

**Smith v TS ZO L.L.C.**

2023 NY Slip Op 33222(U)

September 18, 2023

Supreme Court, New York County

Docket Number: Index No. 155677/2019

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

*Justice*

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INDEX NO. 155677/2019

DENNA SMITH,

MOTION SEQ. NO. 003

Plaintiff,

- v -

TS ZO L.L.C., FINDYOURZO, TISHMAN SPEYER  
PROPERTIES, and ADRIAN FERNANDEZ,**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 100, 103, 118

were read on this motion to/for

JUDGMENT - SUMMARY

In this personal injury action, defendants TS ZO L.L.C. and Tishman Speyer Properties (Tishman) (collectively, movant defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them.

I. Factual and Procedural Background

This case arises from an incident on March 12, 2019, in which plaintiff was allegedly injured while getting a massage in a lounge within the lobby of a building located at 200 Park Avenue in Manhattan (the premises) (NYSCEF Doc No. 13). She commenced this action against defendants asserting claims of negligence on the part of defendants, their agents, and their employees (Doc No. 13). Defendant Adrian Fernandez and movant defendants joined issue by their answers dated October 29, 2019, and December 3, 2019, respectively, denying all substantive allegations of wrongdoing and asserting various affirmative defenses (Doc Nos. 19, 30).<sup>1</sup> Movant

<sup>1</sup> Defendant FindYourZo does not appear to be a real entity. In their answer, movant defendants admitted that "Find Your Zo is a trade name for TS ZO" (Doc No. 30).

defendants move for summary dismissal of the complaint as against them (Doc No. 70), which plaintiff and Fernandez oppose (Doc Nos. 84, 95).

A. Deposition Testimony of Plaintiff (Doc No. 76)

At her deposition, plaintiff testified that she worked for a law firm located on the premises and stated her understanding that Tishman provided the massages, as well as other wellness services, as a benefit to people who worked there. She received an email from her employer that directed her to a website where she could view massage availability and book appointments. All massages took place in the ZO lounge located in the lobby of the premises. On the day of the incident, she went to the lobby for her appointment. Shortly after her massage began, the chair she was seated in collapsed, causing her to fall forward and injure herself.

B. Deposition Testimony of Fernandez (Doc No. 79)

Fernandez testified that he was an independent contractor who worked for nonparty Exubrancy, and confirmed that there was a written agreement between him and Exubrancy to that effect (Doc No. 80). He owned the massage chair that he used and was never instructed by anyone from TS ZO or Tishman about how to perform his work. Upon arriving at the premises, he would set up his equipment in the ZO lounge area of the lobby. Prior to each massage, he cleaned and inspected the chair. On the day of the accident, the chair collapsed shortly after he began plaintiff's massage.

C. Deposition Testimony of Tishman (Doc No. 81)

A senior director for Tishman testified on its behalf, and stated that Tishman launched Find Your ZO as a brand to provide wellness services and discounts to the tenants of its properties. Find Your ZO determined what services to offer tenants, one of which was massages in the lobby of the premises. The senior director was also the Chief Executive Officer of Exubrancy, which

was owned by Tishman and responsible for providing such wellness services on the premises, although Exubrancy had no physical presence there. Exubrancy also provided Tishman with a template waiver that Tishman would have people sign prior to their massage appointments. When the massages were provided in the lobby, a receptionist employed by Tishman met with people prior to their appointments and had them sign the waiver.

D. Deposition Testimony of Tishman Employee (Doc No. 82)

At his deposition, an administrative assistant employed by Tishman testified that he was involved with Find Your ZO and served as a receptionist in the lobby of the premises. He was present in the lobby of the premises on the day of plaintiff's accident and checked her in for her appointment. Although he did not witness the accident, he saw the collapsed chair and Fernandez holding up plaintiff.

II. Legal Analysis and Conclusions

Movant defendants contend that they are entitled to judgment as a matter of law because Fernandez's status as an independent contractor means they cannot be vicariously liable for his actions. Plaintiff, and Fernandez, argue in opposition that issues of fact exist regarding whether Fernandez was an agent of Exubrancy, thereby making him an agent of movant defendants. In reply, movant defendants contend that plaintiff cannot raise a new theory of liability like agency in response to a summary judgment motion, and they reiterate that they neither directed nor controlled Fernandez's actions.<sup>2</sup>

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<sup>2</sup> Movant defendants also argue that they are entitled to common-law indemnification if it is determined that questions of fact exist regarding whether they are vicariously liable. However, this Court will not consider those arguments because they were raised for the first time in their reply papers (*see Ormsbee v Time Warner Realty Inc.*, 203 AD3d 630, 631-632 [1st Dept 2022]; *Matter of Gonzalez v City of New York*, 127 AD3d 632, 633 [1st Dept 2015]).

It is well settled that a plaintiff may successfully oppose a motion for summary judgment by relying on an unpleaded cause of action, so long as the plaintiff's submissions contain "evidentiary facts" supporting such cause of action and the movant is not "misled to its prejudice" (6B Carmody-Wait 2d § 39:28; *see* 97 NY Jur 2d, Summary Judgment, Etc. § 62; *Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 280 [1978]; *Swift Funding, LLC v Isacc*, 144 AD3d 471, 472 [1st Dept 2016]). Courts may look to a plaintiff's pleadings and moving papers to determine whether support for the unpleaded cause of action exists (*see Ramos v Jake Realty Co.*, 21 AD3d 744, 745-746 [1st Dept 2005] [finding plaintiff's opposition papers demonstrated support for respondeat superior claim despite plaintiff alleging only common-law negligence claims]; *Rubenstein v Rosenthal*, 140 AD2d 156, 158 [1st Dept 1988] [finding plaintiff's complaint and moving papers alleged facts sufficient to support unpleaded cause of action]).

Here, between plaintiff's pleadings and her moving papers, there are evidentiary facts to support a cause of action for vicarious liability based on agency. In her complaint, she alleged that movant defendants and their agents/employees were responsible for the chair and that their negligence caused her injuries, and the deposition testimony provided in her moving papers explained the web of organizational arrangements that resulted in Fernandez providing massages in a lounge within the lobby of the premises.

Movant defendants are also not prejudiced by consideration of an unpleaded vicarious liability claim. Although plaintiff's complaint did not include an explicit cause of action for vicarious liability, the mention of agents and employees provided movant defendants with "ample notice" of such theory, and they were able to respond to it in their moving papers (*Rubenstein*, 140 AD2d at 158 [finding defendant not prejudiced were it had prior notice of theory underlying unpleaded cause of action and opportunity to address it before resolution of summary judgment

motion]; *see Salem v MacDougal Rest. Inc.*, \_\_ AD3d \_\_, 2016 NY Slip Op 31163 [U], \*3-4 [Sup Ct, NY County 2016] [finding “explicit allegations” that employee acting within “scope” and “course” of employment provided defendants notice that “plaintiff intended to rely on the doctrine of respondeat superior as grounds for imposing vicarious liability (internal quotation marks omitted)], *aff’d* 148 AD3d 501 [1st Dept 2017]).

Considering plaintiff’s unpleaded cause of action for vicarious liability based on agency, she has demonstrated that summary judgment on such claim is improper, as there are questions of fact exist regarding whether Fernandez was an agent of movant defendants. “To establish a negligence claim based upon an apparent agency theory, a plaintiff must show evidence of words or conduct of the principal communicated to a third party, which give rise to a reasonable belief and appearance that the agent possess authority to act on the principal’s behalf” (*Taylor v Point at Saranac Lake, Inc.*, 135 AD3d 1147, 1148-1149 [3d Dept 2016] [internal quotations marks, ellipsis, brackets, and citations omitted]; *see Stern v Starwood Hotels & Resorts Worldwide, Inc.*, 149 AD3d 496, 497 [1st Dept 2017] [holding “evidence of public representations and reliance may support a finding of apparent or ostensible agency, which may serve as a basis for imposing vicarious liability”]).

Plaintiff understood the massages to be a perk provided by Tishman to the tenants of the premises. She booked massages through the Find Your ZO service, a brand name for TS ZO which Tishman owned and operated, she checked in for her appointment with a Tishman employee and signed a waiver that it provided to her, and the massages took place in the lobby of Tishman’s building—all of which creates an appearance that the massages were provided by movant defendants. Viewing this evidence in a light most favorable to plaintiff as the nonmoving party, it creates a question of fact as to whether plaintiff could have reasonably believed that Fernandez

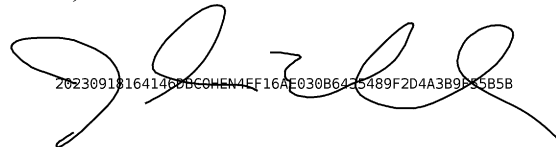
possessed the authority to perform massages as movant defendants' agent (*see Stern*, 149 AD3d at 497 [denying summary judgment after finding company website holding out hotel as company property supported finding of agency authority]; *Taylor*, 135 AD3d at 1149 [finding question of fact existed regarding agency authority because resort website and deposition testimony suggested snowmobile tour was service provided by resort, even though tour guide was independent contractor]).

Therefore, movant defendants are not entitled to summary dismissal of the complaint as against them (*see Ramos*, 21 AD3d at 746 [denying summary judgment because questions of fact existed regarding unpleaded vicarious liability cause of action]; *Salem*, 2016 NY Slip Op 31163 [U], at \*8 [similar]).

Accordingly, it is hereby:

ORDERED that the motion by defendants TS ZO L.L.C. and Tishman Speyer Properties for summary judgment dismissing the complaint as against them is denied; and it is further

ORDERED that the parties are to appear for a settlement/trial scheduling conference in person at 71 Thomas Street, Room 305, on January 31, 2024, at 9:30 a.m.



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DAVID B. COHEN, J.S.C.

9/18/2023  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN