# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART _____

Index Number : 107716/2006

LUO, TONY

VS

POLICE DEPARTMENT

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is consolidated with seq 001 + decided pursuant to attached Dec.



MARILYN SHAFER

Dated: 3/9/07

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

----------X

TONY LUO,

Plaintiff,

Index No. 107716/2006

-against-

THE NEW YORK CITY POLICE DEPARTMENT, QUAN LIN, MICHAEL LEE, L&W EXPRESS VAN SERVICES CORPORATION,

Defendants.



----------X

**SHAFER, J.:**

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence 001, defendant Quan Lin moves move for an order dismissing the complaint as against him pursuant to CPLR 3211 (a) (7) for failure to state a cause of action.

In motion sequence 002, defendants L&W Express Van Services Corporation (L&W) and Michael Lee move for an order dismissing the complaint as against them pursuant to CPLR 3211 (a) (3), (7), and (8) on the grounds that plaintiff lacks the capacity to sue, the pleading fails to state a cause of action, and the court does not have personal jurisdiction over the defendants.

The following allegations are taken from the complaint. Plaintiff is the owner of G&E Express, a commuter van company licensed by the New York City Taxi and Limousine Commission (TLC) to operate commuter vans between Flushing, Queens and Chinatown. Lin is a commuter van driver who works for L&W, a commuter van company that is also licensed by the TLC to operate commuter van lines between Flushing, Queens and Chinatown. Michael Lee is L&W's chief executive officer or chairman. On July 28, 2005, Lin, the driver of the L&W van marked No. 10, pulled his van into the commuter van stop in front of the municipal parking lot at

41st Avenue off Main Street in Flushing, Queens. Shortly thereafter, Lin started taunting and swearing at plaintiff in the parking lot. At that point, Lin lunged at plaintiff with a hammer, striking him on his face and body. In an effort to shield his head from the hammer, plaintiff endured several blows from the hammer to his rib cage. Several bystanders rushed to plaintiff's aid and wrestled the hammer away from Lin and pulled plaintiff to safety. Steven Chin, an eyewitness and patron of the municipal parking lot, called the police and provided the responding officer with an account of the incident. The police subsequently arrested plaintiff and Lin. Plaintiff was taken to the emergency room at the New York Hospital Medical Center in Queens. Plaintiff was diagnosed with stab wounds to his left rib, a rib fracture, intra-abdominal bleeding, and bruises to his left arm and upper body. Plaintiff was released from the hospital on July 31, 2005 and was unable to return to work for an extended period of time following the attack.

The complaint also alleges that, two weeks prior to his attack, Cheng Leong Tam, a dispatcher for L&W, warned defendant Lee about Lin's violent temper and aggressive nature after witnessing his shouting obscenities and threats at plaintiff. The complaint further alleges that Cheng Leong Tam told Lee that he should ask Lin to calm down and stay away from trouble to which Lee replied, "Lin can do whatever he likes." In 2006, the office of the Queens District Attorney dropped the criminal charges against plaintiff and continued its prosecution against Lin. Shortly thereafter, plaintiff commenced this action asserting claims for: (1) false arrest, (2) false imprisonment, (3) civil rights violations, (4) unfair business competition and tortious interference with contract, (5) vicarious liability, and (6) negligence.

**Motion 001**

Plaintiff has failed to demonstrate a viable cause of action against Lin. Where a

complaint fails to state a cause of action upon which relief can be granted, a motion to dismiss pursuant to CPLR 3211 (a) (7) is appropriate. Although the pleadings contain allegations that Lin physically harmed plaintiff, the complaint fails to assert any claims or remedies against Lin for his alleged wrongful behavior. Furthermore, plaintiff appears to have conceded this point in his opposition papers to Lin's motion to dismiss. Although plaintiff promised to subsequently serve an amended complaint to include a cause of action for assault and battery against Lin, to date, no such submission has come before this court. In the face of defendant Lin's motion to dismiss the complaint, the court is unaware of any additional submissions to cure said deficiency.

**Motion 002**

**Vicarious Liability**

Plaintiff has plead a cause of action for vicarious liability sufficient to survive dismissal under CPLR 3211 (a) (7). The doctrine of respondeat superior renders an employer vicariously liable for the torts committed by an employee only to the extent that the underlying acts were within the scope of the employment (*Adams v New York City Tr. Auth.*, 88 NY2d 116, 119 [1996]). The employer need not have foreseen the precise act or manner of the injury as long as the general type of the conduct may have been reasonably expected (*Ramos v Jake Realty Co.*, 21 AD3d 744, 745 [1st Dept 2005]).

The determination of whether the doctrine applies depends upon the connection between the time, place, and occasion for the act; the history of the relationship between the employer and employee as spelled out in the actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one the employer could reasonably have anticipated (*id.*). The complaint alleges that Lin

was a commuter van driver who was employed by L&W (Verified Complaint, ¶¶ 1-5). The complaint further alleges that two weeks prior to his attack, Lin engaged in acts of aggression, blurted out obscenities, and threatened plaintiff and other G&E drivers at their offices (*id.*, ¶¶ 21-26). The complaint also asserts that Cheng Leong Tam asked Lee to dissuade Lin from engaging in any further acts of aggression against plaintiff and Lee replied, "Lin can do whatever he likes." Therefore, the question of whether Lin's act falls within the scope of the his employment is left to the trier of fact (*Schilt v New York City Tr. Auth.*, 304 AD2d 189, 193 [1st Dept 2003]). Thus, taking the allegations of the complaint as true, and giving plaintiff every reasonable inference to be drawn therefrom, plaintiff has sufficiently plead a claim for vicarious liability.

**Negligent Hiring and Retention**

Plaintiff has demonstrated a viable cause of action for negligent hiring and retention. An employer is liable for negligent hiring and retention when it has placed an employee in a position to cause foreseeable harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee (*Shiela C. v Povich*, 11 AD3d 120, 129 [1st Dept 2004]). Here, the complaint alleges that L&W had notice of Lin's propensity for violence (Verified Complaint, ¶¶ 1-26). The complaint also alleges that Lee failed to take action to prevent Lin from endangering the welfare of others, and, as a consequence, Lin's violent conduct resulted in plaintiff's injuries (*id.*, ¶¶ 21-26). Thus, taking the allegations of the complaint as true, and giving plaintiff every reasonable inference to be drawn therefrom, plaintiff has sufficiently pled a claim for negligent hiring and retention.

**Jurisdiction**

Lee also argues that this court lacks personal jurisdiction over him due to improper service. Lee avers that one copy of the summons and complaint was left at the office of L&W at 135-08 38th Avenue, Flushing, New York, and that one copy of the summons and complaint was mailed to Lee's home address at 85-28 131st Street, Kew Gardens, New York (Affidavit of Michael Lee, sworn to on September 7, 2006). Lee further avers that no additional copies of the summons and complaint were left at his home or office (*id.*).

CPLR 308 (1) provides that personal service upon a natural person shall be made by delivering the summons within the state to the person to be served. CPLR 308 (2) provides that personal service may also be made 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 of the person to be served and by either mailing the summons to the person to be served at his or her last know residence. The record establishes that plaintiff's process server delivered the summons to a person of suitable age and discretion at plaintiff's residence and mailed a copy of the summons to his home (Exhibit 1 to Affirmation of Yu-xi Liu, Esq. dated September 27, 2006). Thus, the affidavit of plaintiff's process server constitutes prima facie evidence of proper service under CPLR 308 (2) (*Lattingtown Harbor Prop. Owners Assn., Inc. v Agostino*, 34 AD3d 536, 538 [2d Dept 2006]). Here, Lee has offered no evidence to rebut plaintiff's submission. Therefore, plaintiff has established that this court has personal jurisdiction over Lee.

L&W also argues that this court lacks personal jurisdiction over it due to improper service. Service requirements upon corporations is governed by CPLR 311. The statute provides in part:

> "Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:
>
> 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service . . . ."

(CPLR 311 [a][1]). Here, the affidavit of plaintiff's process server shows that service was made on L&W's managing agent, and thus, it is prima facie evidence of proper service (Exhibit 2 to Affirmation of Yu-xi Liu, Esq., dated September 27, 2006) (*Jubilee Inc. v Haslacha, Inc.*, 270 AD2d 34 [1st Dept 2000]). L&W has offered no evidence to rebut plaintiff's evidence. Therefore, plaintiff has established that this court has personal jurisdiction over L&W.

Defendants further argue that the court lacks jurisdiction over them following plaintiff's submission of a verification by an attorney rather than a party with personal knowledge of the facts in this action. There are certain situations in which verification by someone other than a party is explicitly authorized by statute (CPLR 3020 [d] [3]). One such instance is where the party is "not in the county where the attorney has his office" (*Matter of Giambra v Commissioner of Motor Vehs. of the State of N.Y.*, 46 NY2d 743, 745 [1978]). In opposition, plaintiff's counsel avers that the complaint was verified by counsel on the ground that the plaintiff resided in a different county from their counsel's office. This assertion is uncontroverted. Thus, the verification was entirely appropriate under CPLR 3020 (d) (3).

**Legal Capacity to Sue**

Defendants assert that they are entitled to dismissal pursuant to CPLR 3211 (a) (3) because G&E is a corporation duly licensed under the laws of the State of New York and, as a

corporation, it has the legal capacity to sue for its alleged damages, but plaintiff does not have standing to sue in his individual capacity for damages to a corporate entity.

In tort actions, an injured plaintiff may recover from the defendant all damages directly flowing from and as a natural consequence of the wrongful act, so long as the damages can be ascertained with reasonable certainty (*Behrens v Metropolitan Opera Assn., Inc.*, 18 AD3d 47 [1st Dept 2005]). Here, the pleadings assert that plaintiff suffered damages in excess of $75,000 as a consequence of Lin's assault and battery. Those damages include the cost of plaintiff's hospitalization and medical treatment. Therefore, plaintiff has standing to recover any damages flowing from his personal injury (*id.*).

Accordingly, it is

ORDERED that defendant Quan Lin's motion to dismiss is granted, and the complaint is dismissed with costs and disbursements to this defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to dismiss by defendants Michael Lee and L&W Express Van Services is denied; and it is further

ORDERED that these defendants are directed to serve their answers to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



Dated: 3/9/07

ENTER:

J.S.C.

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