

<b>Wells v Douglas Elliman, LLC</b>
2011 NY Slip Op 30479(U)
February 9, 2011
Supreme Court, New York County
Docket Number: 115373/2009
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_

PART 46

Justice

Index Number : 115373/2009  
**STEIN, LINDA**  
 VS.  
**DOUGLAS ELLIMAN, LLC**  
 SEQUENCE NUMBER : 002  
 DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1

2

3

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~~ :

*The court grants defendant Axion LLC's motion to dismiss the complaint against Axion LLC to the limited extent set forth in the accompanying decision, but otherwise denies the motion. C.P.L.R. § 3211(a)(7).*

**FILED**

MAR 03 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/9/11

*Lucy Billings*

LUCY BILLINGS

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----x

SAMANTHA WELLS and MANDY STEIN, as  
Co-Administrators of the Estate of  
LINDA STEIN, and SAMANTHA WELLS  
and MANDY STEIN, Individually,

Index No. 115373/2009

Plaintiffs

- against -

DECISION AND ORDER

DOUGLAS ELLIMAN, LLC, DE ACQUISITION,  
LLC, INSIGNIA DOUGLAS ELLIMAN, LLC,  
AXION LLC, and NATIVIA S. LOWERY,

Defendants

-----x

**FILED**

**MAR 03 2011**

APPEARANCES:

NEW YORK  
COUNTY CLERK'S OFFICE

For Plaintiffs

David P. Kownacki Esq. and Andrew Leftt Esq.  
420 Lexington Avenue, New York, NY 10168

For Defendant Axion LLC

Thomas W. Hyland Esq. and A. Ernest Tonorezos Esq.  
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP  
150 East 42nd Street, New York, NY 10017

For Defendants Douglas Elliman, LLC, De Acquisition, LLC,  
and Insignia Douglas Elliman, LLC

Patricia D'Antone Esq.  
Curtis, Vasile, P.C.  
2174 Hewlett Avenue, Merrick, NY 11566

LUCY BILLINGS, J.S.C.:

I. BACKGRQUND

Plaintiffs sue to recover damages from defendant limited liability companies, claiming they share responsibility for defendant Lowery killing Linda Stein October 30, 2007. Defendant Axion LLC, the employer of Lowery, whom defendant De Acquisition, LLC, assigned to be Stein's personal assistant, moves to dismiss

[\* 3]

the action against Axion LLC on the ground that the amended complaint fails to state a claim against this defendant. C.P.L.R. § 3211(a)(7). For the reasons explained below, the court grants Axion LLC's motion to the limited extent set forth, but otherwise denies its motion.

Liberally interpreting the amended complaint, the court discerns three grounds on which to sustain plaintiffs' claim that defendant employer negligently hired, supervised, or retained Lowery. (1) If Axion LLC was aware of her criminal or her past employment record, either history demonstrated her unfitness as a personal assistant. (2) Even if Axion LLC was unaware of her record, the position for which she was being hired required a minimal investigation. (3) Even if Axion LLC was not negligent in hiring her, her conflicts with Stein on the job required the employer's remedial action.

Plaintiffs' allegations do not, however, sustain their claim that defendant employer is vicariously liable for Lowery's intentional, culpable acts, because plaintiffs fail to indicate (1) how her employer instigated, authorized, or at least condoned those acts or (2) how they related to her employer's business or her job duties, rather than her own personal objectives. In fact, nothing could more directly contravene the employer's interests or her duties as a personal assistant.

## II. APPLICABLE STANDARDS

Upon defendant Axion LLC's motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(7), the court may not rely on facts alleged

by defendant to defeat the claims unless the evidence demonstrates the absence of any significant dispute regarding those facts and completely negates the allegations against defendant. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Yoshiharu Igarashi v. Shohaku Higashi, 289 A.D.2d 128 (1st Dep't 2001); Ladenburg Thalmann & Co. v. Tim's Amusements, 275 A.D.2d 243, 246 (1st Dep't 2000). The court must accept the amended complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiffs' favor. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 144-45 (1st Dep't 2009). The applicable standard thus is whether reasonable inferences from the amended complaint sustain a claim. Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Pepler v. Coyne, 33 A.D.3d 434, 435 (1st Dep't 2006). See Lappin v. Greenberg, 34 A.D.3d 277, 279 (1st Dep't 2006). In short, the court may dismiss a claim based on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. Leon v. Martinez, 84 N.Y.2d at 88; Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Pepler v. Coyne, 33 A.D.3d at 435; Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 121 (1st Dep't 2002).

Especially upon a pre-answer motion to dismiss as here, at this early stage in the litigation, the court must not evaluate

the merits of plaintiffs' claims prematurely. Nonnon v. City of New York, 9 N.Y.3d at 827; Vig v. New York Hairspray Co., L.P., 67 A.D.3d at 145. Instead, the court must recognize plaintiffs' "right to seek redress, and not have the courthouse doors closed at the very inception of an action, where the pleading meets a minimal standard necessary to resist dismissal of a complaint." Armstrong v. Simon & Schuster, 85 N.Y.2d 373, 379 (1995).

### III. AXION LLC'S MOTION TO DISMISS

#### A. Plaintiffs' Claim of Negligent Hiring, Supervision, and Retention

To recover on plaintiffs' claim for negligent hiring, supervision, or retention, plaintiffs must show that defendant employer received notice, actual or constructive, of an employee's tortious propensities to cause plaintiffs' injury or, in this case, injury to the deceased Linda Stein on whose behalf plaintiffs sue. Coffey v. City of New York, 49 A.D.3d 449, 450 (1st Dep't 2008); White v. Hampton Mgt. Co. L.L.C., 35 A.D.3d 243, 244 (1st Dep't 2006); Nunez v. Caryl & Broadway, Inc., 30 A.D.3d 249, 250 (1st Dep't 2006); Chagnon v. Tyson, 11 A.D.3d 325, 326 (1st Dep't 2004). Plaintiffs allege that defendants, including Axion LLC, placed Lowery with Stein despite Lowery's "history of criminal behavior, theft, fraud, embezzlement, tax evasion, debt and/or civil judgments against her" and despite the fact that she "had been fired and/or separated from previous employment for the above reasons on numerous occasions in the past." Aff. of Thomas W. Hyland, Ex. A ¶ 64. Plaintiffs do not specifically claim that defendants were aware of Lowery's history

of criminal or unlawful conduct before hiring Lowery. Plaintiffs do allege, however, that Stein had "confronted defendant LOWERY" regarding thefts while on the job with Stein, id. ¶ 68, and defendants were negligent in supervising Lowery, by "failing to recognize conflicts" that arose between Stein and Lowery, "address conflicts despite knowledge that same could lead to violence," and "recognize a propensity for violence." Id. ¶ 74. See id. ¶¶ 27, 55-58, 64, 70.

These allegations form the linchpin of plaintiffs' claim for negligent hiring, supervision, and retention. The assault, battery, and murder per se, of which Lowery eventually was criminally convicted, need not have been foreseeable by Axion LLC to sustain their claim. Sanchez v. State of New York, 99 N.Y.2d 247, 252 (2002); Rodriquez v. City of New York, 38 A.D.3d 349, 352 (1st Dep't 2007); Wayburn v. Madison Land Ltd. Partnership, 282 A.D.2d 301, 304 (1st Dep't 2001). See Glover v. Augustine, 38 A.D.3d 364, 365 (1st Dep't 2007); Nunez v. Caryl & Broadway, Inc., 30 A.D.3d at 250; Conde v. Yeshiva Univ., 16 A.D.3d 185, 187 (1st Dep't 2005); Dykes v. McRoberts Protective Agency, 256 A.D.2d 2, 3 (1st Dep't 1998). Plaintiffs' allegations that, either from Lowery's history before her employment by Axion LLC, or from her conflicts with Stein that surfaced during this employment, Lowery's stealing, dishonesty, untrustworthiness, and violence were known or at least foreseeable support the employer's liability. E.g., Hyland Aff., Ex. A ¶¶ 67-68, 70.

In sum, Axion LLC may be held liable if it knew or should

have known of Lowery's violent propensity. Taylor v. United Parcel Serv., Inc., 72 A.D.3d 573, 574 (1st Dep't 2010); Pinkney v. City of New York, 52 A.D.3d 242, 243 (1st Dep't 2008). Axion LLC's alleged failure to resolve conflicts that plainly could lead to violence and failure to recognize and address Lowery's manifested violent propensity, allow an inference that Axion LLC should have known of that violent propensity. T.W. v. City of New York, 286 A.D.2d 243, 245 (1st Dep't 2001); Bumpus v. New York City Tr. Auth., 47 A.D.3d 653, 654 (2d Dep't 2008). See Chagnon v. Tyson, 11 A.D.3d at 326; Sheila C. v. Povich, 11 A.D.3d 120, 129-30 (1st Dep't 2004).

Plaintiffs also claim Axion LLC is liable for negligent hiring in failing to investigate Lowery's trustworthiness adequately. They claim the duty to investigate arises especially here, in view of the employer's "knowledge that defendant LOWERY would be working closely with LINDA STEIN, deceased, in her home," Hyland Aff., Ex. A ¶ 38, and was being assigned the duties of a "personal assistant," giving Lowery access to Stein's funds, business and personal records, and other property. Id. ¶¶ 37-38, 64. Specifically, plaintiffs allege that "Axion was required to exercise due diligence in checking the background and credentials" of Lowery, id. ¶ 51, and to ensure that employees "were without unsuitable, dishonest, and/or violent propensities and without physical, psychological and/or physiological traits or characteristics that would render them unsuitable or unstable or contraindicated for such employment." Id. ¶ 57.

While defendant employer owes a duty to investigate an employee's background only if defendant knows facts that would lead a reasonably prudent employer to investigate, again plaintiffs' allegations that defendants failed to recognize a violent propensity and resolve conflicts early in Lowery's assignment, as well as later, demonstrate that knowledge. T.W. v. City of New York, 286 A.D.2d at 245; K.I. v. New York City Bd. of Educ., 256 A.D.2d 189, 192 (1st Dep't 1998). See Yeboah v. Snapple, Inc., 286 A.D.2d 204, 205 (1st Dep't 2001). The simple fact known to an employer that it was hiring a personal assistant, moreover, plausibly would have led it, if reasonably prudent, to conduct at least a rudimentary check of her criminal history or past employers, which would have revealed a criminal record or a firing for misconduct. See Glover v. Augustine, 38 A.D.3d at 365.

B. Plaintiffs' Claim Based on Respondeat Superior

Under plaintiffs' further theory of respondeat superior, defendant employer is liable for its employee's negligent or intentional acts when the conduct was ordinarily foreseeable and was an incident of the employment. N.X. v. Cabrini Med. Ctr., 97 N.Y.2d 247, 251 (2002); Judith M. v. Sisters of Charity Hosp., 93 N.Y.2d 932, 933 (1999). Defendant employer is not liable for violent actions unless they were within the scope of employment and defendant condoned, authorized, or instigated them. Taylor v. United Parcel Serv., Inc., 72 A.D.3d 573.

The question here is whether the amended complaint supports

defendant employer's liability under respondeat superior for Lowery's culpability in assaulting, battering, and murdering Stein, when those crimes per se need not have been foreseeable by the employer. Added to plaintiffs' claim that Lowery's stealing, dishonesty, untrustworthiness, and violence were foreseeable is the fact that Lowery committed those crimes on the job.

Nevertheless, that simple fact does not, without more, translate into her "acting in the scope of her employment," Hyland Aff., Ex. A ¶ 65, or "in the course of her employment with defendants," id. ¶ 73, "with the knowledge and at the direction of the defendant's employers," referring to Lowery's employers, id. ¶ 69, as plaintiffs further allege. These allegations amount to no more than bare legal conclusions, because they do not show that her intentional, culpable acts were related in any way to her employer's business and not directly against its interests, were in furtherance of her assignment, or were for any purpose other than her own personal motives. Delran v. Prada USA Corp., 23 A.D.3d 308 (1st Dep't 2005); HT Capital Advisors v. Optical Resources Group, 276 A.D.2d 420 (1st Dep't 2000); Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dep't 1997). See N.X. v. Cabrini Med. Ctr., 97 N.Y.2d at 251-52; Judith M. v. Sisters of Charity Hosp., 93 N.Y.2d at 933; White v. Hampton Mgt. Co. L.L.C., 35 A.D.3d at 244; Dykes v. McRoberts Protective Agency, 256 A.D.2d at 3-4. Insofar as the allegations set forth facts, they are still conclusory in failing to indicate how Lowery's conduct furthered Axion LLC's interest or how Axion LLC directed

or at least acquiesced in her assault, battery, or murder of Stein. Taylor v. United Parcel Serv., Inc., 72 A.D.3d 573; Velasquez-Spillers v. Infinity Broadcasting Corp., 51 A.D.3d 427 (1st Dep't 2008). See Brainstorms Internet Mktg. V. USA Networks, 6 A.D.3d 318 (1st Dep't 2004).

Lowery's actions could not be a more "obvious departure from the normal duties" of a personal assistant. White v. Hampton Mgt. Co. L.L.C., 35 A.D.3d at 244. See N.X. v. Cabrini Med. Ctr., 97 N.Y.2d at 251; Judith M. v. Sisters of Charity Hosp., 93 N.Y.2d at 933; Dykes v. McRoberts Protective Agency, 256 A.D.2d at 4. To characterize her actions as an abuse of her position, rather than in furtherance of her position, would be an understatement.

As the complaint contains no other allegations that Lowery's tortious conduct toward Stein was in the scope of her employment or even allowed by Axion LLC, plaintiffs' claim based on respondeat superior fails. N.X. v. Cabrini Med. Ctr., 97 N.Y.2d at 252; Judith M. v. Sisters of Charity Hosp., 93 N.Y.2d at 933; White v. Hampton Mgt. Co. L.L.C., 35 A.D.3d at 244; Conde v. Yeshiva Univ., 16 A.D.3d at 187. See Adams v. New York City Tr. Auth., 88 N.Y.2d 116, 123 (1996); Pinkney v. City of New York, 52 A.D.3d at 242-43. While plaintiffs might present an affidavit to cure pleading defects, no affidavit addresses the deficiencies set forth above. Nonnon v. City of New York, 9 N.Y.3d at 827; Cron v. Harqro Fabrics, 91 N.Y.2d 362, 366 (1998); M.M. v. E.M., 248 A.D.2d 109, 110 (1st Dep't 1998); Lazic v. Currier, 69 A.D.3d

1213, 1214 (3d Dep't 2010).

C. Disclosure Pursuant to C.P.L.R. § 3211(d)

To resuscitate their respondeat superior claim, plaintiffs suggest the possibility that disclosure would uncover crucial evidence regarding defendants' authorization of Lowery's tortious acts on her assignment or their acquiescence in them as part of that assignment. At this pleading stage, plaintiffs well' may be at an informational disadvantage. Particularly where defendants' intent or knowledge is an issue, it may be only through disclosure that plaintiffs obtain the empirical evidence necessary to prevail at trial, including facts that currently sound implausible.

The pleading standards applied above account for the informational asymmetry and the possibilities disclosure offers. A mere hope or theoretical possibility, however, of finding evidence regarding defendants' undisclosed authorization or acquiescence that would supply the crucial underpinning for their vicarious liability, absent any threshold indication beyond speculation, does not justify denying or postponing dismissal. C.P.L.R. § 3211(d); Matz v. Prospect Energy Corp., 63 A.D.3d 619, 620 (1st Dep't 2009); Fitz-Gerald v. Donaldson, Lufkin & Jenrette, 294 A.D.2d 176 (1st Dep't 2002); Rochester Linoleum & Carpet Ctr., Inc. v. Cassin, 61 A.D.3d 1201, 1202 (3d Dep't 2009); Black v. Green Harbour Homeowners' Assn., Inc., 19 A.D.3d 962, 964 (3d Dep't 2005). See Kent v. 534 East 11th Street, 80 A.D.3d 106, 114 (1st Dep't 2010); Barnes-Joseph v. Smith, 73

A.D.3d 494, 495 (1st Dep't 2010); MAP Mar. Ltd. v. China Constr. Bank Corp., 70 A.D.3d 404, 405 (1st Dep't 2010); Chalk & Vermillion v. Thomas F. McKnight, LLC, 303 A.D.2d 225, 226 (1st Dep't 2003). In fact, plaintiffs do not articulate, "from affidavits submitted in opposition to the motion" or otherwise, what facts essential to justify opposition" plaintiffs even hope or speculate "may exist but cannot . . . be stated" now in their pleading. C.P.L.R. § 3211(d). See Art Capital Group, LLC v. Neuhaus, 70 A.D.3d 605, 607 (1st Dep't 2010); Angel v. Bank of Tokyo-Mitsubishi, Ltd., 39 A.D.3d 368, 370 (1st Dep't 2007); Matz v. Prospect Energy Corp., 63 A.D.3d at 620; Bouley v. Bouley, 19 A.D.3d 1049, 1051 (4th Dep't 2005).

D. Plaintiffs' Wrongful Death Claim

Plaintiffs, the deceased Linda Stein's personal representatives, may recover damages for Axion LLC's wrongful conduct if defendant employer would have been liable to the deceased for such conduct had she not died. N.Y. Est. Powers & Trusts Law (EPTL) § 5-4.1(1); Gonzalez v. New York City Hous. Auth., 77 N.Y.2d 663, 667 (1991); Barry & Sons, Inc. v. Instinct Prods. LLC, 15 A.D.3d 62, 66 (1st Dep't 2005). Plaintiffs' wrongful death claim, in contrast, is for the benefit of deceased's distributees. EPTL § 5-4.4(a); Heslin v. County of Greene, 14 N.Y.3d 67, 75 (2010); Hernandez v. New York Health & Hosps. Corp., 78 N.Y.2d 687, 693 (1991); Gonzalez v. New York City Hous. Auth., 77 N.Y.2d at 667; Bumpurs v. New York City Hous. Auth., 139 A.D.2d 438, 439 (1st Dep't 1988).

Axion LLC seeks dismissal of plaintiffs' wrongful death claim on the ground that plaintiffs fail to allege wrongdoing by Axion LLC. As discussed above, however, plaintiffs' allegations regarding Axion LLC's negligent hiring, supervision, and retention survive. The amended complaint also alleges acts and omissions by defendants, including Axion LLC, leading to Stein's death, which satisfy the causation element of wrongful death. E.g., Hyland Aff., Ex. A ¶ 74. See Roques v. Noble, 73 A.D.3d 204, 207 (1st Dep't 2010); Badillo v. City of New York, 35 A.D.3d 307 (1st Dep't 2006).

IV. CONCLUSION

For the reasons set forth, the court grants defendant Axion LLC's motion to dismiss the amended complaint against Axion LLC to the extent of dismissing plaintiffs' second claim against this defendant, for its liability based on respondeat superior, but denies its motion in all other respects. This decision constitutes the court's order. The court will mail copies to the parties' attorneys.

DATED: February 9, 2011

**FILED**

**MAR 03 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS  
J.S.C.**