Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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JAMES McHALE and SIOBHAIN McHALE,

Plaintiffs,

-against-

METROPOLITAN LIFE INSURANCE COMPANY, SCOPE SURVEILLANCE & INVESTIGATIONS, INC., STEPHEN F. KELLY, JR., and "JOHN DOE,"

Defendants.

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Index No. 605844/2015

Motion Submitted: 05/04/16
Motion Sequence: 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....X

Defendant Metropolitan Life Insurance Company (MetLife) moves this Court for an Order granting it leave to renew its prior motion to dismiss the amended complaint pursuant to CPLR §§ 3211 (a)(1) and (a)(7), granting it leave to reargue the prior motion, and upon the granting of this relief, dismissing the amended complaint against it in its entirety. Plaintiffs oppose the requested relief.

In its Decision and Order dated March 10, 2016 (entered March 15, 2016), the Court denied MetLife's prior motion to dismiss on the ground that it was untimely. The Court did not address the merits of MetLife's application; therefore, defendant has not demonstrated that the Court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision" (*see* ***Carrillo v PM Realty Group***, 16 AD3d 611 [2d Dept 2005]; *see* ***CPLR § 2221[d][2]***; ***Barnett v Smith***, 64

AD3d 669 [2d Dept 2009]; ***Frisenda v X-Large Enterprises***, 280 AD2d 514 [2d Dept 2001]; ***William P. Pahl Corp. v Kassis***, 182 AD2d 22 [1st Dept 1992]; *see also* ***Foley v Roche***, 68 AD2d 558 [1st Dept 1979]).

Upon its prior motion, MetLife knew that the motion was timely made, because plaintiffs' counsel had consented to an extension of time to November 4, 2015 for MetLife to answer. The Court, however, was never made aware of the fact that an extension had been granted by plaintiff. In view of the fact that this Court did not previously address the merits of MetLife's dismissal motion, that branch of the instant motion seeking reargument is denied.

CPLR § 2221 (e) provides in pertinent part that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination. . . and shall contain reasonable justification for the failure to present such facts on the prior motion."

The Court also recognizes that it has the discretion to grant renewal upon facts known to the movant at the time of the original motion (***Huma v. Patel***, 68 AD3d 821, 822, [2d Dept 2009]). Nonetheless, a motion for leave to renew is "not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (*see* ***Sobin v. Tylutki***, 59 AD3d 701, 702 [2d Dept 2009], *quoting* ***Rubinstein v. Goldman***, 225 AD2d 328, 329 [1st Dept 1996]; *see also* ***Renna v. Gullo***, 19 AD3d 472, 473 [2d Dept 2005]).

While it clearly would have been the better and more efficient practice for MetLife's counsel to have set forth the reasons establishing timeliness of the motion at the outset, this Court will not perpetuate the waste of judicial resources by denying that branch of the instant motion seeking renewal.[1] Accordingly, MetLife's motion to renew is granted.

Turning now to the merits of the prior dismissal motion, the Court finds that the complaint against MetLife should be dismissed. MetLife's prior motion sought dismissal pursuant to CPLR §§ 3211 (a)(1) and (a)(7).

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[1]It is also disingenuous for plaintiffs to now argue that the instant renewal motion should be denied because MetLife has failed to offer a reasonable excuse as to why the additional fact of the extension was not brought forth. Plaintiffs did not contend that the prior motion was untimely precisely because they knew that they had consented to the extension to November 4, 2015.

Defendant MetLife seeks to dismiss the first two causes of action sounding in civil assault and civil battery based upon documentary evidence, namely the Private Investigator Services Agreement executed by it and co-defendant Scope Surveillance & Investigations, Inc., on June 24, 2011 (the Agreement).

In order to succeed on a motion to dismiss based upon documentary evidence, "the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (***Scadura v. Robillard***, 256 AD2d 567 [2d Dept 1998]).

Affidavits do not constitute documentary evidence in the context of a motion brought pursuant to CPLR § 3211 (a)(1), and will not be considered by the Court in determining this branch of defendants' motion (***Fontanetta v. John Doe 1***, 73 AD3d 78, 86 [2d Dept 2010]). "The word ["documentary"] apparently aims at a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based. (Neither the affidavit nor the deposition can ordinarily qualify under such a test. An affidavit can be met by an opposing affidavit, and a party's deposition is not binding upon him and can therefore be met by him with contrary evidence at the trial)" (***Siegel, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR C3211: 10***).

"[I]t is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence'" (***Fontanetta***, ***supra*** at 84-85).

