

Garcia v City of New York
2014 NY Slip Op 32440(U)
April 4, 2014
Sup Ct, Bronx County
Docket Number: 301278/09
Judge: Douglas E. McKeon
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PART ~~03~~ 19A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed
Settle Order
Schedule Appearance

GARCIA, EDUARDO

Index No. 0301278/2009

-against-

Hon. ~~XXXXXXXXXXXXXXXXXXXX~~

THE CITY OF NEW YORK

Douglas E. McKeon Justice.

The following papers numbered 1 to _____ Read on this motion, DISMISSAL
Noticed on April 25 2013 and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this _____ motion is decided in accordance with the annexed decision and order of the Court.

So ordered.

Motion is Respectfully Referred to: Justice
Justice: McKeon
Dated: 5/13

Dated: 4 / 4 / 14

Hon. Douglas E. McKeon
~~XXXXXXXXXXXXXXXXXXXX~~

Douglas E. McKeon

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

-----X
EDUARDO GARCIA,

Plaintiff(s)

- against -

INDEX NO: 301278/09

THE CITY OF NEW YORK, THE FIRE DEPARTMENT
OF THE CITY OF NEW YORK, BUREAU OF HEALTH
SERVICES, NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION,

Defendant(s)

DECISION/ORDER

-----X
THE CITY OF NEW YORK,

Third-Party Plaintiff,

- against -

INDEX NO. 42081/09

MONTEFIORE MEDICAL CENTER,

Third-Party Defendant

-----X
THE CITY OF NEW YORK,

Second-Third-Party
Plaintiff

- against -

INDEX NO. 42066/12

GLENN GARCIA,

Second Third-Party
Defendant

DECISION/ORDER

-----X
HON. DOUGLAS E. MCKEON

Motion by Glenn Garcia, Second Third-Party Defendant herein for an order dismissing the Second Third-Party complaint against him for failure to state a cause of action is decided as follows.

Plaintiff was bitten on his ear by a pit bull owned by his son, Glenn Garcia. Plaintiff alleges that defendant City of New York was negligent in the handling/discarding of a portion of the ear thereby preventing it from being reattached. In its Third-Party action, The City of New York alleges that Montefiore Medical Center instructed Emergency Medical Service personnel to discard the portion of the ear because it could not be reattached. In its third Third-Party complaint, Montefiore alleges that the occurrence was caused by movant's recklessness, and negligence in failing to properly safeguard, train or restrain the dog so as to protect those on his premises from injury. Montefiore seeks indemnification and/or contribution from movants for all or any part of the verdict or judgment plaintiff may recover against it.

Plaintiff commenced the action against the City in February of 2009. The action by the City against Montefiore was brought seven months later. The City commenced the second Third-Party action against movant two and a half years later. Montefiore commenced its own Third-Party action on December 3, 2012. The motion before this Court is Glenn Garcia's motion to dismiss Montefiore's complaint for failure to state a cause of action.

Movant argues that the third Third-Party complaint should be dismissed

because while the City and Montefiore may be joint tort feasers Glenn Garcia and Montefiore are, at most, successive tort feasers and in the absence of a direct action by plaintiff against him which is now barred by the statute of limitations the Court must find that Montefiore has no valid claim against him. Furthermore, even though Mr. Garcia might in theory be liable for plaintiff's injuries had plaintiff sued him, the City cannot have any liability to plaintiff for the original injury to plaintiff's ear. Montefiore's liability flows from the City's liability so that Montefiore has no greater rights against Mr. Garcia than the City does. The negligence charged to the City and Montefiore is so different in kind from that attributed to the movant that the Court should, in the absence of a direct action by plaintiff against his son, not trace the negligence of Montefiore and the City past their own act, errors and omissions.

In opposition, Montefiore argues that Glenn Garcia's motion to dismiss for failure to state a cause of action should be denied as he is jointly and severally liable for plaintiff's injuries. Montefiore argues that when two or more tort feasers act concurrently or in concert to produce a single injury they may be held jointly and severally liable citing Suria v. Shiffman, 67 N.Y.2d. 87 (1986). Furthermore, where there is an injury incapable of any reasonable division among multiple tort feasers who neither act in concert nor concurrently they may, nevertheless, be considered jointly and severally liable citing to Hawkes v. Goll, 281 N.Y. 808 (1939) and Wiseman v. 374 Realty Corp., 54 A.D.2d. 119 (1st Dept. 1976).

Movant relies on a case called Derby v. Prewitt 12 N.Y.2d 100, (1962 Ct.

App.). In Derby, plaintiff sustained a fracture of the femur after being struck by a taxi. Three days later she was operated on by a defendant doctor whose negligence caused a shortening of the leg. The Court found that the taxidriver and doctor did not contribute concurrently to the same wrong and were not joint tortfeasors as the wrongs were independent and successive allowing for two separate causes of action. Montefiore argues that Derby is distinguishable from the matter herein as here, the lacerations sustained by plaintiff to his ear due to the negligence of Garcia is indivisible from the injuries alleged to have been caused by Montefiore. Plaintiff's complaint alleges that he "sustained serious and severe personal injuries, conscious pain and suffering, permanent disfigurement and emotional distress due to severance of a portion of his ear. Montefiore argues that the severed portion of the ear could not have been reattached and that even if it had been reattached the ear would nevertheless have been disfigured due to the initial dog bite. As such, Montefiore argues that no reasonable division can be made between the original bite and the injury alleged to have been caused by Montefiore Medical Center and, as such, Garcia should be deemed jointly liable. Montefiore argues that the case of Hawkes v. Goll, *Supra*, should apply. There, decedent was struck by a motor vehicle driven by one defendant and, shortly thereafter, struck by a second vehicle driven by a second defendant. The Court of Appeals upheld the Appellate Division finding that while the wrongful acts were not precisely concurrent in point of time the parties may nevertheless be joint tortfeasors where their several acts of neglect

concurrent in producing the injury. Montefiore argues that such reasoning should be applied here where the initial injury was caused by Garcia's negligence in harboring a vicious dog which caused the bite to the ear and the injury.

The Court finds that simultaneous conduct is not necessary to a finding of joint and several liability where there is an indivisible injury such as here. See Ravo v. Rogatnick 70 N.Y.2d 305 (1987). The injury to plaintiff's ear herein was initially caused by movant's dog bite and it is indivisible from the injuries alleged to have been caused by Montefiore Medical Center. The injuries alleged involve the disfigurement of plaintiff's ear. Although Montefiore Medical Center is further alleged to have wrongfully discarded the portion of the ear that was bitten off by the dog, the Court finds that the injury is indivisible as the dog bit off the portion that was ultimately lost. As such, this Court denies the third Third-Party defendant Glenn Garcia's motion to dismiss pursuant to CPLR 3211(a) 77 for failure to state a cause of action in its entirety. Because the Court finds that Glenn Garcia and Montefiore are joint tortfeasors and not successive tortfeasors in the circumstances of this case the absence of a direct action by plaintiff against Glenn Garcia which would now be barred by the statute of limitations does not compel the conclusion that Montefiore has no cognizable claim against Glenn Garcia.

As such, the instant motion by Glenn Garcia is denied.

Dated: *April 4, 2014*



Douglas E. McKeon, J.S.C.