SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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HUNTER JANOFF,

Plaintiff,

-against-

KIRAN NEWTON, DAN S. NEIDITCH a/k/a DAN BLOOMBERG, RIVER 2 RIVER REALTY INC., JASON CASTANO, and XYZ COMPANIES,

Defendants.

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Index No. 158427/15

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
Robert J. Hantman, Esq.
Hantman & Assoc.
1120 Ave. of the Americas, 4th fl.
New York, NY 10036
212-684-3933

For Neiditch:
Todd A. Spodek, Esq.
Spodek Law Group P.C.
100 Church St., 8th fl.
New York, NY 10007
212-300-5196

By notice of motion, defendant Dan S. Neiditch a/k/a Dan Bloomberg moves pursuant to CPLR 3211(a)(7), or alternatively, pursuant to CPLR 3211(c), for an order dismissing the complaint as against him, and pursuant to CPLR 3211(a)(8) for an order dismissing the complaint for lack of personal jurisdiction. Plaintiff opposes and cross-moves pursuant to CPLR 306-b for an order permitting late service of the pleadings. Neiditch opposes.

On August 14, 2015, plaintiff commenced this action by summons with notice, alleging an assault by defendant Newton, of which the other defendants were or should have been aware. (NYSCEF 1). On November 16, 2015, counsel for Neiditch and defendant River 2 River Realty Inc. filed and served a notice of appearance and demand for a verified complaint. (NYSCEF 2).

In his complaint, plaintiff filed a complaint, alleging that Newton, a personal security guard employed by Neiditch and defendant Castano, assaulted him outside a Manhattan

nightclub. He alleges that Neiditch and Castano were negligent in supervising Newton, whose actions were within the scope of his employment. Plaintiff advances claims of assault and intentional infliction of emotional distress against Neiditch and Castano vicariously, and a claim of negligent supervision against them directly. (NYSCEF 3).

On February 16, 2016, plaintiff filed an affidavit demonstrating service of the complaint on Castano. (NYSCEF 4). During the pendency of this motion, plaintiff filed additional affidavits, dated August 14, 2015, reflecting his process server's unsuccessful efforts to locate and serve Neiditch and River 2 River at their shared address, and an unsworn, unsigned document, dated August 19, 2015, describing his process server's sole, unsuccessful attempt to serve Newton at his home. (NYSCEF 20-22).

I. SUFFICIENCY OF PLEADINGS

A. Contentions

In support of of his motion, by affidavit dated March 3, 2016, Neiditch denies that Newton worked for him on the date of the alleged assault and that he therefore was not acting within the scope of his employment. He also denies being present at the nightclub when the incident occurred or that he is in any way connected to Newton. Thus, he contends, there is no basis for finding him liable for his alleged negligent supervision of Newton, or for intentionally inflicting emotional distress. Alternatively, based on his affidavit, plaintiff asks to convert his motion to one seeking summary judgment, and asserts that plaintiff is unable to produce any evidence supporting his claims. (NYSCEF 6-7).

In opposition, plaintiff alleges that Neiditch's counsel represented Newton in a criminal proceeding in which he pleaded guilty to the assault alleged here, thereby suggesting the

existence of a relationship between Neiditch and Newton. Notwithstanding Neiditch's denials, he contends, discovery will reveal that Neiditch was present at the nightclub on the night of the incident, and that he frequented the nightclub accompanied by bodyguards, as well as other details demonstrating his relationship with Newton. Accordingly, plaintiff maintains, dismissal is premature. (NYSCEF 23).

In reply, Neiditch reiterates his contentions, adding that even if plaintiff could establish an agency relationship between him and Newton, he fails to establish that the latter was acting within the scope of his employment, as Neiditch could not have possibly benefitted from Newton's tortious conduct. (NYSCEF 25).

B. Analysis

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Leon*, 84 NY2d at 87-88; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]).

However, when the court considers evidentiary material submitted by the parties, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one," and the motion should be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute

exists regarding it." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.* 115 AD3d 128, 145-146 [1st Dept 2014]). Unless the court converts the motion to one for summary judgment pursuant to CPLR 3211(c), the plaintiff "shall not be penalized because he has not made an evidentiary showing in support of his complaint." (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). In other words, the burden does not shift to the non-moving party to refute a defense raised by the moving party. (*E & D Group, LLC v Vialet*, 134 AD3d 981, 982 [2d Dept 2015]).

Generally, an employer may be held vicariously liable for the torts of its employees "to the extent that the underlying acts were within the scope of the employment." (*Adams v New York City Tr. Auth.*, 88 NY2d 116, 119 [1996]; *Fauntleroy v EMM Group Holdings LLC*, 133 AD3d 452, 453 [1st Dept 2015]). An employer-employee relationship must exist at the time of the alleged tort in order to for the employer to be vicariously liable. (*Olson v B & S Caring Assoc., Inc.*, 271 AD2d 588, 588-589 [2d Dept 2000]; *K. I. v New York City Bd. of Educ.*, 256 AD2d 189, 191 [1st Dept 1998]).

On the other hand, a claim of negligent supervision or retention is premised on the employer's placement of its employee in a position to cause foreseeable harm, which could have been avoided if the employer exercised reasonable care in its hiring and retention of that employee. (*Sandra M. v St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875, 878 [2d Dept 2006]; *Sheila C. v Povich*, 11 AD3d 120, 129 [1st Dept 2004]).

Here, Neiditch's denials that he employed Newton, that he was present at the location of the incident, or that he had any connection to Newton, serve solely to controvert the allegations

set forth in the complaint, and thus, at most, raise an issue of fact as to existence of an employer-employee relationship sufficient to support the imposition of vicarious liability, which need not be resolved here. Thus, Neiditch's affidavit does not conclusively establish that plaintiff has no cause of action premised on his status as Newton's employer. (*See Skillgames, LLC v Brody*, 1 AD3d 247, 251 [1st Dept 2003] [affidavits that merely dispute factual allegations in the complaint do not conclusively establish that plaintiff has no cause of action]).

I decline Neiditch's request, alternatively, to convert his motion to one for summary judgment, as plaintiff declines to offer evidentiary material, choosing instead to stand on his pleadings. (*See eg, Lerner v Prince*, 119 AD3d 122, 131 [1st Dept 2014] [absent indication in record that parties deliberately charted a summary judgment course, conversion pursuant to CPLR 3211(c) unwarranted]).

II. SERVICE OF PLEADINGS

A. Contentions

In seeking an order dismissing the action for lack of personal jurisdiction, Neiditch denies that he was personally served or that he received the summons by mail, claiming to have discovered the lawsuit after his own investigation. (NYSCEF 7).

In response and in support of his cross motion, plaintiff contends that the affidavits he submits demonstrate that his process server unsuccessfully attempted to serve Neiditch and River 2 River at their shared business address, and Newton at his last known home address. His counsel claims that in or around September 18, 2015, he spoke with Neiditch's former attorney, who requested a 30-day extension to answer, which plaintiff allowed, and told him that Neiditch had "personally handed" him the pleadings. Plaintiff's attorney claims that about a month later,

he told Neiditch's present attorney that Neiditch had given the former attorney the pleadings. Present counsel replied that he would contact former counsel "to confirm [their] communication." Thus, plaintiff contends that he had reason to believe that Neiditch was properly served. (NYSCEF 16, 23).

Plaintiff also claims that his process server attempted to serve Newton once at his home, but given Newton's alleged violent tendencies, he did not ask his process server to "put [himself] in physical danger." Accordingly, he seeks an extension of time to serve Newton, Neiditch, and River 2 River. (NYSCEF 20-23).

In opposition to the cross motion, Neiditch contends that plaintiff is not entitled to an extension absent a demonstration of the merits of his claims, and his belief that Neiditch and River 2 River had been served does not justify his delay in properly serving the pleadings. (NYSCEF 25).

B. Analysis

1. Plaintiff's cross motion

Pursuant to CPLR 306-b, the court may permit an extension of time for service of pleadings upon good cause shown or in the interest of justice. (*Bank v Estate of Robinson*, 2016 NY Slip Op 08043, *1 [2d Dept 2016]). "Good cause will not exist where a plaintiff fails to make any effort at service or fails to make at least a reasonably diligent effort at service." (*Bumpus v New York City Tr. Auth*, 66 AD3d 26, 32 [2d Dept 2009] [internal citations omitted]). Alternatively, in determining whether the interests of justice are served by allowing an extension, the court may consider the plaintiff's diligence, the merits of his claim, the length of the delay, the promptness of the request for an extension, whether the statute of limitations has run, and

whether the defendant will be prejudiced. (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]; *de Vries v Metro. Tr. Auth.*, 11 AD3d 312, 313 [1st Dept 2004]). No one of the foregoing factors is determinative. (*Leader*, *supra*, at 106).

Here, the August 19 unsworn document on which plaintiff relies reflects that no further efforts were taken to ascertain Newton's location following a single failed attempt to serve him at his home, and thus he fails to demonstrate good cause. Moreover, there is no indication that Newton had notice of the action, nor does any other factor favor granting an extension in the interest of justice. (*See Bahadur v New York State Dept. of Correctional Servs.*, 88 AD3d 629, 630 [2d Dept 2011] [motion denied where plaintiff, among other things, made single attempt at service close to 120-day deadline]; *cf. Mead v Singleman*, 24 AD3d 1142, 1144 [3d Dept 2005] [while motion ultimately granted under "interest of justice" standard, plaintiff's process server's first failed attempt at service, coupled with mailed pleadings to defendant's mother without "other further timely attempts at service undertaken," did not constitute good cause for extension]).

While the exercise of reasonable diligence is likewise not apparent from the August 14 affidavits, having received the summons with notice, filed a notice of appearance, and communicated with plaintiff's counsel, Neiditch and River 2 River were not likely prejudiced. (See *Owens v Chhabra*, 72 AD3d 664, 665 [2d Dept 2010] [factor favoring permitting an extension is whether defendant had actual notice of claim or action]). Moreover, plaintiff's claims have sufficient merit to withstand a motion to dismiss (*see supra* I.B.; *cf. Bahadur*, 88 AD3d at 630 [motion for extension denied where, among other reasons, plaintiff made no showing of merit beyond attorney-verified amended complaint]), and plaintiff's delay in seeking

an extension was relatively short. Consequently, an extension of time to serve these defendants is warranted in the interest of justice.

2. Neiditch's motion

Given the foregoing result, the branch of Neiditch's motion to dismiss the action for lack of personal jurisdiction is denied. (*See eg, Simonovskaya v Olivo*, 304 AD2d 553, 554 [2d Dept 2003] [plaintiff's motion pursuant to CPLR 306-b granted upon showing it was in interest of justice, and defendants' cross motion to dismiss action for lack of personal jurisdiction denied]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Dan S. Neiditch a/k/a Dan Bloomberg's motion to dismiss the complaint is denied; and it is further

ORDERED, that plaintiff's cross motion for an order granting him an extension to serve defendants is granted to the extent that plaintiff's time to serve defendants Dan S. Neiditch a/k/a Dan Bloomberg and River 2 River Realty Inc. is extended 30 days from the date of his order.

ENTER:

Barbara Jaffe, JSC

DATED: December 9, 2016
New York, New York