

Bige Chen v Two Hustlers LLC
2019 NY Slip Op 33429(U)
October 28, 2019
Supreme Court, Kings County
Docket Number: 504832/14
Judge: Larry D. Martin
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At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of October, 2019.

P R E S E N T:

HON. LARRY D. MARTIN

Justice.

-----X
BIGE CHEN,

Plaintiff,

- against -

DECISION AND ORDER

ms #7

Index No. 504832/14

TWO HUSTLERS LLC, JAMES STARKMAN,
STARQUEST MEDIA, LLC., STARQUMEDIA,
LIGHTSPACE STUDIOS AND LIGHTSPACE
STUDIOS PRODUCTION AND RENTAL FACILITY,

Defendants.

-----X
TWO HUSTLERS LLC.,

Third-Party Plaintiff,

- against -

NEXT MANAGEMENT, LLC.,

Third-Party Defendant.

-----X
The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 1-2 _____
Opposing Affidavits (Affirmations) _____	_____ 3 _____
Reply Affidavits (Affirmations) _____	_____ 4 _____
_____ Affidavit (Affirmation) _____	_____ _____
Other Papers _____	_____ _____

Upon the foregoing papers, third-party defendant Next Management, LLC (Next), moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the third-party complaint of Two Hustlers LLC (Two Hustlers).

Plaintiff, Bige Chen, a professional model, brings this action for personal injuries allegedly sustained by her on July 22, 2013, at approximately noon, when she was injured during a photo shoot arranged by Two Hustlers. At the time of her accident, Chen was being photographed while jumping on a trampoline. Two Hustlers hired the photographer, a production company, an expert in trampoline safety and a casting company for the shoot.

Plaintiff brought the instant action against Two Hustlers and other defendants involved in casting and production of the shoot. Two Hustlers brought a third-party action against Next, plaintiff's management agency, alleging that Next's negligence was a proximate cause of plaintiff's injuries. Specifically, in its third-party complaint, Two Hustlers alleges that Next booked the shoot, failed to inform plaintiff of the acrobatic nature of said shoot, obligated plaintiff to perform functions for which she was ill prepared and failed to advise Two Hustlers that plaintiff was not prepared for the shoot.

Next's agreement with plaintiff, dated March 4, 2010, indicated that Next would act as plaintiff's personal manager and negotiate her modeling contracts, collect her fees, and perform other services. The contract specifically indicates that Next is not Plaintiff's employer:

“Model [Bige Chen] understands that Next is not Model's employer nor does Next control the terms and conditions of Model's services.

To the extent any such supervision and control exists, such supervision and control relates solely to any relationship between Model and any of Model's clients or customers that engage Model to perform services."

(see Mensching affirmation, dated January 18, 2019, exh. J). The agreement was effective for three years and would be automatically renewed every year thereafter unless plaintiff gave written notice thirty days prior to the anniversary of the agreement of her intention to terminate it. Two Hustlers does not dispute that the agreement was effective on the date of plaintiff's accident.

Prior to the photo shoot, the casting company sent an email to Next stating it

"need[s] to be sure the models are ok with trampoline work. There will be a trampoline instructure [sic] and medic and a full crew to make sure safety is a priority. This is not going to be a big deal, but we want the effect of being in the air. They don't need to be gymnasts, just cant[sic] have a fear of heights etc[.]"

(see Goodman affirmation, dated April 26, 2019, exh. 1).

During her deposition, Chen testified that she was trained in rhythmic gymnastics from age six to fourteen in China (see Chen deposition tr at 41, lines 14-25) and she competed nationally from age eleven to fourteen (*id.* at 42, lines 8-11). Rhythmic gymnastics involved floor routines and Chen did not have any experience on a trampoline (*id.* at 42, lines 14-23). Chen testified that Next knew about Chen's background in gymnastics (*id.* at 51, lines 14-25; at 173, lines 5-9) but Next did not tell her that she would be expected to jump on a trampoline for the shoot (*id.* at 56, lines 3-6) or that she would have to do extreme poses (*id.* at 64, lines 18-24).

When asked whether she would ever decline an assignment from Next, Chen testified that “for my reputation in the industry, I don’t say no to a client for my agency” (*id.* at 57, lines 22-24). Chen also testified that she preferred to avoid shoots with nudity, but “unless I’m not dying [sic] or unless I’m conscious [sic], if I can actually go to the set and do my job, I don’t say no” (*id.* at 57, lines 13-19). Later on in her deposition, however, when she was again asked if she had ever turned down an assignment from Next, she testified “yes, once when the shoot was against my country, politically not right” (*id.* at 177, lines 8-14). She clarified that she never before turned down a shoot based on what she was expected to do physically (*id.* at 177, lines 15-18.)

Chen testified that, during her shoot, the photographer and director were guiding her movements (*id.* at 74, lines 22-25) and while there were other models also using the trampoline, she spent more time than them on it because the director wanted more poses from her (*id.* at 71, lines 6-11). Chen testified that her accident occurred approximately four hours after the shoot started (*id.* at 178, lines 11-14). She had a breakfast break during the morning while the other models were being photographed (*id.* at 73, lines 11-13). She also testified that every jump she did was different and towards the end she was tired, dehydrated and losing control of her body (*id.* at 73, lines 6-10). She testified that after she got hurt she was told she did a good job and the photographer captured the shot he needed two hours prior to her fall; she thought he should have ended the shoot after he got the shot (*id.* at 85, lines 5-19). When later questioned whether she would have declined the opportunity to appear in

the shoot had she previously been advised that she would be required to jump on a trampoline, Chen replied that “[she] would be more prepared. [She] would probably go, try it out first to see whether [she] could handle it or not” (*id.* at 177, lines 19-25 to 178, lines 1-4.).

In support of its motion for summary judgment to dismiss the third-party complaint, Next asserts that it cannot be held negligent because it was not present or involved in the shoot, it did not direct or control any of plaintiff’s activities at the shoot, plaintiff was not its employee, and Next did not cause or create the dangerous condition that caused the accident. Next claims there is no support in the record for the allegations contained in the third-party complaint because its models do not have to accept assignments and it did not owe a duty to Two Hustlers to advise it (Two Hustlers) about plaintiff’s capabilities. Further, Next points out that the creative director and photographer from Two Hustlers were happy with Chen’s performance at the shoot.

In opposition, Two Hustlers asserts that there are multiple issues of fact barring judgment in favor of Next as a matter of law. Two Hustlers argues, *inter alia*, that Next failed to advise plaintiff of the nature of the shoot and had Next so informed plaintiff that she would be required to jump on a trampoline, she would not have participated or would have prepared differently. Two Hustlers also asserts that the record demonstrates that plaintiff could not reject jobs arranged for her by Next.

In reply, Next dismisses Two Hustler’s opposition as a mischaracterization of plaintiff’s deposition testimony and based on nothing more than pure conjecture and

speculation.

A party seeking summary judgment has the burden of establishing his or her defense “sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted]; see CPLR 3212[b]). Once movant made its prima facie showing, the burden shifts to the non-moving party to show “facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]). Moreover, summary judgment may be granted to a defendant where it is found to have owed no duty of care to plaintiff (see *Menga v Newsday, Inc.*, 245 AD2d 494, 494 [2d Dept 1997]; see also *Bailey v Town of Oyster Bay*, 227 AD2d 427, 428 [2d Dept 1996]).

The record demonstrates that Next was not plaintiff’s employer and that it did not control, maintain, organize or supervise the shoot where plaintiff was injured. Further, Chen’s own testimony shows she was able to reject opportunities that were offered to her by Next. The record shows no evidence of negligence on the part of Next or that Next did anything to cause Chen’s injuries. As such, Next sufficiently presented its prima facie entitlement to judgment as a matter of law of its defense that it did not breach any duty to plaintiff that lead to her accident (see *Menga v Newsday, Inc.*, 245 AD2d at 494; *McGrath v United Hospital*, 167 AD2d 518, 519 [2d Dept 1990][lower court erred in denying summary judgment where organization sponsoring event at park “had no connection with the operation, maintenance, management or control of the rides” and therefore had no duty to the plaintiff injured on a ride]). Having made its prima facie defense, the burden now shifts to

Two Hustlers to establish the existence of a material issue of fact which would require a trial (*see Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 151-152 [2d Dept 1999]).

Two Hustler's arguments that Next had a duty to inform plaintiff of the acrobatic nature of the photo shoot, forced plaintiff to perform functions for which she was ill prepared and failed to tell Two Hustlers that plaintiff was not prepared for the shoot is not supported by the record before the court. There is no evidence to support Two Hustler's conclusory allegation that Chen was forced by Next to do the shoot. Chen testified that she has declined to do shoots offered to her by Next in the past. There is also no evidence in the record, or even a suggestion, that Chen objected to jumping on the trampoline in boots at this shoot. Further, Two Hustlers' assertion that plaintiff would not have done the shoot if she had previously known she would be required to jump on a trampoline is not supported by the record. In this regard, plaintiff's testimony indicates that if Chen was advised about the trampoline she may have done more to prepare, but she does not state that she would not have accepted or tried to complete the job.

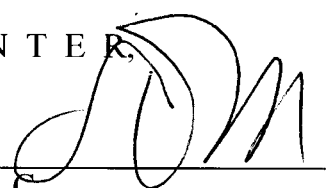
Chen testified that she was chosen for the shoot because of her past dance experience (*see Chen deposition tr at 173, lines 5-9*). Although there is no evidence that Next advised Chen that she would be required to jump on a trampoline for this shoot, there is also no evidence of a causal connection between Next's failure to specifically tell Chen that she would have to jump on a trampoline and the occurrence of her accident during the shoot. Indeed, the court notes that the accident occurred more than four hours after the start of the shoot. Two Hustler's attempt to equate Next's communications with Chen to negligence is

mere conjecture and fails to raise a triable issue of fact to warrant denial of summary judgment (*see June v Sedco Systems*, 203 AD2d 423, 425 [2d Dept 1994]).

For the reasons stated above, Next's motion for summary judgment is granted and the third-party complaint is dismissed as against it. The action is severed accordingly.

The foregoing constitutes the decision, order and judgment of this Court.

ENTER



J. S. C.

HON. LARRY D. MARTIN
Justice of the Supreme Court

2019 NOV 20 AM 8:19
KINGS COUNTY CLERK
FILED

