Huff v Green
2019 NY Slip Op 34323(U)
July 20, 2019
Supreme Court, Nassau County
Docket Number: Index No. 600516/19
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
Justice TRIAL/IAS PART 8

---X

WILLIAM HUFF,

Plaintiff,

-against-

EVAN GREEN a/k/a EVAN GREENBERG,

Defendant.

---X

Index No.: 600516/19
Motion Sequence...01
Motion Date...04/12/19

Papers Submitted:
Notice of Motion....................................x
Affirmation in Opposition.......................x
Reply Affirmation...................................x

Upon the foregoing papers, the motion by the Defendant, EVAN GREEN a/k/a EVAN GREENBERG ("Green"), seeking an Order, pursuant to CPLR §§ 3211 (a)(5) and (a)(7), dismissing the action on the grounds that no cognizable cause of action is alleged against the Defendant and the applicable statute of limitations bars the Plaintiff's claims, and for an award of attorneys' fees and costs incurred by the Defendant for having to defend this allegedly frivolous action pursuant to 22 NYCRR § 130-1.1(a), is determined as provided herein.

The Plaintiff, WILLIAM HUFF ("Huff"), commenced this action by the filing of a Summons and Verified Complaint on January 11, 2019, seeking to recover

damages for personal injuries sustained on January 29, 2017 due to the alleged carelessness, recklessness and negligence of the Defendant, Green, in the operation, maintenance and/or control of his motor vehicle, and in otherwise negligently, carelessly and recklessly causing serious physical injuries to the Plaintiff (*See* Complaint at ¶8). More specifically, the Plaintiff alleges that while he was operating his motor vehicle northbound on Glen Cove Road, just north of its intersection with Westbury Avenue, the Defendant, who was operating his motor vehicle in a negligent manner, caused the Plaintiff to stop his vehicle in the left lane of said roadway (*Id.* at ¶3). The Plaintiff alleges that he was caused to stop his vehicle on such active roadway because the Defendant had pulled his motor vehicle in front of the Plaintiff's vehicle requiring him to stop (*Id.* at ¶). The Plaintiff further alleges that the Defendant then exited his vehicle, approached the Plaintiff yelling and waiving his arms in an aggressive manner, reached through the Plaintiff's open window and struck the Plaintiff in the face, jabbed his thumb into Plaintiff's left eye while attempting to put his other hand into Plaintiff's right eye (*Id.*). The Plaintiff claims that he then opened the vehicle door in an attempt to push the Defendant away and Defendant began to bang the vehicle door against the Plaintiff's lower left leg (*Id.*).

As a result of the foregoing physical altercation, the Plaintiff alleges that he was caused to sustain serious injury resulting in the loss of sight in Plaintiff's left eye due to the force and continued pressure from Defendant striking Plaintiff while Plaintiff was still seated in his vehicle (*Id.* at ¶6).

The Complaint further alleges that the Defendant was negligent, careless and reckless in causing and/or precipitating the foregoing incident without any negligence on the part of the Plaintiff contributing thereto (*Id.* at ¶8). The Complaint also contains allegations that the "negligence of the Defendant caused Plaintiff…to suffer a serious physical injury as defined by New York State Insurance Law Section 5102 (d)", and that Plaintiff "is a covered person as defined in the New York State Insurance Law…" (*Id.* at ¶¶ 10 and 12, respectively).

The crux of the Defendant's motion to dismiss is that the only claim that could potentially be inferred from the allegations contained in the Complaint is an intentional tort which is barred by the applicable one-year statute of limitations. Citing to Section 5104(a) of the No-Fault Law, counsel for the Defendant avers that the allegations fail to state a claim that arises out of negligence in the use or operation of a motor vehicle. Couching the alleged conduct on the part of the Defendant as "intentional, personal attacks" on the Plaintiff, defense counsel maintains that the Complaint fails to state a cause of action. Counsel for the Defendant further argues that dismissal is warranted pursuant to CPLR § 3211 (a)(5) because the statute of limitations for a civil assault and/or battery cause of action begins to accrue on the date the assault and/or battery allegedly occurred. Insofar as this action was commenced nearly two years after the alleged incident, counsel urges that the Complaint must be dismissed as time-barred.

In opposition, the Plaintiff discloses that the Defendant herein has been

previously criminally convicted in the County Court, County of Nassau (under criminal Docket No. 1425N-18) for the same conduct that forms the basis of the allegations in the Verified Complaint. In support of the opposition, the Plaintiff proffers a transcript of the criminal proceedings held on September 12, 2018 before the Hon. Robert G. Bogle; the Certificate of Disposition reflecting the guilty plea taken by the Defendant; and a sworn affidavit from the Plaintiff in opposition to the motion (*See* Exhibits "B", "C" and "D" annexed to Plaintiff's Opposition).

The documents proffered by the Plaintiff show, in pertinent part, that on September 12, 2018, the Defendant, Green, entered a plea of guilty to a charge of Assault in the Third Degree, in violation of Penal Law § 120.00 (2). The Plaintiff alleges that the date, time, facts, circumstances and injuries upon which the amended accusatory instrument associated with the entry of that guilty plea are based on the same as those set forth in the Complaint herein. (*See* Minutes of Plea, annexed to Plaintiff's Opposition as Exhibit "B"). The Defendant, Green, was ultimately convicted of said crime on November 14, 2018, regarding an incident and date of arrest of January 29, 2017, the same date of incident alleged in the instant Complaint (*See* Certificate of Disposition, annexed to Plaintiff's Opposition as Exhibit "C"). The evidence also shows that the accusatory instrument was amended to reflect the elimination of the words "with intent" and replaced with the terms "did recklessly". That is, the plea that was taken, as reflected in the minutes of proceedings, provides, in pertinent part:

> ...you are pleading to the misdemeanor, just to clarify for the record, and this is assault in the third degree in violation of Section 120.00(2) of the New York State Penal Law, in that you, Evan Green, that's you sir, on or about January 29, 2017, in the County of Nassau, in the State of New York, **did recklessly cause physical injury to another person and such injury was to specifically another individual**...
>
> (*See* Exhibit "C" at pp. 11-12 [emphasis supplied]).

In his sworn affidavit submitted in opposition to Defendant's motion, the Plaintiff attests that the "Evan Green" named as the defendant in the foregoing criminal proceedings is the same person named as the sole Defendant in the within action, and that there were no other complaining witnesses in such criminal proceeding except himself (*See* Plaintiff's Affidavit at ¶ 3, sworn to on 04/11/19). The Plaintiff further attests that the January 29, 2017 incident that was the subject of said criminal proceedings is the same incident as the one reflected in his Verified Complaint (*Id.*). The Plaintiff also attests that the injuries that were the basis of such criminal proceedings are the same injuries identified in the Verified Complaint, "the substance of which was that Defendant EVAN GREEN, on the date and time reflect [*sic*] in the complaint, engaged in criminal conduct that resulted in substantial pain, loss of vision and significant damage to [his] left eye" (*Id.*). The Plaintiff states that the Defendant's admission to the criminal court that he "did recklessly cause physical injury to another person and such injury was to specifically another individual", that the Plaintiff is the person to whom such admission of "recklessly causing physical injury" was directed (*Id.*).

Based on the foregoing, counsel for the Plaintiff argues that the Verified

Complaint alleges both reckless conduct and negligence, for which the applicable statute of limitations is three years rendering this action timely commenced. The Plaintiff's counsel further relies upon CPLR §213-b, which sets forth the applicable statute of limitations for civil liability based solely upon a defendant's conviction of criminal conduct causing the injury or loss that is the subject of the civil action – to wit, seven years from the date of the crime. In opposing the Defendant's statute of limitations argument, the Plaintiff also relies upon the one-year tolling provision afforded by CPLR §215 (8) which provides that, where a criminal action against the same defendant has been commenced with respect to the event or occurrence from which a civil claim arises, the plaintiff shall have at least one year from the termination of the criminal action in which to commence the civil action. That is, CPLR §215 (8) provides a one-year extension for commencing a civil action based on assault and battery which runs from the termination of the criminal prosecution. As such, counsel for the Plaintiff avers that the within action was timely commenced under either the three-year statute of limitations applicable to claims for negligence, gross negligence and recklessness (CPLR §214), or the lengthier seven-year limitations period afforded by CPLR §213-b.

In reply, counsel for the Defendant maintains that the entirety of the allegations in the Verified Complaint amount to nothing more than an intentional tort. With respect to time periods set forth in CPLR §§ 213-b and 215 (8), counsel argues that the Plaintiff cannot take advantage of these sections "as the criminal proceeding documents

and Plaintiff's Affidavit do not conclusively prove that the Defendant was convicted of crime [*sic*] that gives rise to the instant action..." (*See* Reply Affirmation of Scott Haworth, Esq., dated 04/11/19, at ¶27).

Legal Analysis

"In deciding a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Von Maack v. Wycoff Hgts. Med. Ctr.*, 140 A.D.3d 1055 [2d Dept. 2016] quoting *Fough v. August Aichorn Ctr. for Adolescent Residential Care, Inc.*, 139 A.D.3d 665, 666 [2016]).

