Yang v Puri
2016 NY Slip Op 31989(U)
September 6, 2016
Supreme Court, Queens County
Docket Number: 700149/2016
Judge: Janice A. Taylor

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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DAVID YANG,

Plaintiff(s),

- against -

KIRAN PURI, SATISH PURI, SANDEEP PURI, Individually and as Officers, Directors, Owners and/or Employees of RAIMENT FASHIONS, INC. and RAIMENT FASHIONS, INC.,

Defendant(s).
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Index No.: 700149/16
Motion Date: 5/11/16
Motion Cal. No.: 157
Motion Seq. No: 1

The following papers numbered 1 - 9 read on this motion for an order dismissing the instant action as against defendants Kiran Puri, Satish Puri, and Raiment Fashions, Inc. (collectively, "the moving defendants").

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Reply Affirmation-Service.....	8 - 9

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

Plaintiff, David Yang, commenced this action for breach of covenant of quiet enjoyment and negligence on January 6, 2016. In his complaint, plaintiff alleges that defendants Kiran Puri ("Kiran") and Satish Puri ("Satish"), and their son Sandeep Puri ("Sandeep") are officers, directors, owners and/or employees of Raiment Fashions, Inc. Plaintiff is the owner of Seoul Upholstery Co. On or about April 1, 2007, plaintiff and Seoul Upholstery Co. entered into a commercial lease agreement with Kiran Puri, Satish Puri, and Raiment Fashions, Inc. for the premises located at 20-48C 129th Street, College Point, New York ("the premises"), of which Raiment Fashions, Inc. is the owner.

Defendants utilized a portion of the premises (referred to hereinafter as "the Back Space") for storage and as an office for defendant Sandeep 's business. In the fall of 2013, defendants

Satish and Kiran discussed with plaintiff the possibility of leasing the Back Space. Thereafter, plaintiff entered into an agreement to lease the Back Space beginning on April 1, 2014. The lease expressly entitles plaintiff to quiet enjoyment of the premises.

On or about March 24, 2014, defendants Kiran and Sandeep visited plaintiff at the premises. Defendant Kiran informed plaintiff that he could begin moving his belongings into the Back Space. Defendant Sandeep became very angry and pushed defendant Kiran. Defendant Sandeep then asked plaintiff if plaintiff could instead move his belongings into the Back Space beginning in the first week of April 2014. Defendant Kiran pulled defendant Sandeep away from the premises and assured plaintiff that he could move his belongings into the Back Space in the week of March 24, 2014.

Plaintiff further alleges that on April 2, 2014, defendant Sandeep entered the premises without plaintiff's permission. Defendant Sandeep asked plaintiff to come outside and plaintiff proceeded outside. When outside, defendant Sandeep began to make threatening gestures towards plaintiff. Plaintiff turned to return to the inside of the premises. As plaintiff tried to return to the premises, defendant Sandeep punched plaintiff in the groin. Plaintiff doubled over from the pain. Then, while wearing brass knuckles, defendant Sandeep punched plaintiff in the head. Plaintiff placed his forearm over his head to protect himself, but defendant Sandeep continued to strike plaintiff in his head and hands. Plaintiff sustained two large laceration to his head and suffered an open fracture with a laceration to his right ring finger. Plaintiff underwent two special surgeries and is now unable to utilize his right ring finger for his work.

Defendant Sandeep interposed an answer dated March 29, 2016. The moving defendants interposed an answer with a counterclaim dated March 8, 2016, in which they allege the following affirmative defenses: contributory negligence, assumption of risk, collateral source offset, breach of contract, and indemnification.

The moving defendants now seek an order dismissing the instant action as against them pursuant to CPLR §§ 3211(a)(1),(3),(7), and (8). In support of their motion, the moving defendants argue that (1) documentary evidence establishes that Raiment Fashions, Inc. was not in existence at the time of the alleged occurrence; (2) defendants Kiran and Satish are not responsible for the torts of their adult son, Sandeep ; (3) plaintiff fails to state a cause of action for breach of covenant of quiet enjoyment; and (4) that plaintiff failed to comply with the requirement in the lease agreement to procure insurance naming the moving defendants as additional insured.

Initially, CPLR § 3211(e) states, "Any objection or defense

based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either [in a pre-answer motion] or in the responsive pleading." In support of their motion, the moving defendants argue that in their answer, they specifically denied that Raiment Fashions, Inc. was an active corporation and that Kiran and Satish are employees of said corporation. Furthermore, the moving defendants argue that the defenses raised in the instant motion do not constitute surprise requiring an affirmative defense be raised in their answer. The moving defendants' arguments are unconvincing. The moving defendants failed to assert a defense founded upon documentary evidence or plaintiff's lack of legal capacity to sue in their answer and thus waived such defenses (*see* CPLR § 3211[e]; *see e.g. Complete Mgt., Inc. v Rubenstein*, 74 AD3d 722, 723 [2d Dept 2010]; *Margolin v I M Kapco, Inc.*, 89 AD3d 690, 691 [2d Dept 2011]). Therefore, the moving defendants' motion to dismiss pursuant to CPLR §§ 3211(a)(1) and(3) is denied.

