

De La Cruz v Evers Marina & Seaplane Base

2021 NY Slip Op 33059(U)

November 18, 2021

Supreme Court, Bronx County

Docket Number: Index No. 32797/2020E

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA-5

YOCAIRA DE LA CRUZ,

Index No.: 32797/2020E

Plaintiff(s),

Against

Present:

HON. ALISON TUITT

Justice

**EVERS MARINA AND SEAPLANE BASE, C & H
MARINE SERVICES, INC., CHARLES EVERS
and JANICE EVERS,**

Defendant(s).

The following papers numbered 1 - 5,

Read on this Defendant's Motion to Dismiss pursuant to CPLR § 3211(a)(7),
3211(a) (8) and EPTL 1-2.13, 5-4.1, subd. 1; 11-3.2, subd. [b]
with stay pursuant to CPLR § 1015

On Calendar of 1/8/2021

Notice of Motion – Affirmation, Affidavits and Exhibits	<u>1</u>
Affirmation in Opposition – Affirmation, Affidavit, and Exhibits	<u>2</u>
Reply - Affirmation, Affidavit, and Exhibits	<u>3</u>
Notice of Cross-Motion – Affirmation, Affidavits, and Exhibits	<u>4</u>
Affirmation in Opposition to Cross Motion - Affirmation, Affidavit, and Exhibits	<u>5</u>

Upon the foregoing papers, Defendants, Charles Evers d/b/a Evers Marina and Seaplane Base's motion pursuant to CPLR § 3211(a)(7), 3211(a) (8) and EPTL 1-2.13, 5-4.1, subd. 1; 11-3.2, subd. [b] with stay pursuant to CPLR § 1015, and Plaintiff's cross-motion pursuant to CPLR § 3025(b) are consolidated for purposes of this decision. For the reasons set forth herein, Defendant Charles Evers d/b/a Evers Marina and Seaplane Base's motion is granted, and Plaintiff's cross-motion is granted solely to the extent as to grant its application to

amend its summons and complaint. All other relief in Plaintiff's cross-motion is otherwise denied.

This is an action to recover damages for personal injuries due to the alleged negligence of Defendants, Charles Evers d/b/a Evers Marina and Seaplane Base (hereinafter referred to as "Defendants"), and Janice Evers and C&H Marine Services arising out of a jet ski accident occurring on August 28, 2018 in Eastchester Bay, New York. Plaintiff alleges that Defendants' negligence caused Plaintiff who was a passenger on the jet ski to crash into a moored motorboat. Defendants filed the herein motion seeking dismissal and Plaintiff submitted opposition and a cross motion to amend the Complaint.

Defendant argues that Plaintiff's complaint should be dismissed as Plaintiff failed to establish a viable cause of action and failed to establish a basis for liability. Defendants continue that the "bald conclusionary" allegations are nonsensical and fail to support a cognizable legal claim as Defendants did not own, control or use the area where the injury occurred nor was the "jet ski or moored boat owned, leased, rented, operated, repaired, or maintained by defendant or any agent or employee of defendants." Defendants contend that they had no duty or obligation to Plaintiff as the accident occurred in a public waterway, outside the outskirts of the marina's perimeter. Moreover, Defendants state that Plaintiff has "thoroughly failed to allege a dangerous or defective condition on the property of the marina," which resulted in the accident occurring. Defendants submit the incident reports of United States Coast Guard and New York Police Department (NYPD) arguing that in both reports, it is determined that the incident occurred in Eastchester Bay outside Evers Marina. Defendants further argue that Plaintiff has also failed to establish a claim for negligence related to use, operation or ownership as it relates specifically to motor vehicle accidents not pertaining to motorboat or jet ski.

Moreover, Defendants argue there exist no ownership interest in or relation to C&H Marine Services and that Defendant Janice Evers passed away over twenty (20) years prior. Defendants state Defendant Charles Evers is a natural person doing business as Defendant Evers Maine and Seaplane Base. As such, the Affidavit of Service nor the service itself complies with CPLR § 308, because neither Defendants Charles Evers, Evers Maine and Seaplane Base or Janice Evers are corporations making substitute service improper. Furthermore "Tony Benjamin" is not an authorized agent of either Defendants. In addition, Defendants argue for dismissal of the Complaint against Janice Evers who has been dead for over twenty years and

cannot be a party to the action pursuant to EPTL 1-2.13, 5-4.1, subd. 1; 11-3.2, subd. [b]. Defendants conclude stating despite the two years Plaintiff had to complete her due diligence she has failed to sue the correct parties, and though notified of this, she has failed to discontinue the actions against Defendants and Janice Evers. Defendant states that Plaintiff should be sanctioned as it was "readily apparent that this complaint as against defendant is completely without any legal basis or merit."

