Barcelona v Ferreira
2017 NY Slip Op 30927(U)
April 12, 2017
Supreme Court, Bronx County
Docket Number: 303302/14
Judge: Howard H. Sherman

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

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Lizzeth Barcelona

Plaintiff

Decision and Order

Index No. 303302/14

-against-

Jorge M. Ferreira and **WDF Inc.,**

Defendant

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The following papers numbered 1-2 read on this motion by **Defendant WDF Inc., for an order dismissing the complaint with prejudice pursuant to CPLR 3211[a][1] and [7]**

Notice of Motion - Affirmation and Exhibits A-F	1	
Amended Affirmation in Opposition , Exhibits A-C	2	

Upon the foregoing papers, this motion by WDF, Inc for an order dismissing the complaint as asserted against it , is denied.

Plaintiff commenced this action seeking damages for personal injuries alleged to have been sustained in a two-vehicle collision that occurred on November 7, 2013 at the intersection of Bruckner Boulevard and Bryant Avenue , Bronx, New York.

Defendant WDF Inc. (WDF) moves to dismiss the complaint on the grounds that the defendant driver was using his personal vehicle at the time of the alleged accident, and the occurrence did not fall within the scope of his employment as a construction worker for WDF Inc. In support, defendant submits the affidavit of its Administrator of Human Resources [Exhibit A], who attests upon a review of the motor vehicle

records maintained by the contractor in the ordinary course of business, that WDF did not own register, operate, maintain , control, and/or insure the motor vehicle operated by Jorge M. Ferreira at the time of the accident [Affidavit of Denise Alvarado ¶ 7]. She further attests that Ferreira was "employed intermittently" by WDF as a laborer , however, "he is neither authorized nor is it in his course of duties fro WDF to operate any company vehicle or to utilize his personal vehicle for company activities ." [Id. 8]

Plaintiff opposes the motion and contends that at the time of the accident Ferreira was operating his motor vehicle within the scope of his employment , and in furtherance of his employer's interest as asserted in the Amended Complaint [¶ 11]. In support of this assertion, plaintiff submits a copy of Ferreira's deposition testimony [Exhibit C]. In pertinent part, he testified that at the time of the accident, he was returning to the work-site with a tool being used that day , having been instructed by his supervisor to retrieve it from WDF's depot [EBT: 13-16].

Discussion and Conclusions

On consideration of a a motion to dismiss under CPLR 3211(a)(1) the court is required "to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" (Weil, Gotshal & Manges, LLP v. Fashion

Boutique of Short Hills, Inc., 10 A.D.3d 267, 270, 780 N.Y.S.2d 593 [1st Dept.2004]), and a dismissal is warranted only when the documentary evidence submitted "utterly refutes plaintiff's factual allegations" (Goshen v. Mutual Life **5 Ins. Co. of N.Y., 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 [2002]; see Greenapple v. Capital One, N.A., 92 A.D.3d 548, 550, 939 N.Y.S.2d 351 [1st Dept.2012]), and conclusively establishes a defense to the asserted claims as a matter of law" Weil, Gotshal, 10 A.D.3d at 270–271, 780 N.Y.S.2d 593, [internal quotation marks omitted].

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 consideration of the papers on submission here, the court finds that defendant has failed to make the requisite showing for entitlement to the requested relief under either of the above criteria. As noted, in light of the testimony of the defendant driver as afforded all possible inferences, it is submitted that plaintiff has adequately stated a claim that the accident occurred within the scope of Ferreira's

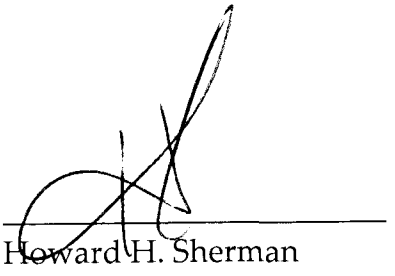
employment for purposes of the theory of respondeat superior as he was engaged in the business of his employer, or that his act may be reasonably said to be necessary or incidental to such employment .

Accordingly, it is

ORDERED that the motion be and hereby is denied.

This shall constitute the decision and order of this court.

Dated: April 12, 2017



Howard H. Sherman