Similarly, CPLR § 3211(e) provides, "An objection based upon a ground specified in paragraph eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading." More succinctly, a defense of personal jurisdiction not asserted in an answer or pre-answer motion is waived (*see McGowan v Hoffmeister*, 15 AD3d 297 [1st Dept 2005]; *Hatch v Tran*, 170 AD2d 649, 650 [2d Dept 1991]; *cf Iacovangelo v Shepherd*, 5 NY3d 184, 186 [2005]). Here, the moving defendants failed to assert a defense of lack of personal jurisdiction in their answer. Thus, the moving defendants waived said defense. Therefore, the moving defendants' motion to dismiss pursuant to CPLR §§ 3211(a)(8) is denied.

Contrastingly, a motion to dismiss for failure to state a cause of action may be made at any time or "in a later pleading, if one is permitted" (*see* CPLR § 3211 [e]). In the present case, plaintiff argues that the moving defendants' motion to dismiss for failure to state a cause of action must be denied because the moving defendants did not obtain leave of court to file such a motion after having failed to assert the defense in their answer. Plaintiff's argument is not supported by the plain language of the statute, however. A motion to dismiss for failure to state a cause of action can be made at any time - irrespective of whether defendants asserted the defense in their answer or a pre-answer motion (*Butler v Catinella*, 58 AD3d 145, 151 [2d Dept 2008]).

The Court now turns to the substance of the motion to dismiss for failure to state a cause of action. When reviewing a motion to dismiss for failure to state a cause of action, the sole criterion is whether the factual allegations in the complaint, taken together, manifest any cause of action cognizable at law (*see*

Polonetsky v Better Homes Depot, 97 NY2d 46, 54 [2001]). The court must liberally construe the pleadings, accepting all the allegations of the complaint as true and affording the plaintiff the benefit of every possible favorable inference *(see People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108, 115 [2009]).

Plaintiff asserts two causes of action against the defendants: breach of covenant of quiet enjoyment and negligence. First, the moving defendants argue that plaintiff fails to state a cause of action for breach of covenant of quiet enjoyment. To prevail on a cause of action for breach of covenant of quiet enjoyment a plaintiff must show actual or constructive eviction (*34-35th Corp. v 1-10 Indus. Assoc., LLC*, 16 AD3d 579, 580 [2d Dept 2005]). Where a constructive eviction is claimed, the plaintiff must establish that he was caused to abandon the premises (*see Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 120 [1958]). In the present case, plaintiff fails to state a cause of action for breach of covenant of quiet enjoyment. Plaintiff argues that he was unable to use the premises to operate his business as he was bedridden for months following the alleged occurrence on April 2, 2014. Nowhere in the complaint, however, does plaintiff allege that he vacated or abandoned the premises (*see Grattan v P.J. Tierney Sons*, 226 AD 811, 811 [2d Dept 1929]["There are no allegations of fact constituting either actual or constructive eviction, and one or the other is indispensable to a good complaint for damages for breach of covenant of quiet enjoyment."]). Accordingly, the moving defendants' motion for failure to state a cause of action for breach of covenant of quiet enjoyment is granted.

Second, the moving defendants argue that plaintiff has failed to state a cause of action for negligence because defendant Sandeep is not an employee of Raiment Fashions, Inc. The moving defendants also argue that they cannot be held liable for the torts of their adult son. At the outset, the complaint alleges that the moving defendants are liable for defendant Sandeep 's actions because said defendant is an employee of the moving defendants. Thus, the moving defendants argument that they cannot be held liable for the actions of their adult son is without merit as it does not address the allegations in the complaint. Furthermore, to prevail on a cause of action for negligent hiring, plaintiff must show that an employer hired or retained an employee with knowledge of the employee's propensity for the sort of behavior which caused the plaintiff's injury (*see Kirkman by Kirkman v Astoria Gen. Hosp.*, 204 AD2d 401, 403 [2d Dept 1994]). Here, plaintiff alleges that defendant Sandeep is an employee of Raiment Fashions, Inc., of which defendants Kiran and Satish are officers, directors, owners and/or employees, that defendants Kiran and Satish had personal knowledge of defendant Sandeep 's violent propensity, and that, as a result of the moving defendants' failure to exercise care in the hiring and training of the alleged employee, plaintiff was injured by defendant Sandeep. Thus, accepting all the allegations of the complaint as true,

plaintiff has stated a cause of action for negligent hiring. Therefore, the moving defendants' motion to dismiss the cause of action for negligence is denied.

Finally, the moving defendants' argument that plaintiff did not comply with the lease agreement by failing to procure insurance naming defendants as additional insured fails to support a motion to dismiss for failure to state a cause of action for negligence.

Accordingly, the motion to dismiss the instant action pursuant to CPLR §§ 3211(a)(1), (3), (8) is denied. The motion to dismiss the cause of action for negligent hiring is also denied. The motion to dismiss the cause of action for breach of covenant of quiet enjoyment is, however, granted.

Dated: September 6, 2016

JANICE A. TAYLOR, J.S.C.