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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 103077/2007
SAGGESE, NICHOLAS
vs
BACIGALUPO, THOMAS
Sequence Number : 001
DISMISS

INDEX NO.
MOTION DATE 7-24-07
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 decided in accordance with the annexed Memorandum Decision + Order.

FILED
OCT 25 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: October 12, 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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NICOLAS SAGGESE,

**Plaintiff,**

**-against-**

THOMAS BACIGALUP; UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, I.B.T.; AND UNIFORMED SANITATION MEN ASSOCIATION, INC.

**Defendants.**



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JOAN A. MADDEN, J.

Defendants, Uniformed Sanitationmen's Association, Local 831, I.B.T (the "Union") and Uniformed Sanitation Men Association, Inc. (the "Corporation"), move to dismiss complaint for failure to state causes of action. Plaintiff Nicolas Saggese ("Saggese") opposes the motion. For the reasons set forth below, the defendants' motion to dismiss is denied in part and granted in part.

**Background**

This action arises out of personal injuries sustained by Saggese, an employee of the New York City Department of Sanitation ("Department of Sanitation"), on April 6, 2006 in an altercation with defendant, Thomas Bacigalupo ("Bacigalupo"). Bacigalupo, a former employee of the Department of Sanitation, is a business agent and trustee for the Union, an organization which represents New York City's sanitation workers.

In April of 2006, employees of Waste Management, Inc., a private sanitation company,

went on strike.[1] Although Union members do not generally cross the picket line, the City and the Union reached an agreement, whereby the Union members are authorized to do so if a Health Code Order is issued to preserve and maintain the health standards of the City of New York. As a result of the Waste Management strike, the New York City Commissioner of Health and Mental Hygiene issued a Health Code Order to the Department of Sanitation authorizing action by Union members. Copies of the order were sent to relevant Department of Sanitation borough offices, including Saggese's office in Brooklyn.

On April 6, 2006, Bacigalupo went to Saggese's office to discuss the procedures and notifications to effectuate waste pick up and requested to see the Health Code Order. During the conversation Bacigalupo allegedly stated that he would like to continue the discussion outside. According to Saggese while outside, Bacigalupo suddenly and without provocation struck him with his fist, knocking him to the ground and injuring him.

Saggese commenced this action seeking damages arising out of the altercation. The complaint contains two causes of action. The first cause of action, against all of the defendants, asserts a claim for intentional tort and alleges that the Union and the Corporation are liable for Bacigalupo's conduct as he was acting within scope of his employment on their behalf at the time of the incident. The second cause of action, against the Union and the Corporation, alleges that these defendants were negligent in hiring and retaining Bacigalupo when they "knew or should have known of his propensity for anger, belligerency and violence." (Complaint, ¶¶ 26, 27).

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[1] According to the submissions, private sanitation companies, like Waste Management, are responsible for collecting commercial waste, while city sanitation workers collect residential waste.

Bacigalupo has answered the complaint and asserted cross-claims and counterclaims. The Union and the Corporation (together "the moving defendants") did not answer the complaint but instead have made this motion to dismiss it for failure to state a cause of action.

The moving defendants first argue that the complaint does not state a claim for intentional tort against the Union as, under New York law, such a claim against a voluntary membership association, like the Union, must allege that every member of the association approved or ratified the conduct at issue. See Martin v. Curran, 303 N.Y. 276, 282, 101 N.E.2d 683 (1951); see Salemeh v. Toussaint, 5 Misc.3d 1032(A), *1 (Sup. Ct. N.Y. Co. 2003), aff'd, 25 A.D.3d 411 (1st Dept. 2006). Since, in this case, the members of the Union did not approve or ratify Bacigalupo's alleged altercation with Saggese, and the complaint does not contain any allegations to this effect, the moving defendants assert that the complaint against the Union must be dismissed.

The moving defendants next argue that the negligent hiring and retention claim should be dismissed as there are no allegations that the Union was on notice of Bacigalupo's propensity for violence. The moving defendants further argue that the Corporation was improperly named as a defendant because the Corporation is no longer a functioning entity, has been dormant for decades, and has never employed Bacigalupo nor has been in any way affiliated with him.

In support of their motion, the moving defendants submit an affidavit from Union president, Harry Nespoli ("Nespoli "). Nespoli states that Bacigalupo, was formerly an employee of the Department of Sanitation, and began in his position as a business agent and trustee for the Union in 1993. According to Nespoli, on the date of the incident, he sent Bacigalupo and other Union business agents to the various borough offices to confirm the existence of Health Code

Orders requiring the Union to cross the picket line, as Union officials had not been supplied copies of the order. Nespoli states that he initially directed the business agents, including Bacigalupo, to inquire about the orders via telephone. Nespoli further stated that after a contentious telephone conversation with Saggese, he instructed Bacigalupo to "physically proceed to plaintiff's office" to see the Health Code Order, but that in doing so, he was in no way authorizing, asking, or directing that there be a physical altercation.

Nespoli further states that the Corporation is not a labor union, does not bargain or represent any Union members, and "to the best of his knowledge" the Corporation has been dormant for decades. Furthermore, Nespoli avers that Bacigalupo was never employed by or in any way affiliated with the Corporation.

Saggese opposes the motion, arguing that the first cause of action should not be dismissed against the Union despite controlling New York precedent to the contrary. Plaintiff bases his argument on the dissents in Martin, supra, Salemeh, supra., which proposed that since a voluntary membership association may bring action as an entity it should also be held liable as an entity. Alternatively, Saggese contends that as Nespoli is the president of all members of the Union, that any order given by Nespoli is in the interest of the Union, and thus implicitly ratified by each member, and that Nespoli's affidavit suggests an atmosphere of resentment and hostility from which Nespoli should have foreseen the possibility of a confrontation.

Saggese also argues that contrary to Nespoli's affidavit, in which Nespoli states that "to the best of his knowledge this entity (the Corporation) essentially has been dormant for decades", the New York State Department lists the Corporation's current status as "Active" as of February 13, 2007, and submits a document from the Department of State supporting his position.

Additionally, in his affirmation, Saggese's attorney refers to a telephone call he received from a representative of Seneca Insurance Company ("Seneca") who advised him that Seneca covered the Corporation for liability and sought information about the action. Moreover, plaintiff notes that in his verified answer, Bacigalupo admitted to being a business agent and trustee of the Corporation and admitted that he was acting within the scope of his employment with the Corporation.

Saggese next argues that the negligent hiring and retention claim, which alleges that defendant " knew or should have known of his (Bacigalupo) propensity for anger, belligerency and violence," is sufficient to state a cause of action under liberal pleading requirements. (Plaintiff's Complaint at 26, 27).

In reply, the moving defendants submit further evidence to support their position, including affidavits from Nespoli, Bacigalupo, and from Sal Salica, an account executive with the brokerage firm of record for Seneca.

Nespoli states in his reply affidavit that the Corporation is ancillary to management of the Union, that it is no longer a functioning entity, and that it does not employ any Union business agents or trustees, and in support of Nespoli's characterization of the Corporation, the moving defendants submit the Corporation's Certificate of Incorporation dated February 3, 1940.

In his affidavit, Bacigalupo states that he is employed by the Union and has never been employed or affiliated with the Corporation, and that pursuant to a Mayoral Executive Order he was "released" to serve as the business agent and trustee for the Union only. As further support, Bacigalupo submits a copy of his paycheck identifying the Union as the issuer of the paycheck.

In his affidavit, Mr. Salica states that the policy carried by Seneca is for the Union, and

that the Corporation is not insured under that policy, nor has the Corporation ever been insured through Seneca.[2]

**Discussion**

On a motion pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); Morone v. Morone, 50 N.Y.2d 481 (1980). At the same time, "'in those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference'" Morgenthow & Latham v. Bank of New York Company, Inc., 305 A.D.2d 74, (1st Dept. 2003) quoting, Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dept. 1999), aff'd, 94 N.Y.2d 659 (2000). In such cases, "the criterion becomes 'whether the proponent has a cause of action, not whether he has stated one.'" Id., quoting, Guggenheimer v. Ginzburg, 43 N.Y.2d at 275. However, dismissal based on documentary evidence may result "only where 'it has been shown that a material fact as claimed by the pleader...is not a fact at all and...no significant dispute exists regarding it." Acquista v. New York Life Ins. Co., 285 A.D.2d 73, 76 (1st Dept. 2001), quoting, Guggenheimer v. Ginzburg, 43 N.Y.2d at 275.

It is well established under New York law that members of a voluntary, unincorporated association, like a Union, cannot be held liable for an intentional tort committed by one of its members unless it is alleged that each and every member approved or ratified the act. Martin v.

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[2]The moving defendants also submit a copy of the declarations page of the policy which identifies the insured as "Uniformed Stationmen's Assoc."

Curran, 303 N.Y. at 282 (1951); see Salemeh v. Toussaint, 25 A.D.3d at 411.

Here, as the complaint fails to allege that each and every member ratified or approved the Bacigalupo's alleged assault against Saggese, the intentional tort claim against the Union must be dismissed. The court is bound by the holdings in Martin and Salemeh and will not, as suggested by Saggese, deny the Union's dismissal motion based on the reasoning of the dissents in these cases. In addition, contrary to Saggese's unsupported argument, the pleading requirements for an intentional tort claim against a voluntary membership organization cannot be altered based on the theory that the allegedly foreseeable assault was implicitly ratified by the membership through the actions of the Union president.

The next issue is whether the complaint states a claim for negligent hiring and retention. In instances where the employer cannot be held vicariously liable for its employee's torts, the employer may still be liable under theories of negligent hiring, retention, or supervision. Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 A.D.2d 159, 161 (2d Dept.), cert denied 522 U.S. 967 (1997), citing Hall v. Smathers, 240 N.Y 486; Restatement [Second] of Torts § 317. 'An essential element of a cause of action for negligent hiring and retention is that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury." Sheila C. v. Povich, 11 A.D.3d 120, 129 (1st Dept. 2004); see also, ; Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 A.D.2d at 161. There is no requirement that causes of action sounding in negligent hiring, retention or supervision be pleaded with specificity. Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 A.D.2d 159; Saunders v. Taylor, 6 Misc.3d 1015(A) (Sup. Ct. N.Y. Co. 2003). Moreover, when a plaintiff has sufficiently pleaded this claim, the court must accept as true not only the complaint's material

allegations, but also whatever can be reasonably inferred therefrom. Saunders v. Taylor, 6 Misc.3d 1015(A) (Sup. Ct. N.Y. Co. 2003), citing, P.T. Bank Central Asia, New York Branch v. ABN AMRO Bank, N.V., 301 A.D.2d 373 (1st Dept. 2003).

Under the above standard, plaintiff's negligent hiring and retention claim is sufficiently pleaded to survive dismissal as it alleges that the defendants "knew or should have known of his [Bacigalupo] propensity for anger, belligerency, and violence." (Plaintiff Complaint 26, 27) Moreover, contrary to the moving defendants' argument, at this stage of the litigation, it cannot be said that the claim is defective based on the absence of support for the allegations as to notice of Bacigalupo's violent propensities. Notably, the cases relied on the moving defendants in support of this argument are not controlling here since they either involve the issue of whether there was enough evidence to support a negligent hiring or retention claim at trial (Detone v. Bullit Courier Serv., 140 A.D.2d 278, 279 (1st Dept.) appeal denied 73 N.Y.2d 702 (1998)) or on a motion for summary judgment ( Ernest L. v. Charlton School, 30 A.D.3d 649 (3d Dept. 2006), or concern pleading requirements for claims other than negligent hiring and retention. See e.g. Wilson v. Tully, 243 AD2d 229 (1st Dept 1998). Thus, contrary to the moving defendants' argument, the complaint adequately states a claim for negligent hiring and retention.

The remaining issue is whether the allegations against the Corporation are sufficient to state a claim. Here, even assuming arguendo that the Corporation is an active entity, the documentary and other evidence submitted by the moving defendants establishes that Bacigalupo was not employed by, or affiliated with, the Corporation such as to provide a basis for its liability here.

Thus, the moving defendants' motion is granted to the extent of dismissing all causes of

action against the Corporation, and the first cause of action against the Union, and denied as to second cause of action against the Union for negligent hiring and retention.

**Conclusion**

In view of the above, it is

ORDERED that motion to dismiss is granted to the extent of (i) dismissing the complaint in its entirety as against Uniformed Sanitation Men's Association, Inc., and (ii) dismissing the first cause of action against the Uniformed Sanitationmen's Association, Local 831, I.B.T.; and it is further

ORDERED that within 30 days of the date of this decision and order, the Uniformed Sanitationmen's Association, Local 831, I.B.T. shall file an answer to the complaint; and it is further

ORDERED that counsel for the remaining parties shall appear for a preliminary conference on November 29, 2007, at 9:30 a.m. in Part 11, room 351 at 60 Centre Street, New York, NY.

A copy of this decision order is being mailed by my chambers to the counsel for the parties.

DATED: October 12, 2007



J.S.C.