG v Goldman Sachs Grp., Inc.*, 43 Misc 3d 1225[A], 2103 NY Slip Op 52314[U] [Sup Ct, NY County 2013] citing *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 [1st Dept 2005]). Here again, Plaintiff is entitled to every possible favorable inference that can be drawn from the pleadings (*Westhill Exports, Ltd. v Pope*, 12 NY2d 491, 496 [1st Dept 1963]).

Defendant argues that the claim should be dismissed because Olivo's actions don't fall within the scope of employment (Def. Mem. Supp. at 8). But this argument is premature on a motion to dismiss, where the proper standard is "whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" *(House of Spices (India), Inc. v. SMJ Servs., Inc.*, 103 AD3d 848, 850 [2d Dept 2013]) quoting *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). In her Complaint, Plaintiff states that "[u]pon information and belief ... Olivo was a driver and/or agent and/or employee of [A Plus] ... [and] was acting in the scope of his employment with [A Plus] and, accordingly, [A Plus] is responsible and liable for Defendant Olivo's actions under the doctrine of respondeat superior" (Def. Ex. A at ¶ 6). Based on the Complaint, and affording Plaintiff every possible inference, Plaintiff has successfully stated a cause of action sounding in respondeat superior and Defendant's motion to dismiss is denied, and it is hereby

ORDERED that Defendant's Motion to Dismiss is denied; and it is further

ORDERED that the parties are to appear for a status conference on October 19, 2016 at 9:30 a.m. at Part 10, 60 Centre St. New York, NY 10007; and it is further

ORDERED that Plaintiff is to serve a copy of this order, with notice of entry, upon Defendants within 20 days of entry.

George J. Silver

George J. Silver, J.S.C.

Dated: SEP 26 2016
New York County

HON. GEORGE J. SILVER