

Saggese v Bacigalupo
2008 NY Slip Op 30776(U)
March 14, 2008
Supreme Court, New York County
Docket Number: 0103077/2007
Judge: Karen Smith
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SUPREME COURT OF THE STATE OF NEW YORK / NEW YORK COUNTY

PRESENT: HON. KAREN SMITH

PART 62

Justice

Index Number : 103077/2007

SAGGESE, NICHOLAS

vs

BACIGALUPO, THOMAS

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE 1/17/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Notices of Cross-Motion

Answering Affidavits - Exhibits *to Cross Motion*

1

2-3

4

5

6

Replying Affidavits *on Motions*

Reply on Cross-Motions

Cross-Motion: Yes No (*2 Cross-Motions*)

Upon the foregoing papers, It is ordered that this motion and both cross-motions are denied in accordance with the annexed memorandum decision and order

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

FILED
MAR 19 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/14/08

K.S.
HON. KAREN SMITH 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: PART 62

-----X
NICHOLAS SAGGESE,

Plaintiff,

-against-

Index No.: 103077/2007
Motion Seq.: 002
Motion Date: 01/17/2008

THOMAS BACIGALUPO, UNIFORMED
SANITATIONMEN'S ASSOCIATION, LOCAL 831, I.B.T.
and UNIFORMED SANITATION MEN ASSOCIATION, INC.

Defendants.

DECISION AND ORDER

-----X
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
THOMAS BACIGALUPO,

Third-Party Plaintiff,

-against-

Third Party
Index No.: 590377/2007

FILED
MAR 19 2008
NEW YORK
COUNTY CLERK'S OFFICE

THE CITY OF NEW YORK DEPARTMENT
DEPARTMENT OF SANITATION,

Third-Party Defendant.

DECISION AND ORDER

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

Plaintiff's ("Saggese") motion to dismiss the counter-claims asserted against him in this action and Defendant, Thomas Bacigalupo's ("Bacigalupo") cross-motions to dismiss the complaint as against him and for leave to serve a late notice of claim are all denied.

This is a personal injury action stemming from a physical altercation between Saggese and Bacigalupo. Saggese's complaint alleges that, while he was engaged in his occupation in a management position for the New York City Department of Sanitation, Bacigalupo, who was then engaged in his occupation as the business agent of the other two named defendants herein,

struck Saggese in the face, without provocation. Bacigalupo, in an amended answer has asserted two counter-claims against Saggese. First, Bacigalupo contends, if he is found liable, he is entitled to indemnification from Saggese because Saggese's culpable conduct caused his own injuries. Second, Bacigalupo contends Saggese maliciously initiated a criminal complaint resulting in criminal prosecution against Bacigalupo which ended in Bacigalupo's favor. When Bacigalupo initially answered this action, he also commenced the third-party action against the City of New York Department of Sanitation ("CNY") contending that, if Saggese sustained the injuries he claims to have sustained, said injuries are the result of CNY's negligent hiring and retention of Saggese and, therefore, CNY is liable to Bacigalupo for the full amount of any recovery Saggese obtains against Bacigalupo.

New York City Corporation Counsel ("Corporation Counsel"), on behalf of Saggese, now moves for summary judgment dismissing the counter-claims asserted by Bacigalupo in the primary action. In the motion, Corporation Counsel contends; 1) since Saggese was engaged in his occupation as an employee of CNY at the time of the occurrence involved in this matter, pursuant to General Municipal Law ("GML") §50-k(6), the filing of a Notice of Claim with CNY is a statutory prerequisite to Bacigalupo's assertion of his counter-claims, 2) Bacigalupo has failed to file a Notice of Claim and, 3) since more than one year and ninety days has elapsed since the occurrence giving rise to his claims, Bacigalupo may not now seek permission to file a late Notice of Claim. Therefore, Saggese argues Bacigalupo's counter-claims must fail as a matter of law.

Corporation Counsel misconstrues the application of GML § 50-k. Although the caption of the section is; "Civil actions against employees of the city of New York", the section actually

addresses the rights and obligations of CNY employees *vis-a-vis* CNY when such employees become involved in litigation with third parties. The entire section is devoted to the circumstances under which, and the means whereby, an employee may seek legal defense by and indemnification from CNY in connection with any litigation by a third party against the employee. The section itself has no relationship whatsoever with the underlying litigation between the employee and the third party.

GML §50-k(6) states, in pertinent part:

“Every action or proceeding instituted hereunder ... shall be commenced pursuant to the provisions of section fifty-i of this chapter and within one year and ninety days. No action or proceeding instituted hereunder ... shall be prosecuted or maintained against the city or any agency or an employee unless notice of claim shall have been made and served upon the city...”.

The provision relates to an action commenced by an employee of CNY, who has sought defense or indemnity from CNY and whose request has been denied by CNY. The section mandates that the employee file a timely notice of claim and commence any action against the City thereon within one year and ninety days of the denial of the request. It has no relationship to the underlying litigation between the employee and the third party.

In the instant action, the counter-claims asserted by Bacigalupo against Saggese are allegedly based upon Saggese's actions and are asserted against Saggese individually. Thus, the Notice of Claim and one year and ninety day provisions of the GML are not applicable to the action. Corporation Counsel's determination that Saggese is entitled to legal defense and indemnity in the instant litigation¹, does not alter the allegations in Bacigalupo's pleading, nor

¹ Even though Saggese has a private attorney representing him in his capacity as plaintiff in the instant action, Corporation Counsel has, pursuant to GML §50-k, determined it will defend Saggese in connection with Bacigalupo's counter-claims against Saggese herein. Corporation Counsel has submitted this motion to dismiss Bacigalupo's counter-claims.

does it have any bearing upon whether Saggese is found to be individually liable to Bacigalupo. Accordingly, Corporation Counsel's motion on behalf of Saggese for summary judgment dismissing Bacigalupo's counter-claims against Saggese based upon Bacigalupo's failure to file a Notice of Claim pursuant to GML §50-k, is denied.

Bacigalupo has filed two separate cross-motions in opposition and response to Saggese's motion. In his first cross-motion, Bacigalupo seeks summary judgment dismissing the complaint against him arguing that, since Saggese brought his action against Bacigalupo in his capacity as an employee of the New York City Department of Sanitation and Saggese did not file a Notice of Claim with CNY, if Bacigalupo's counter-claims are dismissed, Saggese's complaint must also be dismissed. In his second cross-motion², Bacigalupo seeks leave to serve a late notice of claim with respect to his third-party claims against The City of New York Department of Sanitation.

Bacigalupo's factual contention, that he has been sued in his capacity as an employee of CNY, is inaccurate. Saggese's complaint specifically states that Bacigalupo is being sued individually and in his capacity as an agent and trustee of both the Uniformed Sanitationmen's Association Local 831, I.B.T. and the Uniformed Sanitation Men Association, Inc. As there are no allegations in Saggese's complaint to the effect that Bacigalupo was acting in any capacity as an employee of CNY at the time of the incident involved in this matter, there is no basis for Bacigalupo's contention that Saggese's failure to file a Notice of Claim is fatal to Saggese's claims against Bacigalupo. Bacigalupo's motion for summary judgment dismissing the complaint herein is, therefore, denied.

Finally, Bacigalupo's cross-motion seeking leave, pursuant to GML §50-e(5), to file a late

² This is actually a separate motion, improperly denominated as a "cross-motion".

Notice of Claim as against the third-party defendant, CNY is denied because it is untimely
(*Hochberg et al v City of New York*, 99AD2d 1028 [1st Dept, 1984], *affd* 63 NY2d 665).

Accordingly, it is;

ORDERED this motion and two cross-motions are all denied.

The foregoing constitutes the decision and order of this court.

Dated: March 14, 2008

ENTER:

K S S.
Hon. Karen S. Smith, J.S.C.

FILED
MAR 19 2008
NEW YORK
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