

Lewis v Hoyas

2004 NY Slip Op 30398(U)

November 15, 2004

Supreme Court, New York County

Docket Number: 111273/04

Judge: Karen S. Smith

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

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JENNIFER A. LEWIS,

Plaintiff,

-against-

Index No.: 111273/04
Mot. Seq.: 001 and 002
Motion Date: 11/12/04

HECTOR HOYAS and MANHATTAN
PICTURES INTERNATIONAL, LLC

DECISION AND ORDER

Defendants.

-----X
PRESENT: KAREN S. SMITH, J.:

Motion sequence 001 and 002 are consolidated for disposition in this decision.

Defendant Hector Hoyas' motion for an order, pursuant to CPLR §327, dismissing the action on forum non conveniens grounds, is denied.

Defendant Manhattan Pictures International LLC's ("MPI") motion for an order, pursuant to CPLR § 3211(a)(7), dismissing the complaint asserted against it for failure to state a cause of action, is granted to the extent that the third cause of action is dismissed.

Plaintiff's complaint alleges, *inter alia*, (1) that she was sexually assaulted by defendant Hoyas at a home in Canada owned by Hoyas and/or MPI, (2) that Hoyas was an employee, officer, member or director of defendant Manhattan Pictures International, LLC, (3) that Hoyas invited her to the home in order for her to assist him in writing a screenplay on a project to be produced defendants and shown on HBO television, (4) that after the assault, her arm was injured due to Hoyas' negligence and that he took her to the hospital to treat her arm, (5) that after defendant flew her back to the United States, she received medical treatment here and reported the incident to the Quebec police. Plaintiff further alleges that defendant MPI is vicariously liable for the acts of its

employee Hoyas as Hoyas invited plaintiff to his house in furtherance of MPI's business and that defendant MPI was negligent as it was aware of Hoyas' history of sexual misconduct and propensity for violence and failed to take sufficient action to restrain Hoyas or warn Lewis.

The basis of venue is plaintiff's residence and the complaint alleges that both defendants are also New York residents.

Founded upon the equitable principles of justice, fairness and convenience, the common-law doctrine of forum non conveniens "is a highly flexible concept whereby a court, after considering and balancing certain competing factors, may entertain or decline to entertain jurisdiction over an action." (*Intertec Contr. A/S v. Turner Steiner Int'l*, 6 AD3d 1, 4 [1st Dept 2004]). On a motion to dismiss based on forum non conveniens, a court's decision is discretionary and the burden rests upon the defendant to demonstrate relevant private or public interest factors which militate against accepting the litigation. (*Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474, 478-479 [1984]). Thus, the party seeking a change of forum must clearly establish that another jurisdiction is a more appropriate forum. (*National Union Fire Ins. Co. v. Worley*, 257 AD2d 228, 232 [1st Dept 1999]).

Among the factors to be considered by the court are the burden on the New York courts, the residency of the parties, the potential hardship to the defendant, the location out of which the cause of action arose, and the location of the witnesses. (*Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474, 478-479 [1984]; see also, *Grizzle v Hertz Corp.*, 305 AD2d 311 [1st Dept 2003]). It is well established that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. (*Waterways, Ltd. v. Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991]).

Defendant Hoyas' motion is denied as he has failed to meet his burden of clearly

demonstrating that this action would best be adjudicated in Canada. The residence and convenience of the parties militates against a change of forum and the presence of plaintiff's physicians and medical records in New York further suggests that New York is an appropriate forum. Hoyas admits that there were no witnesses to the alleged assault and although he refers to "many foreign witnesses" that he would call at trial, he names only one who is his employee. As there were no witnesses to the assault, Hoyas has not demonstrated that these "foreign witnesses" at the hospital or who received plaintiff's criminal complaint, would be able to offer any material evidence other than written reports. The remaining arguments concerning insurance coverage are unpersuasive.

Defendant Manhattan Pictures International LLC argues that it is entitled to dismissal of plaintiff's third cause of action for vicarious liability as defendant Hector Hoyas was never its employee. In support of this argument, defendant submits a copy of an affidavit from its accountant in Virginia stating that he has reviewed MPI's business accounting records and that at no time during the relevant period was defendant Hoyas its employee. Annexed to the affidavit are payroll records that do not contain Hoyas' name. However, the affidavit is defective as the jurat does not contain the relevant information about the notary including where the notary is qualified. Moreover, even if the affidavit were to be considered substantively, together with the payroll records, it falls short of conclusively establishing that Hoyas was not an employee.

In addition, defendant MPI correctly argues that even if Hoyas were its employee, it is entitled to dismissal of this cause of action as it can not be held vicariously liable for Hoyas' alleged sexual assault.

Under the doctrine of respondeat superior, an employer may be vicariously liable for the

tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment. (*Rovello v Waldron*, 47 NY2d 297, 302 [1979]). However, a sexual assault perpetrated by an employee is not in furtherance of an employer's business and is a clear departure from the scope of employment, having been committed for wholly personal motives. (*N. X. v. Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]). In light of the foregoing, even if Hoyas is MPI's employee, the alleged sexual assault is a departure from Hoyas' duties for solely personal motives unrelated to the furtherance of MPI's business and thus this claim is dismissed.

Defendant MPI contends that it is entitled to dismissal of the fourth cause of action which alleges that defendant MPI was negligent in the hiring and supervision of its employee defendant Hoyas, as MPI knew or should have known of Hoyas' violent propensities.

In order to make out a claim for negligent hiring and retention, a plaintiff must assert that employment relationship existed between the person who committed the alleged battery and the employer sought to be held liable, (*Chagnon v Tyson*, __ AD3d __ [1st Dept, Oct 19, 2004]) and that "the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury." (*Gomez v City of New York*, 304 AD2d 374 [1st Dept 2003]).

Here, plaintiff has properly stated a cause of action for negligent hiring. Defendant has failed to meet its burden on the motion to dismiss by demonstrating that defendant Hoyas was not its employee, as above stated, or that this claim otherwise fails to state a cause of action.

Accordingly, it is hereby

ORDERED that defendant Hector Hoyas' motion to dismiss is denied; and it is further

ORDERED that defendant Manhattan Pictures International, LLC motion to dismiss is

granted to the extent that the third cause of action for vicarious liability is dismissed and it is otherwise denied; and it is further


ORDERED that defendants are directed to serve and file an answer to the complaint within ten days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are to appear for a preliminary conference in Part 44, Room 581 on January 13, 2004, at 11:30AM at 111 Centre Street.

This constitutes the decision and order of the Court.

Dated: November 15, 2004

ENTER:



J.S.C.

FILED
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