Plaintiff submits opposition to Defendants' motion arguing that there are material issues of fact in dispute. Plaintiff argues that Defendants, specifically Defendant Charles Evers failed to address the allegations accusing him of failing to lock and secure the marina. Plaintiff argues with the support of a New York Times article, that Defendant Charles Evers acknowledged that he provides a launch ramp for personal vessels to access the public waterways, he kept the Marina open and that he encouraged people to leave the water at sunset, but it was difficult to enforce the rules. Plaintiff continues that discovery is warranted to allow Plaintiff to key information within the Defendants' "sole knowledge or possession." Moreover, Plaintiff argues that the proof submitted by Defendants is not documentary evidence which can be characterized as "unambiguous and of undisputed authenticity." Plaintiff argues that though she has sufficiently made a cause of action of negligence against Defendants, leave is requested to file an Amended Summons and Complaint. Plaintiff further argues that the Court has jurisdiction over all parties as they were properly served by the process server, the Affidavits of Service were corrected to reflect the service, and should Defendants continue to contest service, a traverse hearing is warranted, not dismissal. Plaintiff also requested time to serve should service be deemed improper after the traverse hearing. Plaintiff states that she was not aware Defendant Janice Evers was deceased and though she agreed to discontinue the action against Defendant Janice Evers, Defendants filed the herein motion. Plaintiff concludes that Defendants application for sanctions is "wholly improper and without merit" as Plaintiff is willing to discontinue the action with prejudice against Defendant Janice Evers.

Plaintiff files a cross-motion CPLR § 3025(b) seeking to supplement the Summons and amend the Complaint adding additional causes of action. Plaintiff argues that the statute of limitation has yet to expire, and this application is necessary to protect Plaintiff's right. Plaintiff states that Defendants were negligent in failing to enforce NY Nav L§ 73-A(e), and in

promoting its violation. Plaintiff further request that the Supplement Summons and Amended Complaint be deemed filed and served on all Defendants nunc pro tunc.

Defendants' Reply and opposition to Plaintiff's cross-motion reiterates their arguments for dismissal. Defendant argues that despite Plaintiff's claims, there is no duty owed to Plaintiff by Defendants, nor do Defendants have a role or casual nexus to the Plaintiff's alleged accident. Defendants further argue that Plaintiff's proposed amendment to the Complaint gives rise to the issue that "one may not profit from one's own wrongdoing." Defendants state that Plaintiff admits she was acting in violation of NY Nav Law § 73-A(e) and that it is undisputed that the accident was proximately cause by "her reckless activity." Defendants argue that Plaintiff attempts to create a duty from her own violation of the law by allegations not provided in the complaint, not provided by Plaintiff and that are not supported by admissible evidence.

In addition, Defendants argue that they have met their burden pursuant to CPLR § 3211(a)(7) and CPLR § 3211(a)(8). Defendants state that "no amount of discovery will yield admissible evidence establishing liability where there is no duty," nor can Plaintiff establish proper service of the Summons and Complaint pursuant to CPLR § 308. Defendant argues that despite Plaintiff's attempt to cure the defect by submitting amended Affidavits of Service, Plaintiff failed to complete the remaining step to effectuate service by mailing the Summons and Complaint by first class mail within twenty days of the substitute service. Furthermore, Defendants argue that a traverse hearing is not warranted as service was never effectuated and the time between when Plaintiff was served the motion to dismiss and the 120-day period for service was "squandered." Moreover, Defendants argue that the interest of justice nor the preservation of judicial resources warrant an extension of time to serve Defendants as there was no duty owed to Plaintiff and Plaintiff's injuries were the result of her "voluntary engagement in illegal activity." Defendants note that the complaint should also be dismissed as a deceased individual, Janice Evers may not be sued, and Plaintiff admitted its failure to complete due diligence. Defendants argue that Plaintiff's failure to complete due diligence couple with her failure to state a cause of action, her complicity in violating NY Nav Law § 73-A(e), and her failure to effectuate proper service warrants sanctions for filing a frivolous action.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). In assessing a motion under CPLR 3211 (a)(7), the

Court determines "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*High Definition MRI, P.C. v. Travelers Cos., Inc.*, 137 AD3d 602, 602, 29 NY3d 23 [1st Dept 2016]). It is, however, also axiomatic that factual allegations which fail to state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to such consideration. (*Leder v. Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]). The New York Court of Appeals has consistently said that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading will seldom if ever warrant the relief the defendant seeks unless such evidence conclusively establishes that plaintiff has no cause of action." (*Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 AD3d 128, 131 [1st Dept 2014])

Defendants provided documentary evidence alleging that the accident occurred outside the confines of the Marina, arguing that there is no duty. However, there is no evidence as to the property line for the Marina to rule out such a claim nor are the documents provided certified or in admissible form. Moreover, though NY Nav Law § 73-A(e) provides that "no person shall operate a personal watercraft or a specialty prop-craft at any time from sunset to sunrise," to the extent that Plaintiff violated NY Nav Law § 73-A(e), her actions would be weighed against any comparative liability assessed with this matter. Assuming for purposes of this pre-answer motion to dismiss, the truth of Plaintiff's allegations, Plaintiff's claim gives rise for an actionable claim of negligence. Thus, Defendants' motion pursuant to CPLR 3211(a)(7) is denied.

The provisions of service on a natural person are found under CPLR § 308. Pursuant to CPLR § 308, where service of process cannot be made with due diligence by personal delivery (subd [1]), a party can be served by the deliver and mail alternative (subd [2]), service can be effected, inter alia, " by delivering the summons within the state to a person of suitable age and discretion at ... the actual ... place of business, dwelling place or usual place of abode within and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" ... filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing...". CPLR § 308. Moreover, under CPLR § 306-b, late service of the Summons and Complaint is permissible where the Court finds "good cause [is] shown or in the

interest of justice." CPLR § 306-b. In *Pennington v. Da Nico Rest.*, 123 AD3d 627, 627-28, 1 N.Y.S.3d 26 [1st Dept 2014], the Court held that Plaintiff's lack of due diligence is "mitigated by the facts that [Defendant] had timely notice of the claim; [Defendant] had been timely, albeit defectively, served; plaintiff had communicated with [Defendant's] insurer and provided the insurer with copies of relevant medical records; there was no prejudice to [Defendant]; and the statute of limitations had expired since the commencement of the action."

Defendants' motion to dismiss under CPLR § 3211(a)(8) is also denied. The Court finds that an extension of time to serve the Summons and Complaint and Supplemental Summons and Amended Complaint is warranted based on several factors. These factors include that Plaintiff timely served Defendants, Charles Evers, and Evers Maine and Seaplane Base at the place of business, though defective, Plaintiff communicated with Defendants' counsel and exchanged records from the NYPD and United States Coast Guard, that since the filing of the herein motion, the statute of limitations has expired and there is no prejudice to Defendants as they had notice of the action. Thus, the Summons and Complaint and Supplemental Summons and Amended Complaint shall be served on Defendants, Charles Evers, and Evers Maine and Seaplane Base pursuant to the CPLR. As the parties have discussed and agreed, the action is dismissed against Defendant Janice Evers. In light of the above, Defendants' motion is denied.

Accordingly, Defendants' motion to dismiss is denied and Plaintiff's cross-motion to file a Supplemental Summons and Amended Complaint is granted in part.

ORDERED that Defendants' motion for an Order pursuant to CPLR § 3211(a)(7) and CPLR § 3211(a)(8) dismissing Plaintiffs' complaint is denied; and it is further

ORDERED that Plaintiffs' cross motion for an Order pursuant to CPLR § 3025(b) to supplement the Summons, and amend the Complaint and Caption is granted solely to the extent that Plaintiffs are granted thirty (30) days to properly serve Defendants Charles Evers, and Evers Maine and Seaplane Base with the Summons and Complaint and the Supplemental Summons and Amended Complaint. The remaining relief is otherwise denied.

This constitutes the decision and Order of this Court.

Dated: November 18, 2021



Hon. Alison Y. Tuitt