

Mishkin v Insomnia Cookies 82nd, LLC
2019 NY Slip Op 31312(U)
May 10, 2019
Supreme Court, New York County
Docket Number: 160904/2015
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

MARION MISHKIN,

Plaintiff,

- v -

INDEX NO. 160904/2015

MOTION DATE _____

MOTION SEQ. NO. 001

INSOMNIA COOKIES 82nd, LLC, SERVE-U
BRANDS, INC., SETH BERNSTEIN, and "JOHN
DOE,"

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 96, 97, 98, 99, 102, 104

were read on this motion to _____ dismiss _____.

Defendants Insomnia Cookies 82nd, LLC, Serve-U Brands, LLC, and Seth Berkowitz (s/h/a Seth Bernstein) (movants) move pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the complaint as asserted against them. Plaintiff opposes.

I. VERIFIED COMPLAINT (NYSCEF 72)

Serve-U is the parent company of Insomnia. Berkowitz is an officer of Serve-U. Insomnia is a retail business that sells and delivers food items. Defendant John Doe was hired by movants to make food deliveries.

On November 16, 2014, at approximately 8:15 pm, plaintiff was entering her residence when Doe, without provocation, committed tortious conduct against her, including "violent, brutal, forcible, physical contact, vicious, profane threats of harm and verbal abuse." Plaintiff suffered injury as a result.

Movants knew or should have known of Doe's vicious propensity, and they knew of facts

that would cause a reasonably prudent person to investigate. Despite this knowledge, they permitted Doe to make deliveries to residential properties, which resulted in the foreseeable assault on plaintiff.

Plaintiff advances four causes of action: (1) assault and battery; (2) *respondeat superior*; (3) negligent hiring, retention, and supervision; and (4) negligence.

II. CONTENTIONS

A. Movants (NYSCEF 65-78)

Movants deny that they may be held vicariously liable for Doe's actions as he acted for personal motives unrelated to the furtherance of movant's business, nor may they be held liable for negligent hiring, retention, or supervision given plaintiff's fatally conclusory allegation that they should have known of Doe's propensity for violence. Moreover, plaintiff alleges no prior history of assault or other bad acts while movants employed Doe nor were they required to check his background.

Movants assert that Berkowitz cannot be held liable absent evidence sufficient to pierce the corporate veil, and that Berkowitz did not exert complete control over the corporation with respect to the alleged incident, and thus, cannot be said to have caused plaintiff's injury. They observe that plaintiff offers no evidence that Doe was their employee, and thus, none of them may be held liable.

Movants also maintain that they sufficiently demonstrate that as they cannot be held vicariously liable or **directly?** liable for negligent hiring, retention, or supervision, plaintiff's negligence claim fails. In support, they offer the affidavit of Berkowitz who states therein that he is the President of both Insomnia and Serve-U, and that Insomnia does not oversee, hire, train, or retain employees. Rather, Serve-U is responsible for hiring all employees, including delivery

personnel. He also denies having taken any independent action related to the day to day action of delivery personnel and has no information about Doe. (NYSCEF 76).

Alternatively, movants seek dismissal as the complaint was untimely served on them.

B. Plaintiff (NYSCEF 81-91)

Plaintiff asserts that given the procedural posture of this action, the facts alleged in the complaint must be taken as true, and thus, she need not present evidence supporting her claim. She argues that she states a cause of action based on vicarious liability, because she alleges that Doe was acting in furtherance of movants' business, and that she states a cause of action for negligent hiring, retention, training, and supervision because she alleges that movants had prior knowledge that Doe had previously engaged in conduct making him unfit to work as a delivery person. She offers an amended verified complaint from a different action in which Insomnia was sued for the alleged assault and battery from an employee at the Insomnia store where Doe was employed. (NYSCEF 83).

Plaintiff claims that her cause of action for negligence is distinct from her claim of negligent hiring, as the alleged negligence is based on Doe's negligence for which movants are vicariously liable, as Doe's conduct was foreseeable, and movants authorized him to enter plaintiff's building. As Berkowitz exercised complete control over Insomnia and its hiring, training, and supervision of employees, the complaint is sufficient as to him, and his affidavit does not constitute documentary evidence and the statements contained therein are fatally conclusory. Moreover, as Berkowitz states that he relied upon a review of corporate records, plaintiff claims entitlement to them. Plaintiff also argues that she meets her burden of alleging that Doe is movants' employee as no evidentiary showing is required at this stage. She maintains that movants were timely served.

Alternatively, as discovery is required, the motion should be denied.

C. Reply (NYSCEF 96-99)

Movants assert that plaintiff's opposition should be disregarded as it was prepared by an attorney, when she had held herself out as representing herself. They claim that evidentiary support is required as her complaint contains only conclusory allegations and bare assertions, and that she fails to submit an affidavit setting forth that there are facts which may exist but are within their exclusive knowledge.

Movants ask that the prior assault case referenced by plaintiff be disregarded given the legal requirement that they be aware of Doe's tendencies, not those of another employee, and moreover observe that the subject of the prior case was not working for them at the time of the alleged assault on plaintiff. They offer the affidavit of Serve-U's payroll and onboarding specialist who states therein that the employee did not work for Insomnia at the time of the incident. (NYSCEF 97-99).

Movants reiterate their previously made arguments.

D. Oral Argument

At oral argument of this motion, plaintiff withdrew all claims of "veil piercing" against Berkowitz, but did not discontinue her causes of action against him.

III. ANALYSIS

Pursuant to CPLR 3211(a)(1), a party may move for an order dismissing a pleading on the ground that it has a defense based on documentary evidence. Such a motion may be granted where factual allegations in the complaint are flatly contradicted by documentary evidence. (*Kaisman v Hernandez*, 61 AD3d 565 [1st Dept 2009]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996]).

A pleading may also be dismissed for a failure to state a cause of action. (CPLR 3211[a][7]). In deciding the motion, the court must liberally construe the pleading, “accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference and determine only whether the alleged facts fit within any cognizable theory.” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, “[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may be properly negated by affidavits and documentary evidence.” (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005], quoting *Biondi v Beekman Hill House Apt, Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

A. Respondeat superior

An employer may be vicariously liable, under a theory of *respondeat superior*, for an employee’s tortious act if it was committed within the scope of employment and in furtherance of the employer’s business. (*Bowman v State*, 10 AD3d 315, 316 [1st Dept 2004]). Whether Doe was acting within the scope of employment and in furtherance of movants’ business when he committed the alleged tort is a factual determination, and accepting the facts as alleged as true, an assault without provocation, absent any authority or supporting facts, cannot have been within the scope of Doe’s employment delivering food nor in furtherance of movants’ business as a food delivery service. (*See e.g., Green v Himon*, 151 AD3d 516, 517 [1st Dept 2017], *lv dismissed* 30 NY3d 1013 [2017] [bike messenger’s employer not vicariously liable as employee’s provocation of an assault on plaintiff was not within the scope of employment or furtherance of employer’s interests]; *Naegele v Archdiocese of New York*, 39 AD3d 270, 270–271 [1st Dept 2007], *lv denied* 9 NY3d 803 [2007] [Archdiocese not vicariously liable for pastor’s alleged fraud and theft as such conduct was not in furtherance of archdiocesan business and was a clear

departure from scope of employment]). Thus, movants cannot be held vicariously liable for Doe's alleged assault and battery, and plaintiff offers no basis for asserting that discovery may alter that result.

B. Negligent hiring, retention, and supervision

An employer may be held liable for negligent hiring where it places an "employee in a position to cause foreseeable harm, harm [of] which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee." (*Sheila C. v Povich*, 11 AD3d 120, 129 [1st Dept 2004]). A cause of action for negligent hiring requires a showing that an employer knew, or should have known, of the employee's propensity for the conduct which caused plaintiff's injury. (*Id.* at 129-130). Although an employer does not have a general duty to check whether a prospective employee has been convicted of a crime (*Yeboah v Snapple, Inc.*, 286 AD2d 204, 205 [1st Dept 2001]), a duty to investigate a prospective employee's background exists when an employer knows of facts that would lead a reasonably prudent person to investigate (*T.W. v City of New York*, 286 AD2d 243, 245 [1st Dept 2001]). A reasonable investigation need not consist only of a criminal background check, but may include the checking of references. (*See e.g., Andersen v Suska Plumbing*, 246 AD2d 475 [1st Dept 1998] [issue of fact existed as to whether employer breached duty by failing to check employee's references]).

While conclusory allegations are insufficient to survive a motion to dismiss, there is no requirement that claims of negligent hiring and supervision be pleaded with specificity. (*Porcelli v Key Food Stores Co-op., Inc.*, 44 AD3d 1020, 1021 [2d Dept 2007]). In *Kerzhner v G4S Gov't Sols., Inc.*, the Court modified a trial court order dismissing a negligent hiring claim supported by the sole allegations that the employer defendants were negligent in hiring an employee who

committed assault and battery on the plaintiff, and that the employer defendants knew or should have known of that the employee's conduct was foreseeable. (138 AD3d 564, 565 [1st Dept 2016]). The Court noted that to the extent the pleadings were insufficiently particular, they could be amplified in a bill of particulars. (*Id.*). Here, plaintiff alleges all the necessary elements of a negligent hiring and retention claim.

C. Berkowitz's liability

Regardless of whether the corporate veil is pierced, a corporate officer who commits an affirmative tortious act may be held personally liable for it, even if he acted on behalf of the corporation in the course of official duties. (*Cronos Grp. Ltd. v XComIP, LLC*, 156 AD3d 54, 76 [1st Dept 2017]; *Peguero v 601 Realty Corp.*, 58 AD3d 556, 558 [1st Dept 2009]).

Here, plaintiff alleges that Berkowitz hired Doe and that he knew or should have known of Doe's propensities. Thus, as he is alleged to have hired Doe personally and negligently, he may be held personally liable.

Berkowitz's affidavit does not constitute documentary evidence within the meaning of CPLR 3211(a)(1). (*Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011]).

D. Doe's identity

Movants offer no support for their contention that plaintiff's failure to identify Doe, at this stage of the action, warrants dismissal of the complaint.

E. Negligence

While plaintiff advances a cause of action for negligence, the allegations relating to Doe's assault reflect intentional, not negligent, conduct which as discussed *supra*, at **III.A**, could not have been within the scope of his employment, and thus, movants may not be held vicariously liable for them.

F. Timeliness

Movants offer no argument or evidence in support of their contention that the complaint was served untimely. In any event, plaintiff demonstrates that the complaint was timely served.

G. Plaintiff's representation

The issues concerning plaintiff's representation were resolved with the filing of a notice of appearance on February 27, 2019 (NYSCEF 103), and movants neither cite case law in support of their contention that plaintiff's opposition should be disregarded, nor articulate any consequential prejudice.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants Insomnia Cookies 82nd, LLC's, Serve-U Brands, LLC's, and Seth Berkowitz's (s/h/a Seth Bernstein) motion to dismiss is granted to the extent they seek dismissal of plaintiff's second and fourth causes of action, as asserted against them, and it otherwise denied; and it is further

ORDERED, that the parties appear for a preliminary conference on July 10, 2019 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

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BARBARA JAFFE, J.S.C.

5/10/2019

DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: