

Reeves v American Tr. Ins. Co.
2021 NY Slip Op 31837(U)
June 2, 2021
Supreme Court, New York County
Docket Number: 100091/2021
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

MICHAEL REEVES,

Plaintiff,

- v -

AMERICAN TRANSIT INSURANCE COMPANY, ANDREW LI, CHERYL GRAVES,

Defendant.

-----X

INDEX NO. 100091/2021
MOTION DATE 05/25/2021
MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

It is hereby

ORDERED that the order to show cause of petitioner Michael Reeves (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of respondent American Transit Insurance Company (motion sequence number 001) is granted solely to the extent that the second and third causes of action in the complaint are dismissed as against said respondent; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of respondents Andrew Li and Cheryl Glaze i/s/h/a "Cheryl Graves" (motion sequence number 001) is granted, and the complaint is dismissed in its entirety as against said respondents, and the Clerk of the Court is directed to enter judgment accordingly in favor of said respondents; and it is further

ORDERED that the motion to expedite of plaintiff Michael Reeves (motion sequence number 002) is denied; and it is further

ORDERED that the balance of this action shall continue; and it is further

ORDERED that counsel for respondent American Transit Insurance Company shall serve a copy of this order along with notice of entry on all parties within ten (10) days.

In this hybrid action/special proceeding, plaintiff Michael Reeves (Reeves) moves, via order to show cause, for a temporary restraining order directing defendant American Transit Insurance Company (ATIC) to commence paying certain no-fault insurance benefits, and also asserts causes of action against ATIC and individual co-defendants Andrew Li (Li) and Cheryl Glaze (Glaze) i/s/h/a “Cheryl Graves for breach of contract and other relief, while Li, Glaze and ATIC cross-move to dismiss both the order to show cause and the complaint (together, motion sequence number 001). Reeves also moves for an order to expedite this matter (motion sequence number 002). For the following reasons, defendants’ cross motions are granted in part and denied in part, and Reeves’s motion is denied.

FACTS

Reeves is a resident of Kings County who suffered injuries to his right arm and shoulder on May 23, 2020 while he was in the process of exiting an Uber taxi. *See* verified petition at 3-4; exhibit 4. ATIC is a New York licensed no-fault insurance company, and co-defendants Li and Glaze are ATIC employees. *See* notice of cross motion (ATIC), D’Gracia aff, ¶¶ 1-9; notice of cross motion, Li supplemental aff ¶ 1; Glaze supplemental aff, ¶ 1.

Reeves’s complaint alleges that he was employed as an office manager by non-party law firm Glassman Law at the time of his injury. *See* complaint at 3-4, “Section II” (paragraphs not numbered). Sometime after the accident, Reeves submitted a loss of earnings claim to ATIC.¹ On January 14, 2021, an ATIC claims investigator conducted an “examination under oath” (EUO) of Reeves, who was represented by counsel. *See* order to show cause, exhibit 4. However, Reeves gave inconsistent testimony about his employment status at that EUO. Reeves stated that, on May 23, 2020, his employer was “IDS NYC,” a/k/a Immigrant Detainees Support

¹ Neither Reeves nor ATIC has presented any record of Reeves’s notice of claim.

of New York City. *Id.*, exhibit 4 at 9. He averred that “I was coming to IDS from Glassman Law,” that “I just joined IDS at the time the coronavirus started . . . that was my employer.” *Id.*, exhibit 4 at 10. Reeves explained that “I joined Glassman Law Firm around November of 2019,” and that his final day at Glassman Law was “sometime mid March - I don’t remember exactly.” *Id.*, exhibit 4 at 12-13. He said that he received his last paycheck from Glassman Law “probably [in] early March,” and, when asked whether he was a independent contractor or an employee at Glassman Law, Reeves stated that “I wasn’t an employee.” *Id.*, exhibit 4 at 22. However, Reeves also stated that he “did not receive payment” from IDS NYC and that “we were not paid from work.” *Id.*, exhibit 4 at 19. Nevertheless, Reeves emphasized that “at the time of the accident on May 23rd, I was hired and employed by IDS,” and that “my employment was with IDS - it was not with Glassman Law.” *Id.*, exhibit 4 at 21. Regarding his claim, Reeves stated that “I’m making a lost wage claim based on the wages that were lost from IDS,” but that “in the alternative, I would accept a lost wage claim from Glassman Law because I was still hired by Glassman Law at the time of the accident . . . I [had] not been terminated . . . I was just waiting for the office to open back up” after it had been shut because of the coronavirus pandemic. *Id.*, exhibit 4 at 24. Reeves presented copies of several of his paychecks from Glassman Law, the most recent of which was dated March 13, 2020. *Id.*; exhibit 2.

On February 8, 2021, ATIC issued a “denial of claim form” to Reeves which stated that “lost wage benefits are denied as the documentation does not support a claim of any lost income as a result of the accident.” *See* order to show cause, exhibit 3. The denial of claim form was signed by Li in his capacity as an ATIC claims investigator. *Id.*

Reeves then submitted an ex parte order to show cause on February 18, 2021. *See* order to show cause. The court rejected that order as it was initially drafted, but signed a corrected

copy on February 23, 2021. The court struck out Reeves's TRO request, and specified that he personally serve the order to show cause on respondents by March 3, 2021. *Id.* Instead, Reeves sent copies of the order to show cause to all three respondents at ATIC's Brooklyn office via USPS priority mail on February 25, 2021. Reeves also sent copies of his summons and complaint to respondents at ATIC's Brooklyn office on February 25, 2021. He performed that service via USPS certified mail, however, and the three certified mail receipts all bear the delivery date of March 3, 2021. ATIC later filed an answer with affirmative defenses on March 26, 2021. *See* verified answer. Li and Glaze then filed a joint cross motion to dismiss both the order to show cause and the complaint on March 29, 2021, and ATIC filed a cross motion for identical relief on March 30, 2021. *See* notices of cross motion (together, motion sequence number 001). Reeves subsequently filed a "motion to expedite" on May 11, 2021. *See* notice of motion (Reeves; motion sequence number 002). This matter is now fully submitted.

DISCUSSION

Reeves's order to show cause seeks preliminary injunctive relief in the form of a temporary restraining order directing ATIC to begin making no-fault/lost wages payments to him. *See* order to show cause, verified petition, ¶ 3. Pursuant to CPLR 6301:

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."

The Court of Appeals holds that "[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction

and a balance of equities in its favor.” *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005), *citing* CPLR 6301.

Here, respondents do not argue the merits of Reeves’s TRO request. Instead, they assert that his order to show cause must be denied, and this proceeding dismissed for lack of personal jurisdiction pursuant to CPLR 3211 (a) (8), because Reeves did not serve the order in the manner specified. *See* notice of cross motion (Li & Glaze), mem of law at 7-8; respondent’s mem of law (ATIC), at 6-7. The court finds this argument persuasive. In *Matter of Ruine v Hines* (57 AD3d 369 [1st Dept 2008]), the Appellate Division, First Department, reiterated the rules that “[t]he mode of service provided for in an order to show cause is jurisdictional and must be literally followed,” and that a “[p]etitioner’s pro se status is not an excuse for noncompliance.” 57 AD3d at 370 (internal citations omitted); *see also Wade v Giacobbe*, 176 AD3d 641 (1st Dept 2019).

Here, the corrected order to show cause that the court signed on February 23, 2021, provided as follows:

“ . . . let *personal service of a copy of this order, and the petition and other papers upon which this order is granted*, upon all other parties to this proceeding or their attorneys, on or before the 3rd day of March, 2021 be deemed good and sufficient. A copy of an affidavit or other proof of service shall be filed with the County Clerk (Room 141-B) immediately after service and the original thereof shall be presented to this court on the return date directed in the second paragraph of this order.”

See order to show cause (emphasis added). However, the “proof of timely service” letter that Reeves sent to the court on March 31, 2021 plainly states that he served both the order to show cause and the complaint via priority and certified mail on February 25, 2021, and he annexed copies of the Post Office receipt and the certified mailing receipts to it. This documentary evidence clearly demonstrates that Reeves did *not* effect personal service of the order to show cause on respondents, as the court directed. As a result, the court concludes the Reeves’s order

to show cause must be denied for lack of personal jurisdiction, and that so much of this proceeding as sought a TRO must be dismissed.

The court here notes that Reeves's TRO request also fails on the merits, since the case law interpreting CPLR 6301 requires a petitioner to demonstrate "a probability of success on the merits," and Reeves is unable to do so herein. Insurance Law § 5102 (a) (2) (the "no-fault" law) includes "loss of earnings from work" within the definition of "basic economic loss" for which an injured party may submit a claim. However, a claim will be properly denied where the claimant cannot "demonstrate that he sustained a compensable lost wage claim within the no-fault statute." *State Farm Mut. Auto. Ins. Co. v Stack*, 55 AD3d 594, 595-596 (1st Dept 2008). Evidence that a claimant's employment ended prior to the date on which s/he was injured has been recognized as grounds for dismissal of a no-fault claim. *See e.g., Ross v GEICO Indem. Co.*, 172 AD3d 1834 (3d Dept 2019). Here, as previously noted, the evidence as to whether Reeves was employed by either Glassman Law or IDS NYC on May 23, 2020 is equivocal, at best. As a result, the court cannot find that there is "a probability of success on the merits" that Reeves will prevail on his no-fault claim. This uncertainty compels the denial of his TRO request, since he cannot establish one of the component elements of such a claim at this juncture. In view of the foregoing, the court denies Reeves's order to show cause. That does not end the current inquiry, however.

