

**Yang v Puri**

2017 NY Slip Op 32953(U)

September 28, 2017

Supreme Court, Queens County

Docket Number: 700149/16

Judge: Janice A. Taylor

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15  
Justice

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DAVID YANG,

Plaintiff(s),

Index No.:700149/16

Motion Date:5/19/17

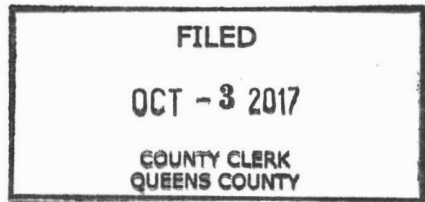
- and -

Motion Cal. No.: 122

Motion Seq. No: 5

KIRAN PURI, SATISH PURI, SANDEEP PURI,  
Individually and as Officers, Directors,  
Owners and /or Employees of Raiment  
Fashions, Inc. and RAIMENT FASHIONS, INC.,

Defendant(s).  
-----x



The following papers numbered 1 - 10 read on this motion by the defendant Sandeep Puri for an order dismissing the amended complaint.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Reply Affirmation-Exhibits-Service.....	8 - 10

This is an action to recover damages arising for personal injuries sustained by plaintiff arising from an alleged assault by Sandeep Puri at the premises located at 20-48 129<sup>th</sup> Street in College Point, NY, which is operated as a store known as defendant Raiment Fashions, Inc. ("Raiment"), on April 2, 2014. Defendants Kiran Puri and Satish Puri are the owners of Raiment. Plaintiff leased a portion of the subject premises pursuant to a lease dated March 29, 2007, which was extended on April 1, 2014. Plaintiff subsequently commenced the within action against defendants alleging causes of action for negligence, negligent hiring, breach of contract, and the intentional torts of assault and battery.

That branch of Sandeep Puri's motion to dismiss the

amended complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction is denied. Any objection to service of a pleading is waived if not interposed in the answer or raised in a pre-answer motion to dismiss (CPLR 3211[e]; see *Matter of Parkside Ltd. Liab. Co.*, 294 AD2d 582 [2d Dept 2002]). Specifically, CPLR 3211(e) provides, in pertinent part, that the defense of lack of personal jurisdiction "is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection." Moreover, the Court of Appeals of New York held in *Addesso v Shemtob*, 70 NY2d 689, 690 (1987), that "there is no reason to depart from the statute's plain language even though the jurisdictional defect was asserted in a pleading made as of right in response to a complaint amended as of right by plaintiff." As such, the waiver of a jurisdictional defense cannot be undone by a subsequent amendment to a pleading adding the missing affirmative defense. Here, Sandeep Puri answered the original complaint, but failed to raise any jurisdictional defense in that answer. Consequently, the basis for Sandeep Puri's objection of lack of personal jurisdiction - improper service of the original summons and complaint - asserted for the first time in his amended answer to plaintiff's amended complaint should have been made in his original answer and, thus, has been waived.

Next, the court turns to that branch of Sandeep Puri's motion to dismiss the amended complaint against him for failure to state a cause of action pursuant to CPLR 3211(a)(7). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (see *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 406, 414 [2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*).

Applying these principles to the case at bar, those branches of Sandeep Puri's motion to dismiss the first and second causes of action for negligence insofar as asserted against him are granted. It is well-settled that New York does not recognize a cause of action for negligent assault (see *Johnson v City of New York*, 148 AD3d 1126 [2d Dept 2017]; *Schetzen v Robotsis*, 273 AD2d 220 [2d Dept 2000]). Here, the causes of action in which plaintiff seeks recovery on negligence theories against Sandeep Puri allege intentional offensive conduct and, therefore, do not state causes of

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action separate from plaintiff's assault and battery claim (see *Ferran v Williams*, 194 AD2d 962 [3d Dept 1993]). Plaintiff alleges in the negligence causes of action against Sandeep Puri that Sandeep Puri physically injured plaintiff by leaving his home while under the influence of oxycodone and possessing a concealed weapon. Plaintiff further alleges that Sandeep Puri "pushed Plaintiff in the shoulder and punched Plaintiff in the groin," and "punched Plaintiff in the head with a brass knuckle." Such conduct is repeated in the allegations of plaintiff's assault and battery cause of action against Sandeep Puri. As such, the first and second causes of action for negligence insofar as asserted against Sandeep Puri are dismissed.

That branch of Sandeep Puri's motion to dismiss the cause of action for breach of contract against him is also granted. The elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach (see *Dee v Rakower*, 112 AD3d 204, 208-209 [2013]). In this case, however, the amended complaint fails to allege that Sandeep Puri is a party to the subject lease agreement for the premises. Rather, plaintiff alleges that, "[o]n or about April 1, 2007, Plaintiff and Seoul Upholstery, and Defendants KIRAN PURI, SATISH PURI and RAIMENT FASHIONS, INC. executed a commercial lease for the Premises," and that, "[o]n or about March 24, 2014, Defendants KIRAN and SATISH and Plaintiff came to an agreement for the new lease which includes the Back Space." Therefore, the cause of action for breach of contract insofar as asserted against Sandeep Puri is dismissed.

That branch of Sandeep Puri's motion to dismiss the fifth cause of action alleging the intentional torts of assault and battery on the ground that it is barred by the statute of limitations pursuant to CPLR 3211(a)(5) is granted. The statute of limitations governing intentional torts is one year (CPLR 215[3]). Here, the alleged assault occurred on April 2, 2014, and plaintiff commenced the instant action on January 6, 2016 - almost two years after the incident. Moreover, plaintiff's contention that the one-year statute of limitations has been tolled under CPLR 207 is unavailing. CPLR 207 provides, in pertinent part, that

"[i]f, after a cause of action has accrued against a person, that person departs from the state and

remains continuously absent therefrom for four months or more, or that person resides within the state under a false name which is unknown to the person entitled to commence the action, the time of his absence or residence within the state under such a false name is not a part of the time within which the action must be commenced . . . ."

The statute further states, however, that the tolling provision shall not apply "while jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to the defendant within the state" (CPLR 207[3]). The burden is on the plaintiff to demonstrate that the statute of limitations is tolled by the defendant's absence from the state (see *New York State Higher Educ. Servs. Corp. v Bandler*, 168 AD2d 752, 753 [1990]). "This requires a showing that there was no statutory authority for obtaining jurisdiction over the defendant and not merely that the defendant could not be located" (*id.* at 753). Plaintiff has failed to demonstrate that CPLR 207 is applicable here as there is no evidence that Sandeep Puri was either absent from the state within the meaning of the statute or that he was listed under a false name. Plaintiff's fifth cause of action for assault and battery against Sandeep Puri is, thus, dismissed as time-barred.

Accordingly, that branch of Sandeep Puri's motion to dismiss the amended complaint insofar as asserted against him pursuant to CPLR 3211(a)(7) and that branch of the motion to dismiss the fifth cause of action alleging the intentional torts of assault and battery pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations are granted. In all other respects, the motion is denied.

Dated: September 28, 2017

  
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JANICE A. TAYLOR, J.S.C.

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