

Romain v Lozardo

2015 NY Slip Op 30810(U)

May 8, 2015

Supreme Court, Suffolk County

Docket Number: 20157/2012

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 20157/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 MARIE ROMAIN and JOSEPH ROMAIN,

Plaintiffs,

-against-

EDGAR LOZARDO,

Defendant.

ORIG. RETURN DATE: SEPTEMBER 27, 2012
 FINAL SUBMISSION DATE: SEPTEMBER 26, 2013
 MTN. SEQ. #: 003
 MOTION: MG

ORIG. RETURN DATE: NOVEMBER 8, 2012
 FINAL SUBMISSION DATE: SEPTEMBER 26, 2013
 MTN. SEQ. #: 004
 MOTION: MD

ORIG. RETURN DATE: NOVEMBER 8, 2012
 FINAL SUBMISSION DATE: SEPTEMBER 26, 2013
 MTN. SEQ. #: 005
 MOTION: MG

ORIG. RETURN DATE: FEBRUARY 5, 2013
 FINAL SUBMISSION DATE: SEPTEMBER 26, 2013
 MTN. SEQ. #: 006
 MOTION: MG

ORIG. RETURN DATE: SEPTEMBER 26, 2013
 FINAL SUBMISSION DATE: SEPTEMBER 26, 2013
 MTN. SEQ. #: 007
 MOTION: MG CASEDISP

SELF-REPRESENTED PLAINTIFFS:

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Upon the following papers numbered 1 to 30 read on these motions _____
TO QUASH SUBPOENAS, TO COMPEL DISCOVERY, AND FOR SUMMARY JUDGMENT .
Notice of Motion and supporting papers 1-3 ; Answer to Notice of Motion and supporting papers
4, 5 ; Order to Show Cause and supporting papers 6-8 ; Affidavit in Opposition and
supporting papers 9, 10 ; Reply to Show Cause and supporting papers 11, 12 ; Notice of
Motion and supporting papers 13-15 ; Answer to Oppose Notice of Motion to Quash Subpoena
and supporting papers 16, 17 ; Notice of Motion and supporting papers 18-20 ; Opposition of
Notice of Motion to Quash Subpoena and supporting papers 21, 22 ; Reply Affidavit and
supporting papers 23, 24 ; Notice of Motion and supporting papers 25-27 ; Oppose Motion
and supporting papers 28, 29 ; Reply Affirmation 30 ; it is,

ORDERED that this motion (seq. #003) by defendant EDGAR
LOZARDO for an Order, pursuant to CPLR 2304 quashing a judicial subpoena
duces tecum, and issuing a protective Order pursuant to CPLR 3103, is hereby
GRANTED for the reasons set forth hereinafter; and it is further

ORDERED that this motion (seq. #004) by plaintiffs MARIE ROMAIN
and JOSEPH ROMAIN for an Order compelling an examination before trial of
defendant, is hereby **DENIED** as moot given the Court's ruling herein on
defendant's motion for summary judgment; and it is further

ORDERED that this motion (seq. #005) by non-party CAPITAL ONE
BANK for an Order, pursuant to CPLR 2304 and/or 3103 (a) and 3101 (b),
quashing the subpoena duces tecum dated October 5, 2012, or issuing a
protective Order with respect to the documents sought therein, on the grounds
that the subpoena is improper in that it is overly broad; would require production
of materials which are confidential; the subpoena was not properly served; and,
the subpoena was served solely for harassing purposes and use in an unrelated
case now on appeal in which defendant EDGAR LOZARDO is not a party and in
which the Appellate Division rejected plaintiff's motion for similar discovery, is
hereby **GRANTED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion (seq. #006) by defendant EDGAR LOZARDO for an Order, pursuant to CPLR 2304, quashing a judicial subpoena duces tecum, and issuing a protective Order pursuant to CPLR 3103, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion (seq. #007) by defendant EDGAR LOZARDO for an Order, pursuant to CPLR 3212, granting defendant summary judgment and dismissing plaintiff's complaint, is hereby **GRANTED**, and plaintiff's complaint is dismissed.

The Court has consolidated these applications for the purpose of rendering the within decision and Order.

This is an action sounding in either intentional tort or negligence commenced by the self-represented plaintiff, JOSEPH ROMAIN ("plaintiff"). Plaintiff alleges that he was "violently struck and injured in and about the back by a shopped cart handle by defendant [his co-worker] EDGAR LOZARDO while delivering packages at 11:10 A.M. on December 15, 2009 inside the mailroom Capital One Bank 275 Broadhollow Road, Melville, New York 11747, County of Suffolk State of New York, caused plaintiff to sustain serious injuries." Plaintiffs' complaint alleges that the occurrence was caused solely by the negligence of defendant. Plaintiffs assert two causes of action herein, to wit: the first for negligence on behalf of plaintiff, and a second for loss of services on behalf of plaintiff's wife, MARIE ROMAIN. Plaintiffs seek damages on the first cause of action in the amount of \$10,000,000.00 in compensatory damages and \$500,000.00 in punitive damages, and on the second cause of action in the amount of \$5,000,000.00.

The action was commenced by summons and complaint on July 5, 2012. A verified answer was interposed on behalf of defendant on or about August 8, 2012.

The parties, and non-party CAPITAL ONE BANK, have now filed the applications delineated above. The Court shall initially address defendant's motion for summary judgment seeking dismissal of the complaint.

On a motion for summary judgment the Court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). Therefore, in determining the motion for summary

judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (see *Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2004]; *Roth v Barreto*, 289 AD2d 557 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). The failure of the moving party to make such a *prima facie* showing requires denial of the motion regardless of the insufficiency of the opposing papers (see *Dykeman v Heht*, 52 AD3d 767 [2008]; *Sheppard- Mobley v King*, 10 AD3d 70 [2004]; *Celardo v Bell*, 222 AD2d 547 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NYS2d 557 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (see *Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022 [1970]).

Defendant argues that plaintiffs' complaint must be dismissed, as if plaintiff bases his claim on negligence, his action is barred by the exclusivity provision of Workers' Compensation Law § 29 (6). Alternatively, if plaintiff bases his theory of liability on intentional tort, his action is barred by the applicable one-year statute of limitations (see CPLR 215 [3]).

In opposition to this motion, plaintiff claims, among other things, that defendant "planned intentionally and violently to break plaintiff's back on December 15, 2009."

Based upon the adduced evidence, the Court finds that defendant has established *prima facie* that he is entitled to judgment as a matter of law dismissing the complaint (see *Winegrad*, 64 NY2d 851; *Vaden v Rose*, 4 AD3d 468 [2004]; *McNulty v DePetro*, 298 AD2d 566 [2002]). In opposition, plaintiff has failed to establish the existence of any material issues of fact which require a trial of this action.

With respect to defendant's statute of limitations argument, in determining which limitations period is applicable to a given cause of action, the court must look to the substance of the allegations rather than to the characterization of those allegations by the parties (see *Western Elec. Co. v Brenner*, 41 NY2d 291 [1977]; *McDonald v Riccuiti*, 2015 NY Slip Op 02460 [2d Dept]; *Doe v Jacobs*, 19 AD3d 641 [2005]; *Rutzinger v Lewis*, 302 AD2d 653 [2003]). Although plaintiff's complaint characterizes his claim for damages as based upon defendant's negligence, the substance of the allegations therein, as well as his averments in opposition to this motion and in other submissions to the

Court, clearly describe an intentional act allegedly committed by defendant. Therefore, the Court finds that this action is time-barred under the one-year statute of limitations applicable to intentional torts, having been commenced over two and one-half years after the subject incident (see CPLR 215 [3]; *McDonald*, 2015 NY Slip Op 02460).

Even assuming, *arguendo*, that plaintiff's claim sounds in negligence, such a cause of action would be barred by the provisions of Workers' Compensation Law § 29 (6). It is undisputed herein that plaintiff and defendant were co-workers in the mailroom of Capital One Bank acting within the scope of their employment at the time of the subject incident. Thus, workers' compensation is plaintiff's exclusive remedy and he is barred from maintaining this action (see Workers' Compensation Law § 29 [6]; *Feitner v Town of Smithtown*, 23 AD3d 431 [2005]; *Macchirole v Giamboi*, 97 NY2d 147 [2001]; *Roman v Ainechi*, 15 AD3d 562 [2005]).

Moreover, it is well-settled that no cause of action to recover damages for negligent assault exists in New York (see *Wertzberger v City of New York*, 254 AD2d 352 [1998]; *Richman v Nussdorf*, 203 AD2d 548 [1994]; *Rafferty v Arnot Ogden Mem. Hosp.*, 140 AD2d 911 [1988]).

Accordingly, defendant's motion for summary judgment is **GRANTED**, and plaintiffs' complaint is dismissed in its entirety.

In view of the foregoing, this motion (seq. #004) by plaintiffs to compel an examination before trial of defendant is **DENIED** as moot. In addition, these motions (seq. #003, #005, and #006) to quash the subpoenas served by plaintiff in this action are all **GRANTED**, pursuant to CPLR 2304, and the subpoenas are all hereby quashed as this action is now disposed.

The foregoing constitutes the decision and Order of the Court.

Dated: May 8, 2015


HON. JOSEPH FARNETI
Acting Justice Supreme Court

 X FINAL DISPOSITION

 NON-FINAL DISPOSITION