[* 1]

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

PRESENT: JUDITH J. GISCHE PART 10

Justice

Diggins

INDEX NO. 105255T/10

MOTION DATE

- v -

MOTION SEQ. NO. 4

Turner Const. Co

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

FILED

NOV 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Only #4 open & only to extent that motion to dismiss is before the court. That relief has no opp submitted

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

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

Dated: 11/16/11

HON. JUDITH J. GISCHE 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 10

----------x

DAVID DRIGGERS,

Plaintiff (s),

-against-

TURNER CONSTRUCTION COMPANY, LINCOLN CENTER DEVELOPMENT PROJECT, INC., J.P. MORGAN CHASE & CO., JOHN CIVETTA & SONS, INC and NICK GIARRUSSO,

Defendant (s).

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DECISION/ ORDER
Index No.: 105255/10
Seq. No.: 004

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def's n/m [3211] w/JES affirm, RH affid, TJC affid, memo, exhs	1

Gische, J:

Upon the foregoing papers, the decision and order of the court is as follows:

The court has before it the motion of Turner Construction Company ("Turner"), Lincoln Center Development Project, Inc. ("LCDP"), John Civetta & Sons, Inc. ("Civetta") and Nick Giarrusso ("Giarrusso") (collectively "defendants") for an order dismissing the complaint against Giarrusso pursuant to: (a) CPLR 3211(a)(8) for lack of personal jurisdiction based on improper service; (b) CPLR 3211(a)(7) as against Turner and LCDP for failure to state a cause of action, because Turner and LCDP did not supervise, direct or control the work of Giarrusso, nor did LCDP have knowledge of Giarrusso's purported propensity for the injury-causing conduct; (c) CPLR 3211(a)(7) as against Civetta, for failure to state a cause of action because Civetta did not have knowledge of Giarrusso's purported

propensity for the injury-causing conduct; and alternatively, (d) pursuant to CPLR 3211(c) and CPLR 3212, granting Turner, LCDP, Civetta and Giarrusso's motion for summary judgment. Although the Note of Issue has not been filed, defendants have answered the complaint, therefore, issue has been joined, and summary judgment releif is available. CPLR § 3212; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept. 2001].

Defendant's motion was served on April 7, 2010. The parties subsequently stipulated to adjourn the return date of the motion. However, due to clerical error, the stipulation was not processed and the motion was submitted to this court, without opposition and without exhibits. In a decision dated May 17, 2011, the court denied the defendant's motion because the exhibits to the motion were missing. Thereafter, defendants brought a motion to vacate and renew, which the parties agreed to adjourn to September 8, 2011. On September 8, 2011, the court granted the motion to vacate and renew. On November 3, 2011, the renewed motion to dismiss was submitted to the court, without opposition. Therefore, the motion to dismiss is considered and decided on default.

Turner entered into a contract with LCDP for certain work to be performed at West 65th Street and Broadway in New York, New York (the "Site") as part of a renovation/redevelopment project. Turner hired Civetta to perform certain excavation and foundation work at the Project. On December 17, 2007, there was an altercation between a pedestrian and Civetta's laborer, Giarrusso, at the intersection of Broadway and 65th Street. The altercation allegedly occurred as Giarrusso was flagging down pedestrian traffic, to prevent pedestrians and workers from entering the intersection, while directing a tractor trailer.

Discussion

(a) Lack of Personal Jurisdiction of Giarrusso (CPLR § 3211[a][8])

In the context of a motion to dismiss pursuant to CPLR § 3211, the court must afford the challenged pleadings a liberal construction, take the allegations as true, and provide the pleader with the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 [2002]; Leon v. Martinez, 84 N.Y.2d 83 [1994]; Morone v. Morone, 50 N.Y.2d 481 [1980]; Beattie v. Brown & Wood, 243 A.D.2d 395 [1st Dept. 1997]). In deciding the motion to dismiss, the court must consider whether, accepting all facts, that they support the claims asserted (Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 [1976]) and whether they fit within any cognizable legal theory (Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 [2005]).

In deciding whether any claims must be dismissed, the court does not have to consider whether plaintiff has pled claims that it will eventually succeed on. Rather, the court has to broadly examine the complaint to see whether, from its four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1st Dept. 1977).

Strict compliance with the service dictates of CPLR § 308 is required in order to obtain jurisdiction over a defendant. Persaud v. Teaneck Nursing Center, Inc., 290 A.D.2d 350 (1st Dept. 2002); see, Olsen v Haddad, 187 A.D.2d 375 (1st Dept. 1992), *lv denied* 81 N.Y.2d 707.

CPLR § 308(2) governs service of process upon a person, and requires:

> "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 *actual place of business*...such delivery and mailing to be effectuated within twenty days of each other; proof of service shall be filed with the clerk of the court" designated in the summons within twenty days of either such delivery or mailing, whichever is effected later." (emphasis added.)

The term "actual place of business" includes that location that the person to be served, "through regular solicitation or advertisement, has held out as (his or her) place of business." CPLR § 308(6). Where a defendant has not been properly served with process, a court lacks personal jurisdiction over that defendant and the complaint must be dismissed. CPLR § 3211(a)(8); Persaud v. Teaneck Nursing Center, Inc., 290 A.D.2d 350 (1st Dept. 2002). Furthermore, CPLR § 3211(e) requires the defendant to move for judgment within sixty days of filing an answer, otherwise this defense is considered waived. See Wiebusch v. Bethany Memorial Reform Church, 9 A. D. 3d 315 (1st Dept. 2004), World Hill Ltd. v. Sternberg, 25 Misc.3d 1224(A) (Sup.Ct. N.Y. 2009).

Here, the plaintiffs' attempt at service upon Giarrusso, by delivering a copy of the Summons and Verified Complaint to Civetta, is defective because Giarrusso was not employed by Civetta on the date of attempted service, nor was Civetta otherwise authorized to accept service on behalf of Giarrusso. Plaintiffs' affidavit of service indicates that the process server attempted to effectuate service upon Giarrusso by serving him at his last known business address. In fact, the affidavit of service clearly indicates that the process server was informed that Giarrusso was no longer employed by Civetta on the date of the attempted service. The fact that Giarrusso had not been employed by Civetta for years is confirmed by Theodore J. Civetta ("Mr. Civetta"), in his affidavit, where he indicates that Giarrusso was employed for Civetta from August 5, 2004 through October 26, 2009. (See, Mr. Civetta Affidavit, Def's Exhibit K).

Here, there is no evidence in admissible form that Giarrusso was employed by Civetta on the date of the attempted service, nor that plaintiff mailed a copy to Giarrusso at his actual place of business. Moreover, there is no further indication of any attempts by plaintiff to serve Giarrusso. Therefore, plaintiff has not established the court has personal jurisdiction over Giarrusso. CPLR § 308(2). Since the failed attempts at service on Giarrusso, pursuant to CPLR § 308(6), plaintiff did not make any further attempts to timely serve Giarrusso within the period prescribed by CPLR § 306-b. Daniels v. King Chicken & Stuff, Inc., 35 A.D.3d 345 (2nd Dept. 2006) (An action is subject to dismissal, upon motion of the defendant, if service of process is not made within the prescribed period of CPLR 306-b.) Accordingly, this court lacks personal jurisdiction over Giarrusso and the plaintiff's Complaint as against Giarrusso is dismissed.

(b) Failure to State a Cause of Action

Although the moving defendants seek "dismissal" pursuant to CPLR § 3211(a)(7) of plaintiff's claims or "summary judgment" (CPLR § 3211[c] and CPLR § 3212) in their favor, each of them have answered the Verified Complaint and issue has been joined. Therefore, what each of the moving defendants actually seeks is dismissal of the claims against them on the merits, based upon one of the enumerated grounds in CPLR § 3211, or phrased differently, summary judgment dismissing the complaint for failure to state a cause of action. Accordingly, each moving defendant bears the initial burden of setting forth evidentiary facts to prove his or its *prima facie* case such that it would be entitled to judgment in its favor, without the need for a trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). Only if the moving defendants meet this burden does it then shift to plaintiff to submit evidentiary facts to controvert the allegations set forth in the defendants' papers to

demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, *supra*).

The general rule is that a party who employs an independent contractor is not liable for the contractor's negligent acts, since the party has no right to control the manner in which the work is done (Brothers v New York State Electric and Gas Corp., 11 N.Y.3d 251 (2008); Bellere v. Gerics, 304 A.D.2d 687, 688 [2nd Dept. 2003]; see Kleeman v. Rheingold, 81 N.Y.2d 270, 273 [1993]; Metzger v. Yorktown Jewish Ctr., 283 A.D.2d 466 [2nd Dept. 2001]; Marino v. City of N.Y., 259 A.D.2d 469 [2nd Dept. 1999]). The rule and exceptions governing vicarious liability of a hirer of an independent contractor apply also for a general contractor who engages a subcontractor. Whitaker v. Norman, 75 N.Y.2d 780 (1989); Broderick v. Cauldwell-Wingate Co., 301 N.Y. 182 (1950); Rapp v Zandri Constr. Corp., 165 A.D.2d 639 (3rd Dept. 1991).

In contrast, a party may be held liable for a contractor's negligence under theories of negligent hiring, negligent retention, and negligent supervision (Bellere v. Gerics, *supra*; see Sato v. Correa, 272 A.D.2d 389 [2nd Dept. 2000]). To hold a party liable under theories of negligent hiring, negligent retention, and negligent supervision, a plaintiff must establish that the party knew or should have known of the contractor's propensity for the conduct which caused the injury. (Id.)

The negligence of an employer arises from the employer having placed an employee in a position to cause a foreseeable harm, harm which that injured party most probably would have been spared had the employer taken reasonable care in making its decision conferring the hiring and retention of the employee. Detone v. Bullit Courier Service, Inc., 140 A.D.2d 278 (1st Dept. 1988); Rodriguez v. United Transp. Co., 246 A.D.2d 178 (1st

Dept. 1998); Coffey v. City of New York, 49 A.D.3d 449 (1st Dept. 2008).

(i) Turner and LCDP:

The defendants now move to dismiss the claims, as against Turner and LCDP, for failure to state a cause of action because defendants claims that Turner and LCDP did not supervise, direct or control the work of Giarrusso, because he was not an employee of Turner or LCDP. Furthermore, they argue that Turner and LCDP did not have knowledge of Giarrusso's purported propensity for the injury-causing conduct

In his complaint, plaintiff alleges that Turner maintained and operated the construction site through its employees. (See, Def's Exhibit B, at ¶ 25). Plaintiff further alleges that "a construction worker, an employee of defendant Turner" was involved in the incident at the site. (See, Def's Exhibit B, at ¶ 26). However, the construction worker, Giarrusso, did not work for Turner or LCDP. In fact, he was the employee of Civetta, a subcontractor at the site. (See, Hubner Affidavit and Civetta Affidavit, Def's Exhibits J and K, respectively). Defendants establish through the affidavits of Hubner and Civetta that Turner did not supervise, direct or control Giarrusso's work at the site and that he was not employed by Turner. They deny that Tuner or LCDP had any knowledge of any propensity by Giarrusso to engage in the conduct which allegedly caused the incident, and the plaintiff has failed to submit any proof to the contrary. Therefore, plaintiff's claim is dismissed against Turner and LCDP.

(ii) Civetta:

The defendants also move to dismiss the claims, as against Civetta, for failure to state a cause of action, because Civetta did not have knowledge of Giarrusso's purported propensity for the injury-causing conduct.

Plaintiff's complaint asserts that Civetta was "negligent, reckless and careless in that it violated its duties to persons lawfully on the premises...by knowingly permitting suffering and allowing the aforesaid premises to be, become and remain in a defective, unsafe and dangerous condition and was further negligent in failing to take suitable precaution for the safety of persons." (See, Pltf's Verified Complaint, Def's Exhibit E, ¶ 8).

Defendant has established that Civetta is a member of the General Contractors Associates of New York, Inc. and employs member of the appropriate trade union to perform its foundation and excavation work. Giarrusso was a member of the Building, Concrete Excavating & Common Laborers Union, Local No. 731. Civetta employed Giarrusso from approximately August 5, 2004 through October 26, 2009. Mr. Civetta claims that Giarrusso was a diligent, responsible worker, and that neither Mr. Civetta, the project manager, nor Civetta, had any knowledge of Giarrusso ever being involved in any prior incident or altercation at the project site, or at any other job site, nor did nay such incident occur after December 17, 2007 on any Civetta job site while Giarrusso was employed by Civetta. (See, Civetta Affidavit, Def's Exhibit K).

As this motion is unopposed, plaintiff has failed to raise an issue of fact as to whether the Giarrusso was negligently hired, supervised or retained. Plaintiff failed to raise a factual issue as to whether, at the time of his hiring, Civetta was on notice of facts triggering a duty to inquire further. As to supervision, plaintiff has failed to raise an issue of fact that Civetta, during the course of its supervision, had any knowledge of Giarrusso's propensity for the conduct causing the injury, prior to the alleged incident. (See Osvaldo D. v Rector Church Wardens & Vestrymen of Parish of Trinity Church of N.Y., 38 A.D.3d 480 [1st Dept. 2007]). Therefore, plaintiff's first cause of action for negligent hiring and supervision claim is

dismissed as against Civetta.

The Remaining Second Cause of Action Against Civetta, for Assault, is Dismissed

After filing a lawsuit against Turner, LCDP and J.P. Morgan Chase & Co., under Index No. 105255/2010, plaintiff brought a separate action against Civetta and Giarrusso, filed under Index No. 114492/2010. On March 2, 2011, the parties entered into a Stipulation that the two actions be consolidated under Index No. 105255/2010 for the purposes of discovery and trial, and to bear the caption David Driggers vs. Turner Construction Company, Lincoln Center Development Project, Inc., J.P. Morgan Chase & Co., John Civetta & Sons, Inc. and Nick Giarrusso. On January 13, 2011, the court partially granted motion sequence 001, to the extent that the cause of action for assault was dismissed, as against Turner, LCDP and J.P. Morgan Chase & Co.[1] (Index No. 105255/2010), the court held that this claim is time barred by the applicable statute of limitations. CPLR § 215(3); Smiley v. North General Hosp., 59 A.D.3d 179 (1st Dept. 2009).

Paragraphs 26, 27 and 28 of the Verified Complaint (Index No. 105255/2010) constitute the cause of action for the assault. (See, Pltf's Complaint, Def's Exhibit B). Paragraphs 21, 22 and 23 of the Verified Complaint (Index No. 114492/2010) constitute the cause of action for the assault. (See, Pltf's Complaint, Def's Exhibit E). Although asserted against different defendants, the causes of action asserted by the plaintiff are identical. Furthermore, although the plaintiff has not moved with respect to or addressed the second cause of action against Civetta, nor has Civetta sought relief from the second cause of action, the second cause of action against Civetta arises from the same facts and

[1] J.P. Morgan Chase & Co., is no longer a party to this action, as the case against it was dismissed pursuant to the decision of motion seq. 002.

circumstances and is therefore barred by the applicable statute of limitations and is likewise dismissed.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendant NICK GIARRUSSO's motion to dismiss the plaintiff's complaint is granted, on default; and it is further

ORDERED that defendant TURNER CONSTRUCTION COMPANY's summary judgment motion dismissing plaintiff's complaint is granted on default; and it is further

ORDERED that defendant LINCOLN CENTER DEVELOPMENT PROJECT, INC.'s summary judgment motion dismissing plaintiff's complaint is granted on default; and it is further

ORDERED that defendant JOHN CIVETTA & SONS, INC.'s summary judgment motion dismissing plaintiff's complaint is granted as to the first cause of action, on default; and it is further

ORDERED that plaintiff's second cause of action against defendant JOHN CIVETTA & SONS, INC. is dismissed because it is barred by the applicable statute of limitations; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
November 16, 2011

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.