Here, even a narrow reading of the Plaintiff's Complaint demonstrates a legally cognizable claim that has been timely commenced. Defense counsel cherry-picks allegations from the Complaint to support the theory that the only actionable claims stated therein are intentional torts. To the contrary, viewing the allegations set forth in the Complaint in the light most favorable to the Plaintiff, as the Court must do on a pre-answer motion to dismiss, the Plaintiff unequivocally states a cause of action sounding in negligence, gross negligence and/or gross negligence – claims that carry with them a three-year statute of limitations.

In any event, the evidence proffered in opposition to the motion sufficiently demonstrate the applicability of the seven-year limitations period afforded by CPLR

Section 213-b, as well as the one-year "extension" afforded by CPLR Section 215 (8). Defense counsel's attacks on the evidence submitted by Plaintiff simply confirms the need for discovery – not summary dismissal of the action.

Moreover, defense counsel's reliance on *Vasquez v. Wood*, 18 A.D.3d 645 [2d Dept. 2005], is misplaced. In that case, the Appellate Division, Second Department found that CPLR Section 213-b did not extend to wrongful death and "survival" causes of action against the defendant-appellant because that defendant was not convicted of any crime as a result of the accident that gave rise to the civil action (*Vasquez*, 18 A.D.3d at 646). Notably, the facts and circumstances giving rise to the civil claims are not discussed in the Appellate Division's decision in *Vasquez*, nor are they referenced in the Defendant's counsel's reply affirmation herein.

Vasquez addressed an issue of first impression: whether the limitations extension of CPLR 213-b applies to a defendant <u>who is only vicariously liable for the conduct of the defendant who was convicted in a related criminal case</u>. The victim in *Vasquez* was killed as a result of defendant Wood's reckless driving. Wood was convicted of driving while intoxicated and criminally negligent homicide. The civil action at issue, which was brought more than three years but within seven years of the incident, was asserted against both Wood and Queensboro Toyota, Inc., the owner of the rented car that Wood was driving. The owner's alleged liability was pursuant to Section 388 of the Vehicle and Traffic Law, which included liability for the gross negligence and recklessness

of an individual driving with the owner's consent. The trial court held that CPLR 213-b applied thereby saving the action against the vicariously liable owner (*Vasquez v. Wood*, 190 Misc.2d 427 [Sup. Ct. Queens Cty., 2001]). The Appellate Division subsequently reversed finding that the terms of CPLR 213-b did not apply to the vicariously liable owner.

As relevant here, while the terms of CPLR 213-b did not apply to the vicariously liable owner of the vehicle, it did apply to Wood, the defendant convicted of a crime as a result of the accident that gave rise to the civil action. Having reviewed the entirety of the facts in *Vasquez*, this Court finds that denial of Defendant's motion herein is indeed warranted.

The extended limitations period afforded by CPLR 215 (8) further warrants denial of the motion as that statute specifically provides a one-year extension to commence civil actions for intentional torts committed by "the same defendant" against whom a criminal proceeding was commenced for the "same conduct." In this regard, even if the only cognizable claims in the Complaint were intentional torts, as the Defendant maintains, the action would still be timely. The criminal proceedings against the Defendant, Green, terminated in or about November 2018 and the instant action was commenced in January 2019, well within the one-year extension afforded by CPLR 215 (8).

The Court declines to entertain defense counsel's application for sanctions and finds the request itself frivolous. The Court has considered the Defendant's remaining contentions and find them to be patently without merit.

Accordingly, it is hereby

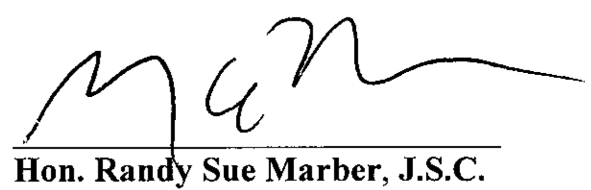
ORDERED, that the motion by the Defendant, EVAN GREEN a/k/a EVAN GREENBERG, seeking an Order, pursuant to CPLR §§ 3211 (a)(5) and (a)(7), dismissing the action on the grounds that no cognizable cause of action is alleged against the Defendant and the applicable statute of limitations bars the Plaintiff's claims, and for an award of attorneys' fees and costs incurred by the Defendant for having to defend this allegedly frivolous action pursuant to 22 NYCRR § 130-1.1(a), is **DENIED**, in its entirety; and it is further

ORDERED, that the deadline by which the Defendant must file and serve an Answer to the Verified Complaint is **July 22, 2019**; and it is further

ORDERED, that counsel for the parties shall **appear for a Preliminary Conference in the Preliminary Conference Part of this courthouse on August 1, 2019 at 9:30 a.m.** This directive, with respect to the date of the Preliminary Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require.

This constitutes the decision and Order of this Court.

DATED: Mineola, New York
June 20, 2019



Hon. Randy Sue Marber, J.S.C.

ENTERED
JUN 20 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE