Vaccaro v Francolopez
2018 NY Slip Op 30656(U)
April 10, 2018
Supreme Court, New York County
Docket Number: 158982/17
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Adam Silvera **Part 22**

ANTHONY VACCARO,

Plaintiff,

-against-

OMARLIN FRANCOLOPEZ, RYDER TRUCK RENTAL INC., ANHEUSER BUSCH d/b/a BUDWEISER and D. BERTOLINE & SONS INC.

Defendants.

DECISION/ORDER

INDEX NO. 158982/17
MOT. SEQ. NO. 001

ADAM SILVERA, J. :

BACKGROUND

In October 2017, plaintiff commenced this action against defendants to recover monetary damages for injuries allegedly sustained in a motor vehicle accident on July 25, 2017. All defendants filed an answer. Defendant Anheuser Busch (hereinafter referred to as "Budweiser") now moves to dismiss plaintiff's complaint pursuant to CPLR §3211(a)(1) and (a)(7), or for a change of venue. Plaintiff cross-moves to retain venue in New York County for the convenience of his witness pursuant to CPLR 510(3). Budweiser opposes the cross-motion and plaintiff replies. Defendants D. Bertoline & Sons Inc., Omarlin Francolopez, and Ryder Truck Rental, Inc. have not opposed the motion or cross-motion.

DISCUSSION

Budweiser's Motion to Dismiss

Budweiser moves to dismiss this action pursuant to CPLR §3211(a)(1) and (a)(7), arguing that, based on the documentary evidence, Budweiser was not involved in the motor vehicle accident and

should not be a defendant herein. Budweiser further argues that plaintiff failed to state a cause of action.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the movant has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). A motion to dismiss the complaint for failure to state a cause of action "will generally depend upon whether or not there was substantial compliance with CPLR 3013." *Catli v Lindenman*, 40 AD2d 714, 715 (2d Dep't 1972). If the allegations are not "sufficiently particular to give the court and parties notice of the transactions intended to be proved and the material element of each cause of action", the cause of action will be dismissed. *See Catli*, 40 AD2d at 715. CPLR 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." In determining whether to grant a motion to dismiss, the court accepts the facts alleged in a complaint as true, and determines whether the facts as alleged fit within any cognizable theory of law. *See Morone v Morone*, 50 NY2d 481, 484 (1980); *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Additionally, all such facts must be accorded every favorable inference. *Beattie v Brown & Wood*, 243 AD2d 395, 395 (1st Dep't 1997).

Preliminarily, the Court notes that the Verified Complaint alleges, *inter alia*, that Budweiser is the registered owner, or lessee or lessor, of the motor vehicle involved in the motor vehicle accident on July 25, 2017. The complaint further alleges that Budweiser operated or controlled such motor vehicle at the time of the subject accident, and did so negligently, recklessly, and carelessly thus causing plaintiff's injuries. Taking the allegations in the complaint as true and affording every favorable inference, Budweiser has failed to establish that plaintiff failed to state a cause of action against it. As such, Budweiser's motion to dismiss pursuant to CPLR 3211(a)(7) is denied.

As to Budweiser's argument that this action must be dismissed based upon the documentary evidence, such argument also fails. On a motion to dismiss pursuant to CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law". *Leon v Martinez*, 84 NY2d 83, 88 (1994). Movant "has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim". *Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 (1st Dep't 2002)(internal quotations omitted). Here, Budweiser relies on the Verified Answer with Cross-Claims of defendant Ryder Truck Rental, Inc. in which it admits that it owned and leased the subject vehicle, and the Verified Answer of defendants Omarlin Francolopez and D. Bertoline & Sons, Inc. in which they admit to operating the subject vehicle.

A quick review of defendant Ryder Truck Rental, Inc's Verified Answer with Cross-Claims reveals that such defendant admits that it is the registered owner of the motor vehicle in question herein, and further admits that it leased such motor vehicle to Budweiser. *See* Summons and Complaint, ¶11 and Verified Answer with Cross-Claims, ¶3. Thus, the documentary evidence relied upon by Budweiser does not conclusively dispose of plaintiff's claim against it. Budweiser's motion to dismiss is denied.

Budweiser's Motion to Change Venue to Westchester County

Budweiser also moves to change venue to Westchester County, arguing that venue is improper as none of the parties resided in New York County when the action was commenced. Budweiser designates Westchester County, where plaintiff resides and where the motor vehicle accident occurred. In opposition, plaintiff argues, *inter alia*, that Budweiser failed to proffer a demand to change venue. However, in its reply, Budweiser proffers such demand which was timely made pursuant to CPLR §511. Plaintiff's other arguments regarding venue are without merit. Here, Budweiser has established that its principal place of business is in Missouri, and through the State of New York Department of State,

Budweiser obtained a principal office in New York State in Onondaga County. It is undisputed that plaintiff resides in Westchester County, and that the co-defendants do not reside in New York County. Thus, Budweiser has established that plaintiff improperly designated New York County as the venue for this action and its motion is granted.

Plaintiff's Cross-Motion to Retain Jurisdiction in New York County

Plaintiff cross-moves to retain venue in New York County pursuant to CPLR §510(3) arguing that this Court should retain jurisdiction for the convenience of his doctor, who will be called as a witness at trial. CPLR §510(3) states that "[t]he court, upon motion, may change the place of trial of an action where:…(3) the convenience of material witnesses and the ends of justice will be promoted by the change." Here, plaintiff argues that his treating anesthesiologist/pain specialist practices medicine in New York County, and that it would be more convenient for him to appear and offer testimony at trial in New York County.

It has consistently been held that "all things being equal, a transitory action should be tried in the county in which the cause of action arose", here Westchester County. *McGuire v General Electric Co.*, 117 AD2d 523, 523-524 (1st Dep't 1986). The Court notes that "[t]he language 'other things being equal' refers to the number of witnesses residing in counties opted for by the litigants." *Seabrook v Good Samaritan Hosp.*, 395 NYS2d 208, 209 (1st Dep't 1977). Here, plaintiff alleges that he will call his doctor as a witness, and that such doctor practices medicine in New York County. However, plaintiff himself will be a witness and he resides in Westchester County where the accident occurred. As such, the number of witnesses residing in the counties opted for by plaintiff and by Budweiser are equal. Plaintiff has failed to establish that retaining venue in New York County, pursuant to CPLR §510(3) will promote the ends of justice, and, thus, plaintiff's cross-motion is denied.

Accordingly, it is

ORDERED that defendant Anheuser Busch's motion to dismiss is denied; and it is further

ORDRED that defendant Anheuser Busch's motion to change venue to Westchester County is granted; and it is further

ORDERED that the venue of this action is changed from this Court to the Supreme Court, County of Westchester, and upon service by movant of a copy of this order with notice of entry and payment of appropriate fees, if any, the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Westchester; and it is further

ORDERED that plaintiff's motion to retain venue in New York County is denied; and it is further

ORDERED that within 30 days of entry, defendant Anheuser Busch shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the decision/order of the Court.

Dated: April 10, 2018

ENTER:

Hon. Adam Silvera, J.S.C.