

**Shainwald v Professionals for Non-Profits, Inc.**

2019 NY Slip Op 30522(U)

February 26, 2019

Supreme Court, New York County

Docket Number: 154396/2018

Judge: Carmen Victoria St. George

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 34

\_\_\_\_\_  
SYBIL SHAINWALD,

Plaintiff,

Index No.: 154396/2018  
Motion Sequence No.: 001

- against -

DECISION/ORDER

PROFESSIONALS FOR NON-PROFITS, INC.,

Defendant.

\_\_\_\_\_  
**ST. GEORGE, CARMEN VICTORIA, J.S.C.:**

Plaintiff Sybil Shainwald commenced the herein action against defendant Professionals for Non-Profits, Inc. (“PNP”), a temporary employment staffing agency, to recover damages for fraud and negligent hiring. PNP moves, pre-answer, to dismiss the complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action.

BACKGROUND

The following facts are drawn from the complaint. Plaintiff alleges that she retained the services of PNP to provide her with a personal assistant, primarily for administrative and organizational tasks. Plaintiff informed Gayle A. Brandel (“Brandel”) of PNP that the assistant would be working out of her New York City apartment during the summer of 2017, while she resided in her summer home on Long Island. Plaintiff states that she “specifically requested that the person placed in her apartment have nothing checkered in his or her past given that [plaintiff] would not be present in her apartment” (complaint ¶ 15). On or about July 13, 2017, PNP recommended Brooke Wright to plaintiff for the position. Plaintiff states that on that date she had a phone conversation with Brandel who “represented that PNP had conducted due diligence into

Ms. Wright's background and confirmed that Ms. Wright was trustworthy enough to be placed in Shainwald's apartment for several months while Shainwald was not there" (*Id.* at ¶ 17). Relying on Brandel's representation, plaintiff alleges that the following day Ms. Wright began performing administrative services for her and continued to do so until September 22, 2017.

On August 1, 2017, while plaintiff was residing on Long Island, she alleges that Ms. Wright stole "approximately \$100,000 worth of [plaintiff's] jewelry" (*Id.* at ¶ 24). Specifically, plaintiff alleges that Ms. Wright sent the jewelry via Federal Express from her apartment to Ms. Wright's apartment in Brooklyn. However, plaintiff states she did not learn of this alleged theft by Ms. Wright until approximately October 15, 2017, when she discovered a receipt from Federal Express showing that a package was shipped from her to Ms. Wright on August 1, 2017. Plaintiff surmises that "[g]iven that the only person who was in [her] apartment from mid-July 2017 through early September 2017 was Ms. Wright, it was apparent that Ms. Wright stole the jewelry by Federal Expressing it to herself" (*Id.* at ¶ 27). Further, plaintiff alleges that on or about October 17, 2017, she contacted the police and filed a police report stating that her jewelry was missing. According to the complaint, there was some back and forth between plaintiff and PNP regarding outstanding invoices, which plaintiff rejected in part because PNP was responsible for placing Ms. Wright in her apartment. Thereafter, plaintiff commenced the herein action by the filing of her complaint on or about May 10, 2018.

In this action, plaintiff seeks damages against PNP for fraud and the negligent hiring of Ms. Wright. Plaintiff alleges that she suffered damages in the amount of \$100,000, which is the approximate value of the jewelry Ms. Wright stole from her due to PNP's fraud and negligence. In addition, plaintiff seeks punitive damages based upon PNP's "tortious and malicious fraud" (complaint ¶ 54).

CONTENTIONS OF THE PARTIES

Now before the Court is a motion by PNP, pursuant to CPLR § 3211(a)(7), dismissing the complaint for failure to state a cause of action. PNP argues that both causes of action are insufficiently plead. PNP contends that both allegations are centered on plaintiff's claim that PNP had a duty to conduct a "background check" of Ms. Wright and that it failed to do so. With respect to the negligent hiring claim, PNP argues that there was no legal duty to conduct a background check on Ms. Wright as there was no indication that she had a propensity for theft. Regardless, PNP states, the complaint does not allege anything that would indicate a background check on Ms. Wright would have revealed any past crimes. PNP further contends that plaintiff's allegation that it "knew or should have known of Ms. Wright's propensity for theft" is conclusory and cannot survive a motion to dismiss.

In addition, PNP argues that plaintiff's fraud claim is not plead with the requisite particularity under CPLR § 3016(b). While PNP concedes that the date and general description are alleged, it argues that the "specifics of the alleged misrepresentation are not included" (PNP's Mem. of Law, p 11). PNP contends that plaintiff's use of the terms "background check" and "thoroughly vetted" are too vague. Specifically, PNP argues that these descriptions could mean anything from checking Ms. Wright's references to conducting a criminal history search. Likewise, PNP asserts that the complaint does not state with particularity how plaintiff justifiably relied on the alleged misrepresentations or how plaintiff sustained injuries as a result of this reliance.

In opposition, plaintiff argues that she has alleged a valid claim for negligent hiring. Plaintiff maintains that PNP breached its duty owed to her by failing to conduct any investigation into Ms. Wright's background. Plaintiff further contends that the duty to investigate arises especially here, in view of the nature of PNP's business as an employment agency and states "[a]n

employment agency, perhaps even more so than any other type of business, must take reasonable care that potential candidates are suited for particular employment opportunities since employment agencies like PNP are paid in large part because they vet potential candidates on behalf of employers” (Shainwald’s Mem. of Law, p 8).

While plaintiff concedes that there is no specific procedure to vet an employee, she asserts that the legal standard is whether PNP “should have known” facts that would lead to a further investigation. Attached to her opposition papers is an affidavit of Josh Krakowsky, counsel for plaintiff. Krakowsky, in his affidavit, attests that:

“[o]n April 17, 2018, prior to commencing this lawsuit, I conducted a ‘Public Records’ search on Brooke (Daquana) Wright on Westlaw. The reason for that search was to determine if there were any red flags in Ms. Wright’s background that would have put PNP on notice to investigate Ms. Wright further in order to determine the viability of a claim against PNP for negligent hiring...

According to Westlaw’s ‘Public Records,’ Ms. Wright had a lien placed on her for \$301.35 by the New York State Department of Taxation and Finance...

Ms. Wright also was the subject of an eviction proceeding, which is indicated by a lien being placed against her by a company named Tifereth Yaakov Tzvi LLC for ‘forcible entry detainer’”(aff of Krakowsky).

Plaintiff surmises that PNP may argue that a tax lien and being sued for eviction have no bearing on Ms. Wright’s trustworthiness or character. On the contrary, plaintiff argues, that the “primary factor in deciding whether to let a person work in a home office when you are not present is whether the person can be trusted not to steal your property” (Shainwald’s Mem of Law, p 10). Plaintiff maintains that a financially responsible and trustworthy person would not allow a tax lien to be placed on her or be the subject of an eviction action. In light of the foregoing, plaintiff argues that PNP should have known that Ms. Wright was not trustworthy and should have been more fully investigated prior to placing her into plaintiff’s home.

Next, plaintiff asserts that her cause of action for fraud is plead with the requisite specificity imposed by CPLR § 3016(b). Plaintiff argues that the complaint sufficiently identifies Brandel as the source of the misrepresentations, the exact date, and the words used. Contrary to PNP's contention, plaintiff states that she specifically plead justifiable reliance (*citing* complaint ¶ 51). Likewise, plaintiff maintains that she sufficiently plead damages in the value of the jewelry stolen by Ms. Wright, which she attributes to Brandel's misrepresentations (*Id.* at ¶ 53).

In reply, PNP argues that there is no allegation in either the complaint or plaintiff's opposition papers that PNP was on notice of the tax debt or the landlord dispute. PNP further argues that plaintiff's claim that it should have known about the back taxes and landlord tenant dispute simply because it is an employment agency is without merit. Regardless, PNP argues, those minor financial issues do not reveal a propensity to steal \$100,000 in jewelry.

PNP further argues that plaintiff's assertion that Ms. Wright should not have been hired for the position on the basis of her not being financially responsible must be rejected as against public policy. Relying on N.Y.C. Administrative Code §§ 8-107 (24) and 8-102 (29), PNP states that employment agencies are prohibited from conducting a credit check of prospective employees, which includes inquiring about "bankruptcies, judgments, or liens." Therefore, PNP argues, the type of financial background check that plaintiff claims should have been performed would have directly violated applicable New York City statutes.

With respect to the fraud claim, PNP reiterates dismissal is warranted as it is not plead with the requisite particularity required by CPLR § 3016(b). PNP emphasizes, like it did in its moving papers, that the causation element is insufficiently plead. Specifically, PNP argues that the complaint has failed to set forth any allegations establishing that Ms. Wright had a criminal record

or a propensity to commit the alleged crime. PNP concludes that it cannot be argued that its supposed failure to perform a criminal background check in any way caused plaintiff's damages.

#### DISCUSSION

When a court considers a motion to dismiss pursuant to CPLR § 3211(a)(7), the complaint is to be given a liberal construction, "there is a presumption the allegations in the pleading are true and are entitled to the benefit of all favorable inferences that may be made therefrom" (*Morgan Stanley Mtge. Loan Trust 2006-13ARX v Morgan Stanley Mtge. Capital Holdings LLC*, 143 AD3d 1, 7 [1st Dept 2016]). The Court evaluates not whether the complaint states a cause of action, but whether a claim exists based on the "any reasonable view" of the allegations in the pleading (*Aristy-Farer v State of New York*, 29 NY3d 501, 509 [2017]). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]). However, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). With this standard in mind, the Court turns to the complaint's causes of action.

#### 1. Negligent Hiring

To recover on a claim for negligent hiring, plaintiff must show that the "employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Detone v Bullit Courier Serv., Inc.*, 140 AD2d 278, 279 [1988]; *Gomez v City of New York*, 304 AD2d 374, 374 [1st Dept 2003] ["recovery on a negligent hiring and retention theory requires a showing that the employer was on notice of the relevant tortious propensities of the wrongdoing

employee”)). Moreover, “there is no common law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee” (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 163 [2d Dept 1997]; *Yeboah v Snapple, Inc.*, 286 AD2d 204, 205 [1st Dept 2001][“An employer is under no duty to inquire as to whether an employee has been convicted of crimes in the past”]; *T.W. v City of New York*, 286 AD2d 243, 245 [1st Dept 2001][“An employer has a duty to investigate a prospective employee when it knows of facts that would lead a reasonably prudent person to investigate that prospective employee”]).

As a preliminary matter, it is necessary to point out that Ms. Wright has not been convicted of the alleged theft nor has she been charged. During oral argument on the instant motion, the Court inquired as to the status of the criminal action. Plaintiff’s counsel represented that there was a detective assigned to the case, however, no arrests have been made.

Plaintiff alleges in the complaint that “PNP knew or should have known of Ms. Wright’s propensity for theft prior to the theft’s occurrence” and therefor was negligent in hiring her (complaint ¶ 60). Such conclusory allegations, even if deemed true, are insufficient to support the negligent hiring claim (*see Naegele v Archdiocese of New York*, 39 AD3d 270 [1st Dept 2007]). Plaintiff’s supplementary affidavit does not cure the deficiencies in her complaint. For one thing, plaintiff fails to allege the existence of a criminal record or any facts that would have led a reasonable person to investigate Ms. Wright. (*see T.W.*, 286 AD2d at 245). For another, plaintiff fails to set forth any allegations that had PNP performed a criminal background check on Ms. Wright, it would have showed a propensity for theft (*K.I. v New York City Bd. Of Educ.*, 256 AD2d 189, 191-192 (1st Dept 1998) (dismissing a negligent hiring claim where “[p]laintiff points to nothing which would have been revealed by checking the [employee’s] criminal history”). As

PNP correctly asserts, evidence of a \$301 tax debt and involvement in a landlord tenant dispute does not reveal a propensity for criminality.

Moreover, plaintiff's claim that Ms. Wright should not have been hired because she is not "financially responsible" is equally unavailing. PNP also correctly points out that if it were to conduct the type of financial background search that plaintiff's counsel attested to in his affidavit, it would have been in violation of New York City Statutes. Specifically, New York City Administrative Code § 8-107 (24), which states in relevant part:

"[i]t shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to request or to use for employment purposes the consumer credit history of an applicant for employment or employee, or otherwise discriminate against an applicant or employee with regard to hiring compensation, or the terms, conditions, or privileges of employment based on the consumer credit history of the applicant or employee" (Administrative Code of the City of New York § 8-107 [24]).

Section 8-102 (29) defines "consumer credit history" as follows:

"[a]n individual's credit worthiness, credit standing, credit capacity, or payment history, as indicated by: (a) a consumer credit report; (b) credit score; or (c) information an employer obtains directly from the individual regarding (1) details about credit accounts, including the individual's number of credit accounts, late or missed payments, charged-off debts, items in collections, credit limit, prior credit report inquiries, or (2) bankruptcies, judgments or liens ..." (Administrative Code § 8-102 [29]).

In light of the foregoing, plaintiff's affidavit has not remedied the deficiencies in her complaint.

Assuming arguendo that Ms. Wright was arrested, charged, and convicted of the alleged theft (which has not been shown), plaintiff still has not alleged notice by PNP, of Ms. Wright's "criminal proclivities, [and] without the allegation of such foreseeability, no duty exists" (*Kogan v Musiker Discovery Programs Inc.*, 2000 WL 33249833, at \*5 [Sup Ct, Nassau County 2000]). Even affording the complaint the benefit of all reasonable inferences, as the court must on a motion

to dismiss, there are no factual allegations from which a viable cause of action sound in negligent hiring can be gleaned. Therefore, the cause of action for negligent hiring is dismissed.

## 2. Fraud

A claim for fraud must be pleaded with the requisite particularity (CPLR § 3016(b)). To plead fraud, the plaintiff must allege “(1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). A fraud claim has been pleaded sufficiently, pursuant to CPLR § 3016(b), when a complaint states “who made the misrepresentation to whom, the date the misrepresentation was made, and its content” (*El Entertainment U.S. LP v Real Talk Entertainment, Inc.*, 85 AD3d 561, 562 [1st Dept 2014]). The purpose of this specificity is to “inform a defendant with respect to the incidents complained of” (*Pludeman v Northern Leasing Sys. Inc.*, 10 NY3d 486, 491 [2008]). The statute does not require a plaintiff to prove her allegations. Indeed, the Court of Appeals has “cautioned that section 3016(b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting the fraud” (*Id.*). “Thus, where the concrete facts are peculiarly within the knowledge of the party charged with the fraud, it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings” (*Id.* at 491-492).

### i. Misrepresentation

Here, plaintiff has sufficiently pleaded the existence of material representations. Specifically, plaintiff alleges that on July 13, 2017, Brandel materially misrepresented that PNP “conducted a background check on Ms. Wright and thoroughly vetted her in advance to ensure that it was appropriate to place Ms. Wright in [her] apartment while [plaintiff] was not living there”

(complaint ¶ 44). Plaintiff not only identified Brandel as the source of the material misrepresentations, but the date and the words used by Brandel. To the extent defendants argue that the terms “background check” and “vetting” are too vague, this Court must accept the complaint’s allegations to be deemed true. Therefore, plaintiff has satisfied the particularity requirement of CPLR § 3016(b) in that the complaint sufficiently detailed Brandel’s misrepresentations in a manner that is sufficient to inform PNP of the substance of plaintiff’s claims (*see Pludeman*, 10 NY3d at 491).

ii. Knowledge of Falsity

Plaintiff further alleges that Brandel’s representations were false when made and Brandel knew they were false (complaint ¶¶ 48-49). Such allegations are sufficiently specific to overcome the requirements of CPLR § 3016(b) (*see Black v Chittenden*, 69 NY2d 665, 668 [1986] [allegations that defendant’s statements “were false and were known by the defendant to be false when made by [defendant] are sufficient to plead a defendant’s knowledge of falsity”]).

iii. Intent to Induce and Reasonable Reliance

The next two elements are alleged in paragraphs 45-47, 50-51 of the complaint. Plaintiff alleges that Brandel made the above statements “with the intent that plaintiff would rely upon them in permitting Ms. Wright to perform services in plaintiff’s apartment while plaintiff was not there, so that PNP could earn money” (complaint ¶ 47). Plaintiff states that these false statements were material to her decision to allow Ms. Wright in her apartment, that she justifiably relied on them, and permitted Ms. Wright to perform services in her apartment while she was not there. Moreover, plaintiff alleges that her reliance on Brandel’s assurances were reasonable in that she “had no knowledge of the falsity of the representations and had no reason to know that the representations were false” (*Id.* at ¶ 51). Regardless, the reasonableness of plaintiff’s reliance “implicates factual

issues whose resolution would be inappropriate at this early stage” (*Knight Sec. v Fiduciary Trust Co.*, 5 AD3d 172, 173 [1st Dept 2004]). As such, PNP’s argument regarding justifiable reliance comes prematurely.

iv. Loss Causation and Damages

“To establish causation, plaintiff must show both that defendant’s misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)” (*Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]). Loss causation is “the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff (*Fin. Guar. Ins. Co. v Putnam Advisory Co., LLC*, 783 F3d 395, 402 [2d Cir 2015]). “A plaintiff may satisfy the requirements of loss causation if ‘it was foreseeable that [the plaintiff] would suffer losses as a result of relying on [the defendant’s] alleged misrepresentations’” (*NRAM PLC v Societe Generale Corporate and Inv. Banking*, 2014 WL 3924619, at \*13 (Sup Ct, NY County, Aug. 5, 2014 ], citing *MBIA Ins. Corp., v Countrywide Home Loans, Inc.*, 87 A3d 287, 295 [1st Dept 2011]).

Damages for fraud are calculated according to the “out-of-pocket” rule and must reflect “the actual pecuniary loss sustained as a direct result of the wrong” (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1986]). Under CPLR § 3016(b), “[i]t is not necessary ... that the measure of damages be pleaded, so long as the facts are alleged from which damages may be properly inferred” (*Black*, 69 NY2d at 668).

PNP argues that plaintiff has failed to demonstrate loss causation (that the alleged misrepresentation caused plaintiff’s claimed losses). More specifically, PNP seeks dismissal of this cause of action on the claimed basis that plaintiff does not indicate how a background check, or plaintiff’s reliance on the same, would have prevented the alleged theft.

In rebuttal, plaintiff argues that the complaint adequately alleges that the theft of her jewelry resulted from the fact that she hired Ms. Wright based on Brandel's fraudulent assurances that PNP conducted a background check on Ms. Wright before recommending her for the position. With respect to damages, plaintiff alleges that she sustained damages "in an amount to be determined at trial, but in any event no less than the value of the jewelry stolen by Ms. Wright during the course of the services she provided to the plaintiff" (complaint ¶ 53). Plaintiff further asserts that she is entitled to punitive damages against for its tortious and malicious fraud.

Substantively, the factual allegations in this matter are speculative in nature. Even accepting plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, this Court finds that plaintiff has not plead facts from which damages may be reasonably inferred. Specifically, plaintiff has failed to allege facts demonstrating a direct causal link between the specific misrepresentation of PNP and the alleged theft. Put another way, even assuming Brandel made false representations regarding PNP's vetting process, plaintiff's claim that Ms. Wright stole \$100,000 worth of jewelry, which she claims is evidenced by a Federal Express receipt is far too attenuated for this Court to entertain. Therefore, PNP's motion to dismiss based on plaintiff's failure sufficiently plead loss causation is granted.

Accordingly, it is

ORDERED that defendant PNP's motion pursuant to CPLR § 3211(a)(7) for an order dismissing the complaint is granted; and it is further

ORDERED that plaintiff Sybil Shainwald's complaint against Professionals for Non-Profits, Inc., is dismissed in its entirety; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the court.

**Dated:**

*2/26/2019*

**ENTER:**

  
CARMEN VICTORIA ST. GEORGE, J.S.C.