Accordingly, the only documentary evidence submitted in support of defendants' motion is the Agreement dated June 24, 2011, the authenticity of which is undisputed by the parties (*see* ***Attias v. Costiera***, 120 AD3d 1281 [2d Dept 2014]).

In the Agreement, co-defendant Scope Surveillance is referred to as the "Vendor Company" whose services to be performed are delineated as consisting of "private investigative services . . . for Metropolitan and its corporate affiliates . . .in response to a request for the investigation of certain claims submitted by MetLife." The Agreement makes clear that MetLife "offers no commitment or guarantee of any [a]ssignment or of a volume of business in quantity or dollars with respect to future [s]ervices." The private investigative services performed for MetLife are provided on a nonexclusive basis by Scope, and Scope is required to submit invoices to MetLife "at the completion of the [s]ervices."

The terms of the Agreement also contain a section entitled "Covenants, Warranties & Representations," by which Scope warrants and represents, *inter alia*, that it is insured under a "blanket Errors and Omissions insurance contract with liability limits in the minimum amount of One Million Dollars . . . and that it will maintain such insurance coverage throughout the time it is assisting with the investigation of its specific claims assigned, and agrees to notify MetLife within ten (10) calendar days from receipt of notice if such coverage is due to be terminated." Furthermore, Scope warrants that it carries the required Workers Compensation insurance for each state in which it is licensed to operate, and that it has complied with any and all relevant laws concerning licenses and qualifications for itself, its agents, and its employees.

Section 6 of the Agreement concerns indemnification of MetLife by Scope for any losses "that may be sustained by [MetLife] by reason of any misrepresentation, or negligent or wrongful acts or omissions, or incorrect warranty, or any breach of any representation or warranty, covenant, agreement, obligation or undertaking in this Agreement by Vendor or its directors, officers, employees or other representatives . . ."

Section 7 of the Agreement is entitled "Independent Contractor/Agents." In relevant part, the terms of this section contain Scope's (Vendor's) acknowledgment and agreement "that its affiliates and agents are solely personnel of Vendor and not MetLife, working under the control and direction of Vendor, and that *Vendor will be solely responsible for the (a) recruitment, hiring, training, utilization, assignment, re-assignment, promotion, retention, discipline, termination and other employment related activities concerning such personnel*, and (b) payment for its affiliates and agents' of all applicable taxes, fees, charges for benefits . . . and all other deductions and withholdings as required by Law and furthermore shall indemnify MetLife accordingly for any loss in this regard. Vendor shall have full responsibility for the actions and omissions of all personnel employed by Vendor or any agents who are involved in performing the [s]ervices and for any losses arising therefrom" (emphasis added).

As to MetLife's Private Investigator Minimum Standards attached to the Agreement as Exhibit A, that addendum sets forth general and basic quality assurance standards, such as prohibiting investigative personnel from engaging in illegal/unlawful actions or activities, prohibiting the vendor's personnel from consuming alcohol and/or controlled substances that would have any effect on the investigator's ability to perform the services, and prohibiting the harassment of claimants or witnesses. Aside from these most basic, common sense, *minimum* standards of conduct, MetLife also sets forth the minimum standards that it requires for the evidence collected by Scope's personnel during an investigation, and for the writing of the investigative reports. Finally, the minimum standards address the billing practices for expenses that may be incurred during

an investigation, including travel and lodging, upon advance notice to MetLife. Specifically excluded from reimbursable expenses are those incurred with respect to "file creation costs, organizing a file, *training personnel*, or overhead costs . . ." (emphasis added).

It appears to the Court that the inclusion of the minimum standards addendum is MetLife's attempt to ensure that the fruits of any investigation are able to be relied upon in order to make claims' decisions, and possibly for use in a courtroom setting; therefore, such standards are more akin to "best practices" and general rules of operation, and do not constitute control over the means employed to achieve the results (*see* ***Irrutia v. Terrero***, 227 AD2d 380 [2d Dept 1996]).

As a general rule, "a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts" (***Kleeman v. Rheingold***, 81 NY2d 270, 273 [1993]; *see also* ***Chainani v. Board of Education of the City of New York***, 87 NY2d 370 [1995]). The exceptions to this general rule "fall roughly into three basic categories: negligence of the employer in selecting, instructing or supervising the contractor; employment for work that is especially or 'inherently' dangerous; finally, instances in which the employer is under a specific nondelegable duty"(***Kleeman, supra*** at 274 [internal citations omitted]).

In this case, the amended complaint alleges a vague and general "pattern of harassment" engaged in by MetLife, in addition to the January 13, 2015 incident that has apparently given rise to this action, in which it is alleged that the unidentified private investigator (John Doe) swore at plaintiffs and then "violently slammed his car door into Siobhain's back before recklessly speeding away."

In the amended complaint, plaintiffs allege broadly that Doe acted in "his capacity as employee, agent, contractor or representative of MetLife, Scope and/or Kelly . . ." (Amended complaint, paragraph 13). Yet, it appears that plaintiffs seek to hold MetLife vicariously liable for Doe's alleged actions, because plaintiffs specifically allege that Doe "was or is an employee, agent or representative of Scope" (Amended Complaint, paragraph 7). This same specific allegation is not also alleged against MetLife, nor could it be, inasmuch as Doe is not an employee of MetLife pursuant to the plain terms of the Agreement made between Scope and MetLife. The terms thereof make clear that MetLife does not hire, train, or assign any private investigative personnel to a particular assignment. Moreover, MetLife does not pay the investigators, but only remits payment to Scope based upon Scope's invoices. Furthermore, Scope is the sole entity responsible for providing benefits and Workers' Compensation insurance for its own employees, i.e. the private investigators that Scope hires (*see* ***Wecker v. Crossland Group, Inc.***, 92 Ad3d

870 [2d Dept 2012]). Finally, the amended complaint does not contain a single allegation tending to assert or suggest that any of the exceptions to the general rule apply.

Given that the Agreement submitted by MetLife resolves all factual issues as a matter of law with respect to MetLife's lack of vicarious liability for the alleged actions of John Doe, it conclusively disposes of the plaintiffs' claims made in the first two causes of action for civil assault and battery. Accordingly, those causes of action are dismissed as to MetLife.[2]

"A cause of action for negligent hiring . . . is based upon the defendant's status as an employer. Such a claim requires the employer to answer for a tort committed by an employee against a third person 'when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm'" (***Matter of Sandra M.***, 33 AD3d 875, 878 [2d Dept 2006], *quoting* ***Kirkman v. Astoria General Hospital***, 204 AD2d 401, 403 [2d Dept 1994]). "[A] negligent hiring claim does not require the existence of any particular relationship between the plaintiff and the defendant employer (internal citation omitted). Rather, the defendant is responsible for the harm its negligently hired employee causes to any third party" (***Id.*** at 879).[3]

The amended complaint alleges that "MetLife owed a duty of care to Plaintiffs by hiring companies and persons who would act in a reasonably prudent manner," and that MetLife violated that alleged duty of care by negligently hiring Scope, and by negligently failing to adequately train and supervise Scope.

Firstly, the documentary evidence establishes that Scope was not MetLife's employee, and there is no allegation that John Doe was an employee of MetLife. Accordingly, absent an employer-employee relationship, there can be no cause of action

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[2]The Agreement contains a choice of law clause providing that it "shall be governed by and construed in accordance with the laws of the State of Rhode Island." Plaintiffs' substantive claims against MetLife are appropriately dismissed pursuant to the law of Rhode Island, as Rhode Island also recognizes the independent contractor rule (*see* ***Konar v. PFL Life Insurance Company***, 840 A2d 1115 (2004); ***Bromaghim v. Furney***, 808 A2d 615 (2002). Furthermore, in their opposition papers, plaintiffs do not dispute the applicability of the independent contractor rule in Rhode Island.

[3]As with the independent contractor rule, an employer is negligent in hiring or retaining an employee when the employer hires, supervises, or retains said employee with the knowledge of his unfitness or of failing to use reasonable care to discover the unfitness (***Mainella v. Staff Builders Industrial Services, Inc.***, 609 A2d 1141 (1992).

for negligent hiring as a matter of law.

Secondly, even if plaintiffs could allege a cause of action for negligent hiring, they have failed to properly plead that cause of action. The amended complaint is devoid of the necessary allegation that MetLife knew or should have known of the propensity for the conduct that cause the injury (*see* ***Huang v. St. John's Evangelical Lutheran Church***, 129 AD3d 1053 [2d Dept 2015]).

Accordingly, and for those reasons the third cause of action for negligent hiring is hereby dismissed as against MetLife.

Because the three substantive claims against MetLife are dismissed upon the instant motion, the fourth and fifth causes of action alleging derivative claims for loss of consortium on behalf of each of the plaintiffs must also be dismissed. These derivative claims cannot survive the dismissal of the main claims for damages (***Klein v. Metropolitan Child Services, Inc.***, 100 AD3d 708 [2d Dept 2012]).

Dated: June 22, 2016
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED

JUN 24 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE