

Hauser & Wirth Inc. v Fresh Direct, Inc.

2019 NY Slip Op 30435(U)

February 25, 2019

Supreme Court, New York County

Docket Number: 151923/17

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC

PART 47

Hauser + Wirth

-v-

Fresh Direct

INDEX No. 151923/17

MOTION DATE

MOTION SEQ. No. 003

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits _____ No(s) 1

Answering Affidavits - Exhibits _____ No(s) 213

Replying Affidavits _____ No(s) 4

Plaintiff Hauser & Wirth Inc., an art gallery, commenced this negligence action against defendant Fresh Direct, Inc. and its deliveryman, defendant Carlos Santelises, after Mr. Santelises, in the course of delivering bottled water to the gallery on June 6, 2016, bumped into a sculpture owned by Fondazione Fausto Melotti, which then fell to the floor and broke. By order dated May 9, 2018, this court granted plaintiff's motion to amend the complaint to add Fondazione Fausto Melotti as a necessary party and denied without prejudice defendants' motion for summary judgment. After answering the amended complaint, defendants Fresh Direct and Santelises now move again to dismiss the complaint pursuant to CPLR 3211 or for summary judgment pursuant to CPLR 3212. In response, plaintiffs Hauser & Wirth and Melotti cross-move for summary judgment on their negligence claims and also seek to amend the complaint to add U.T.F. Trucking as a defendant.

With respect to defendants' motion, defendants correctly argue that Hauser & Wirth's negligence claims must be dismissed. It is undisputed that Melotti was the owner of the sculpture, which was on display at Hauser & Wirth's gallery pursuant to a consignment agreement with Melotti. Lynch Aff., Exh. B. The only damages alleged by Hauser & Wirth in the amended complaint are damages to the sculpture. Lynch Aff., Exh. A, ¶¶ 16, 19, 22-23, 26-27, 30-31, 34-35, 38-39, 42-43, and 46-47. Since Hauser & Wirth is not the owner of the sculpture, it cannot recover for these damages. Further, to the extent Hauser & Wirth argues that it may have lost a commission on a sale of the sculpture, such damages are barred by the economic loss rule. 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc., 96 N.Y.2d 280, 291-92 (2001). Accordingly, Hauser & Wirth's claims must be dismissed.

CHECK ONE: _____ CASE DISPOSED NON-FINAL DISPOSITION

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With respect to Melotti's claims, defendants argue that these claims should be dismissed because it has already been compensated by XL Specialty Insurance Company for what it represented in the Sworn Statement of Proof of Loss to be the "Whole Loss and Damage." Lynch Aff., Exh. C. However, in opposition to the motion, plaintiffs have submitted evidence showing that the value of the sculpture may have exceeded this amount. Affidavit of Christina Karahalios sworn to on July 12, 2017, Exh. 4. Thus, there is an issue of fact regarding the value of the sculpture and whether it exceeded the amount Melotti received from the insurance company, and thus his claims cannot be dismissed. Of course, should Melotti prevail on his claims in this action, his recovery will be limited to any amount awarded which has not already been reimbursed by the insurer. CPLR 4545; see also Liberman v. Cayre Synergy 73rd LLC, 108 A.D.3d 426, 428 (1st Dep't 2013) (holding that plaintiffs may recover damages to their unit which have not been reimbursed).

Defendants are also entitled to dismissal of the claims against the deliveryman, Carlos Santelises, because he was acting within scope of his employment during the delivery. Parris v. Eastside Hotel Associates, 293 A.D.2d 659 (2d Dep't 2002). Although plaintiffs' argue that dismissal is premature because discovery has not been conducted, they have offered no proof to show that any such discovery would change this fact, as it is undisputed that Mr. Santelises was in the course of making his delivery for Fresh Direct when the incident occurred.

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Defendants also seek to dismiss the claims of gross negligence. Conduct constituting gross negligence "must smack of intentional wrongdoing." Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 554 (1992) (internal quotations and citations omitted). "It is conduct that evinces a reckless indifference to the rights of others." Id. Ordinarily, the question of gross negligence must be determined by the trier of fact. Lubell v. Samson Moving & Storage, Inc., 307 A.D.2d 215 (1st Dep't 2003). Here, the material facts regarding defendant Mr. Santelises' conduct are undisputed and show that Mr. Santelises walked backward into the sculpture as he was attempting to deliver bottled water to the gallery. Affidavit of Carl Johns sworn to on July 26, 2017, Exhs. 2 & 3. Plaintiffs make much of the fact that Mr. Santelises chose to walk backward despite the fact that the sculpture was in plain view. However, ordinary mistakes or miscalculations in performing a task do not rise to the level of gross negligence. Industrial Risk Ins. v. Port Auth. Of New York, 387 F.Supp.2d 299, 307 (S.D.N.Y. 2005). Although Mr. Santelises arguably could have acted more carefully when he made the delivery, it is clear from the photographs that he was attempting to avoid the sculpture as he entered the gallery and thus did not act with "a reckless indifference to the rights of others." Lubell, 307 A.D.2d at 216 (dismissing gross negligence claim where there was no indication that defendant's negligence differed in kind from acts of ordinary negligence in storing plaintiff's property); see also Ninacci Diamond & Jewelry Co. v. Miller Freeman, Inc., 281 A.D.2d 342 (1st Dep't 2001). Accordingly, the claim of gross negligence will be dismissed.

Turning to plaintiff's motion, plaintiffs first seek to file an amended complaint to add Fresh Direct's affiliate, U.T. F. Trucking as a defendant. It is well-established that motions for leave to amend pleadings should be freely granted absent prejudice or surprise, unless the proposed amendment is patently devoid of merit. MBIA Ins. Corp. v. Greystone & Co., 74 A.D.3d 499, 500 (1st Dep't 2010). Here, defendants have failed to demonstrate that they would suffer prejudice as a result of the amended complaint. Thus, the motion to amend will be granted. To the extent plaintiffs also seek summary judgment on their negligence claims, the motion is premature as defendants must be afforded an opportunity to respond to the second amended complaint.

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Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing the claims of plaintiff Hauser & Wirth, Inc., dismissing all claims against defendant Carlos Sentelises, and dismissing the claims of gross negligence, and is otherwise denied; and it is further

ORDERED that plaintiffs' motion to amend to add U.T.F. Trucking as a defendant is granted and that, within 30 days of entry of this order, plaintiff shall file and serve the second amended complaint, in conformity with the rulings in this order, on the parties to this action by e-filing same, and upon the additional parties, by personal service of a supplemental summons and the second amended complaint; and it is further

ORDERED that the plaintiffs' motion for summary judgment is denied without prejudice; and it is further

ORDERED that the clerk is directed to amend the caption, and the action shall bear the following caption:

Fondazione Fausto Melotti,
Plaintiff,
v.
Fresh Direct, Inc. and U.T.F. Trucking, Inc.,
Defendants.

and it is further

ORDERED that within 30 days of entry of this order Plaintiff shall e-file a 'Notice to County Clerk' (NYSCEF Form EF-22, using NYSCEF document type of same title) attached to a copy of this order for the County Clerk to be properly notified pursuant to CPLR 8019(c) and thereby effect the change in caption; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on Thursday, March 21, 2019 at 9:30 AM. IAS Part 47, 80 Centre St. Room 320

Dated: 2/25/19

Hon. Paul A. Goetz, JSC

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