In addition to the order to show cause, Reeves served a pro se summons and complaint which respondents cross-move to dismiss. When evaluating a motion to dismiss, pursuant to CPLR 3211 (a), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." *See Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 (2106), citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98

NY2d 314, 326 (2002). However, where the allegations in the complaint consist only of bare legal conclusions, or of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. *See e.g. Tectrade Intl. v Fertilizer Dev. and Inv., B.V.*, 258 AD2d 349 (1st Dept 1999); *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233 (1st Dept 1994). In according Reeves's pro se complaint the benefit of a very liberal reading, the court notes that it purports to set forth causes of action for: 1) "denial of benefits within the meaning of subdivision 4 of Section 671 of the Insurance Law" (which sounds in breach of contract); 2) violation of civil rights "under section 1983"; and 3) "aiding and abetting discrimination against him in violation of NYC Admin. Code § 8-107 (6)." *See* complaint at 1, 7-10 (paragraphs not numbered). The court also notes that respondents do not object to the complaint on the grounds of lack of personal jurisdiction, pursuant to CPLR 3211 (a) (8), as they did to the order to show cause. Instead, they contend that it should be dismissed pursuant to CPLR 3211 (a) (7) because the majority of Reeves's claims do not state cognizable causes of action.

As an initial matter, however, ATIC avers that Reeves "has the right to pursue a breach of contract claim for lost wages against [ATIC]." *See* notice of cross motion (ATIC), mem of law at 7-8. They particularly assert that "he submitted a wage claim to [ATIC] under a contract for no-fault insurance, and he maintains that his claim has been processed unfairly." *Id.* at 8. The court notes that ATIC does not concede that Reeves will prevail on his lost wages/breach of contract claim, since the extant evidence indicates that he will have difficulty in demonstrating (a) that he was employed on May 23, 2020. (b), if so, by whom, and (c) that the injuries which he suffered in the accident rendered him unable to work and directly caused him quantifiable loss of income. Nevertheless, these issues may not be resolved at this stage of the instant litigation.

Therefore, in light of ATIC's concession, the court finds that Reeves has stated a viable cause of action against ATIC for breach of contract. Since ATIC has already filed an answer to this claim, this claim may proceed.

The court does not make the same finding with respect to Li and Glaze, however. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). “[T]he burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it.” *Eden Temporary Servs. v House of Excellence Inc.*, 270 AD2d 66, 67 (1st Dept 2000), quoting *Paz v Singer Co.*, 151 AD2d 234, 235 (1st Dept 1989). Li and Glaze assert that “unlike [ATIC], they are not insurance companies . . . they did not issue any insurance policy . . . [and] they have no contractual relationship or privity of any kind with [Reeves].” *See* notice of motion (Li & Glaze), mem of law at 11. The court finds their assertion compelling. The most generous reading of the complaint discloses that Li and Glaze are merely ATIC employees, and does not indicate that they entered into any form of contractual relationship with Reeves. It is axiomatic that a breach of contract claim cannot be maintained against a defendant who was not a party to the agreement in question. *See Blank v Noumair*, 239 AD2d 534, 534 (2d Dept 1997). Therefore, the court finds that the portion of LI's and Glaze's cross motion that seeks dismissal of Reeves's first cause of action should be granted.

The second cause of action that the court can divine herein arises from Reeves's statement on page 1 of the complaint that he “brings this civil action under section 1983.” *See* complaint at 1 (paragraphs not numbered). This statement presumably refers to 42 USC § 1983, to prevail under which a claimant must establish: (1) that one of his/her rights secured by the Constitution or laws of the United States was violated; and (2) that this violation was caused or committed by

a person acting under color of state law. *See Reeves v Hemsley*, Civil Action No. 18-14061 (JMV/MF), 2019 WL 2560133, *6, 2019 US Dist LEXIS 103856, * 15 (DNJ, 2019), citing *West v Atkins*, 487 US 42, 48 (1988); *Graham v Connor*, 490 US 386, 393-94 (1989). Respondents assert that this claim must fail, as a matter of law, because Reeves's complaint "does not and cannot allege that [ATIC, Li or Glaze are] . . . eligible government defendant[s] within the meaning of Section 1983." *See* notice of cross motion (ATIC), mem of law at 8-10; notice of cross motion, (Li & Glaze), mem of law at 13-14. The court also finds this assertion compelling. The complaint alleges that ATIC is a private insurer and that Li and Glaze are two of its employees. However, the complaint contains no allegations from which to even infer that ATIC, Li or Glaze were "acting under color of state law" while they reviewed Reeves' application for no-fault/lost wages benefits. Because that application was merely a routine civil claim, Reeves's rights under the U.S. Constitution were not implicated in respondents' alleged mishandling of it. Therefore, the court finds that so much of ATIC's and of Li's and Glaze's cross motions as seek dismissal of Reeves's second cause of action should be granted.

The third cause of action that can be divined from the complaint relates to the allegations on page 9 that the "Defendant employees aided and abetted the discrimination against him, in violation of NYC Admin. Code § 8-107 (6) to deny 9 him benefits within the meaning of subdivision 4 of Section 671 of the Insurance Law, commonly referred to as the No Fault Law." *See* complaint at 9 (paragraphs not numbered). That regulation provides that "[i]t shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so." ATIC notes that, to the extent that Reeves alleged that it committed an act proscribed by the New York City Human Rights Law (NYCHRL), his claim against it under subsection (6) thereof must fail, as a matter of

law, because “an individual cannot aid and abet his own alleged discriminatory conduct.” *Krause v Lancer & Loader Group, LLC*, 40 Misc 3d 385, 399 (Sup Ct, NY County 2013), citing *Matter of Medical Express Ambulance Corp. v Kirkland*, 79 AD3d 886 (2d Dept 2010). Li and Glaze join in this argument, and further note that the complaint does not describe any activity by them at all,² much less any acts which might constitute a violation of the NYCHRL, or an attempt to aid and abet such a violation. *See* notice of motion (Li & Glaze), mem of law at 13-14. The court finds that the complaint does not describe any activity by any of the respondents which might correlate to its passing mention of NYC Admin. Code § 8-107 (6), let alone a violation thereof. Therefore, the court concludes that so much of ATIC’s and of Li’s and Glaze’s cross motions as seek dismissal of Reeves’s third cause of action should be granted.³

The final matter before the court is Reeves’s motion for the court to expedite its consideration of his order to show cause and TRO application for the payment of no fault benefits. *See* notice of motion (Reeves). The court notes that Reeves did not cite any statutory authority in that motion to justify his request. However, because the court has already denied Reeves’s order to show cause, his motion to expedite its consideration is now moot. Therefore, the court concludes that Reeves’s motion should be denied on that ground.

Accordingly, the court concludes that Reeves’s order to show cause must be denied; that ATIC’s cross motion should be granted with respect to the second and third causes of action in the complaint only; the Li’s and Glaze’s cross motion should be granted in its entirety; that

² Or even mention their names. *See* notice of motion (Li & Glaze), mem of law at 13-14.

³ The court here notes that Reeves also filed a complaint against ATIC, Li and Glaze with the New York City Human Rights Commission (HRC) that alleged that they had violated the NYCHRL, and that the HRC closed that claim in an order dated February 24, 2021. *See* notice of cross motion (Li & Glaze), exhibit B.

Reeves’s motion should be denied as moot; and that this action should continue with respect to Reeves’s’ breach of contract claim against ATIC.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the order to show cause of petitioner Michael Reeves (motion sequence number 001) is denied; and it is further

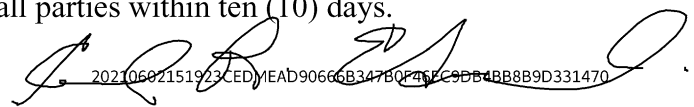
ORDERED that the cross motion, pursuant to CPLR 3211, of respondent American Transit Insurance Company (motion sequence number 001) is granted solely to the extent that the second and third causes of action in the complaint are dismissed as against said respondent; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of respondents Andrew Li and Cheryl Glaze i/s/h/a “Cheryl Graves” (motion sequence number 001) is granted, and the complaint is dismissed in its entirety as against said respondents, and the Clerk of the Court is directed to enter judgment accordingly in favor of said respondents; and it is further

ORDERED that the motion to expedite of plaintiff Michael Reeves (motion sequence number 002) is denied; and it is further

ORDERED that the balance of this action shall continue; and it is further

ORDERED that counsel for respondent American Transit Insurance Company shall serve a copy of this order along with notice of entry on all parties within ten (10) days.


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6/2/2021
DATE CAROL R. EDMOAD, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE