

Rivera v Bhuiyan

2016 NY Slip Op 30670(U)

March 17, 2016

Supreme Court, Bronx County

Docket Number: 306435/2014

Judge: Howard H. Sherman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY
Part 4



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Enniger Rivera

Plaintiff

Decision and Order

Index No. 306435/2014

-against-

**MD.LR Bhuiyan, Margaret Rivera and
Park West Executive Services, Inc.,**

Defendants

Howard H. Sherman
J.S.C.

-----x
The following papers numbered 1-3 read on this motion for an order pursuant to CPLR § 3211(a)(7) dismissing certain claims submitted August 31, 2016

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Affirmation and Exhibits A-E	1	
Affirmation in Opposition - Exhibits A,B	2	
Affirmation in Reply	3	

Upon the foregoing papers this motion by defendants for an order pursuant to CPLR § 3211(a)(7) dismissing the claims sounding in negligent hiring , retention , and supervision, and precluding plaintiff from offering evidence at trial regarding his claims for which particulars were not provided, is denied.

Plaintiff commenced this action on December 8, 2014 seeking damages for personal injuries alleged to have been sustained in a motor vehicle accident that occurred on October 31, 2014 on Ditmars Boulevard, at or near its intersection with 31st Street, Queens County , New York. The complaint, as amended ¹alleges that Margaret

¹ Defendant Park West Executive Services , Inc. was added as a party defendant by supplemental summons and amended complaint.

Rivera (Rivera) was operating a motor vehicle owned by MD. LR. Bhuiyan (Bhuiyan) and Park West Executive Services Inc. (Park West) with the knowledge, and permission, and consent of both defendants, in the scope of her employment with defendants [Verified Amended Complaint ¶¶ 22; 27]. It is also alleged that each of these defendants "negligently hired and/or retained defendant [Rivera] for employment." [Id. ¶¶ 31-32], and that they were negligent, careless and reckless in the ownership, operation, management, maintenance, supervision, use and control of the motor vehicle [¶ 41].

Defendants Bhuiyan, and Rivera, and Park West served an amended answer, which, in pertinent part, denied that Rivera operated the subject vehicle in the scope of her employment with Park West, and denied knowledge sufficient to form a belief that Rivera operated the vehicle in the course of her employment with MD.LR. Bhuiyan.

Motion

Defendants now move for an order dismissing the negligent hiring and retention claim on the grounds that they fail to state a valid cause of action, and for an order of preclusion for the failure to serve a verified bill of particulars. Plaintiff opposes the motion on the grounds that substantial discovery remains outstanding, and with respect to the branch of the motion seeking discovery sanctions, submits a copy of the verified bill of particulars dated May 8, 2015, three days after the notice of motion.

Discussion and Conclusions

The established "sole" criteria for the court's consideration of a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7) , " is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail (see *Foley v D'Agostino*, 21 AD2d 60, 64-65; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:24, p 31; 4 Weinstein-Korn-Miller, NY Civ Prac, par 3211.36). " *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 , 372 N.E.2d 17 [1977] To this end, the court is required to " liberally construe the complaint (see e.g. *Leon v Martinez*, 84 NY2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]; CPLR 3026), and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion (see *Sokoloff v Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001] [collecting cases]; *Wieder v Skala*, 80 NY2d 628, 631, 609 N.E.2d 105, 593 N.Y.S.2d 752 [1992]) " , according plaintiff " the benefit of every possible favorable inference (see *Sokoloff*, 96 N.Y.2d at 414, 729 N.Y.S.2d 425, 754 N.E.2d 184). " *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152, 773 N.E.2d 496 [2002] ; see also, *Toth v. New York City Dept. of Citywide Admin. Servs.*, 119 A.D.3d 431, 988 N.Y.S.2d 488 [1st Dept. 2014] . The question of "[w]hether a plaintiff . . . can ultimately establish its allegations *is not taken into consideration* in

determining a motion to dismiss" (*Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497, 867 NYS2d 386 [1st Dept 2008] [emphasis added], lv denied 12 NY3d 713, 910 NE2d 430, 882 NYS2d 682 [2009]). " *African Diaspora Mar. Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 211, 968 N.Y.S.2d 459 [1st Dept. 2009]

Upon review of the submissions here and upon consideration of the alleged facts of the claims in the light most favorable to plaintiff, as well as the verified bill of particulars amplifying in detail the manner in which Rivera is alleged to have been reckless in the operation of defendants' vehicle, and the answer denying the assertion that she was acting in the scope of her employment at the time of the accident, it is the finding of this court that defendants have failed at this juncture to make the requisite showing to warrant dismissal of the claims for negligent hiring/retention. While defendants correctly argue that it is settled that "[g]enerally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training (internal citations omitted)" (*Quiroz v. Zottola*, 96 A.D.3d 1035, 1037 948 N.Y.S.2d 77 [2d Dept. 2012]), at this early juncture, the determinative issue of whether Rivera was acting within the scope of her employment when driving defendants' vehicle at the time of the accident is here controverted.

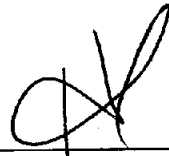
Upon the showing that plaintiff has provided the verified bill of particulars, albeit late, the remainder of the motion must be denied .

Accordingly, it is

ORDERED that the motion be and hereby is denied.

This shall constitute the decision and order of this court .

Dated: March 17, 2016



Howard H. Sherman