

Chiesa v McGregor

2019 NY Slip Op 34883(U)

September 10, 2019

Supreme Court, Kings County

Docket Number: Index No. 518314/18

Judge: Dawn M. Jimenez-Salta

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At an IAS Term, Part 88 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 10th day of September, 2019.

P R E S E N T:

HON. DAWN M. JIMENEZ-SALTA,

Justice.

-----X
MICHAEL CHIESA,

Plaintiff,

- against -

Index No. 518314/18

CONOR MCGREGOR, MCGREGOR SPORTS AND ENTERTAINMENT, LLC, JOHN DOES 1-20, names being fictitious as unknown at this time, BROOKLYN EVENTS CENTER, LLC d/b/a BARCLAYS CENTER, AEG MANAGEMENT BROOKLYN, LLC and JOHN DOES 21-50, names being fictitious, as unknown at this time,

MOTION SEQ. 2

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FILED

MMS

Defendants.

-----X
The following papers numbered 1 to 3 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-2

Opposing Affidavits (Affirmations) _____

3

Upon the foregoing papers in this assault and battery action, defendants Connor McGregor (McGregor) and McGregor Sports and Entertainment, LLC (MSE) move, pursuant to CPLR 3211 (a) (7),¹ for an order dismissing from the amended complaint: (1)

¹ While defendants' notice of motion only states that it is made pursuant to CPLR 3211 (a) (8) and 306-b, their supporting affirmation and memorandum of law seek dismissal pursuant to CPLR 3211 (a) (7). Absent prejudice, the court, pursuant to CPLR 2001, disregards this obvious error and deems the motion as having also been made pursuant to CPLR 3211 (a) (7).

the first cause of action for damages under Executive Law § 632-a (Son of Sam Law); (2) the second cause of action for negligence; (3) the third causes of action for negligent infliction of emotional distress; (4) the sixth cause of action for intentional infliction of emotional distress; and (5) the eighth cause of action for punitive damages. Defendants also move, pursuant to CPLR 3211 (a) (8) and 306-b, for an order dismissing the amended complaint in its entirety as against MSE.

Background

This Assault and Battery Action

On September 10, 2018 Michael Chiesa (Chiesa), a professional mixed martial artist (MMA) competitor, commenced this assault and battery action against: (1) McGregor, a professional MMA competitor and the Ultimate Fighting Championship's (UFC's) former Featherweight and Lightweight champion; (2) MSE; and (3) others, by filing a summons and a complaint verified by counsel. On December 20, 2018, Chiesa filed a supplemental summons and an amended verified complaint. The amended complaint generally alleges that MSE "is a domestic and/or foreign corporation doing business in the State of New York" and that McGregor is an "agent" and "promotor" of MSE and "acted on behalf of" MSE (amended complaint at ¶¶ 8, 10, 11 and 12).

The Barclay's Incident

On April 5, 2018, McGregor and the John Doe defendants had allegedly gone to the loading dock of the Barclays Center in Brooklyn where Chiesa and other MMA competitors

were present on buses (amended complaint at ¶ 50). McGregor and the John Doe defendants allegedly “surrounded and/or swarmed the subject bus,” “yelled expletives and threatening and intimidating phrases and/or remarks[,]” “attempted to board the subject bus and prevent it from moving[,]” “kicked the exterior of the subject bus multiple times . . .” and “threw objects and dangerous instruments directly at the subject bus windows . . .” (*id.* at ¶¶ 52-56).

The amended complaint further alleges that:

“Defendant McGREGOR, individually and on behalf of MSE, came across a dolly and/or hand truck, lifted same over his head, as he ran towards the bus, hurled the dolly and/or hand truck into a window of the subject bus, causing the window to violently shatter, creating shrapnel, shards of glass, and other dangerous moving and flying sharp objects.

“Plaintiff was seated in the subject bus at the seat that was adjacent to the window that defendant McGREGOR shattered. The glass from the shattered window, and the hand truck itself, struck the plaintiff, causing severe facial lacerations and other injuries

* * *

“By his own admission, defendant McGREGOR, individually and on behalf of MSE, engaged in the aforementioned conduct and acts with the premeditated intent and purpose of inflicting severe personal injuries and/or murdering Nurmagedov, [another professional MMA competitor] and sought to promote his brand and profit from his criminal activity . . .” (*id.* at ¶¶ 59, 60 and 71).

McGregor was allegedly “arrested and charged with felony and misdemeanor crimes” and “[t]he case was later disposed following a guilty plea by McGREGOR” (*id.* at ¶ 82).

The amended complaint asserts eight causes of action for: (1) damages under the Son of Sam Law; (2) negligence; (3) negligent infliction of emotional distress; (4) assault;

(5) battery; (6) intentional infliction of emotional distress; (7) negligent hiring, retention and supervision; and (8) punitive damages.

Defendants' Instant Dismissal Motion

On January 9, 2019, defendants McGregor and MSE filed the instant pre-answer motion seeking to dismiss the first, second, third, sixth and eighth causes of action in the amended complaint, pursuant to CPLR 3211 (a) (7), and seeking to dismiss the entire amended complaint as against MSE, pursuant to CPLR 3211 (a) (8) and 306-b.

McGegor and MSE contend that Chiesa's first cause of action for damages under the Son of Sam Law should be dismissed as "defective as a matter of law because McGregor was not convicted of a felony, as is required under the law." Defendants assert that "McGregor subsequently plead guilty to a violation, a single count of disorderly conduct stemming from these events." McGregor and MSE further contend that Chiesa "seeks to misuse the Son of Sam Law to try and recover monies in addition to the damages he claims he actually sustained during the Barclay's incident." According to defendants, "[t]he Son of Sam Law . . . does not provide a path for an individual to obtain a windfall above their actual proven compensatory damages sustained by an alleged tort."

McGegor and MSE argue that the second and third causes of action for negligence and negligent infliction of emotional distress should be dismissed because "New York courts have long held that, once intentional offensive conduct has been pled, the actor cannot be liable for claims sounding in negligence" and "[a]ll of the allegations in the complaint are

supported by the *intentional* act committed by McGregor” (emphasis added). They further argue that the negligent infliction of emotional distress claim is subject to dismissal because it is merely duplicative of the assault and battery claims.

McGegor and MSE contend that the sixth cause of action for intentional infliction of emotional distress should be dismissed because it is duplicative of the assault and battery claims, and McGregor’s alleged conduct “does not approach the rigorous standard of outrageousness as defined by New York courts.” In addition, defendants argue that the amended complaint lacks “any specific allegations of emotional distress, and contain[s] only unsubstantiated boilerplate assertions.”

McGegor and MSE argue that dismissal of the eighth cause of action for punitive damages is warranted, as a matter of law, because “New York does not recognize punitive damages as an independent cause of action . . .”

McGegor and MSE seek to dismiss the entire amended complaint as against MSE, a purported Nevada corporation, on the ground that the amended complaint fails to allege that “MSE has any contacts with or connection to New York.” Defendants further argue that “Chiesa does not allege that MSE has registered to do business in New York, or has any property, agents, telephone listings, offices, employees or bank accounts in New York” and “[t]he complaint only contains a boilerplate allegation that MSE does business in New York . . . but does not allege anything more about this supposed business or how it is connected to the state of New York.” Essentially, defendants contend that Chiesa has failed to satisfy

his burden of proving that there is personal jurisdiction over MSE because “Chiesa fails to allege [that] there is any nexus between MSE’s in-state activities and the alleged acts committed by McGregor.”

Chiesa, in opposition, submits a lengthy attorney affirmation in which his counsel argues that defendants’ dismissal motion lacks merit. Regarding the first cause of action for damages under the Son of Sam Law, Chiesa argues that he “need only allege that defendant was charged with or convicted of a felony” in order to seize any income generated as a result of McGregor’s crime. Chiesa argues that the second cause of action for negligence is not subject to dismissal because “the law and cases imply that once intentional offensive conduct has been **proven** (not merely pled), the actor cannot also be held liable for claims of negligence.” According to Chiesa, “at this infancy stage of litigation, it is prudent to assert all possible theories of liability [and] it would be improper to dismiss any of them, prior to the exchange of discovery and depositions.”

Chiesa contends that his third and sixth causes of action for negligent and intentional infliction of emotional distress, respectively, are not duplicative of his assault and battery claims because they are based on different alleged facts. Chiesa further asserts that McGregor’s alleged “violent and terrorizing” conduct was sufficiently outrageous to support his claims for infliction of emotional distress, and that “it is premature to determine this issue at this early juncture of the proceedings.” Regarding the eighth cause of action, Chiesa seemingly concedes that there is no independent cause of action for punitive damages, and

argues that his request for punitive damages in connection with his other causes of action “must survive.”

Regarding that branch of defendants’ motion seeking to dismiss the entire complaint as against MSE, pursuant to CPLR 3211 (a) (8) and 306-b, Chiesa contends that defendants’ argument that MSE is a Nevada corporate entity with no contacts to New York state is “irrelevant” because long arm jurisdiction exists against MSE under CPLR 302 (a) (2) since “[t]he subject tort took place in New York State” and “[t]hat is all that is required.” Essentially, Chiesa contends that he sufficiently pled that there is long-arm jurisdiction over MSE because the amended complaint alleges that: (1) McGregor is a representative of MSE; (2) McGregor committed tortious acts on behalf of MSE; (3) the tortious acts were committed in New York; and (4) there is a nexus between the tort and MSE’s business.

Discussion

(1)

On a motion seeking to dismiss a complaint, pursuant to CPLR 3211 (a) (7), for failing to state a cause of action “the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible [favorable] inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2008], *lv dismissed* 12 NY3d 878 [2009]; *see also EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). In

determining whether a complaint is sufficient to withstand a CPLR 3211 (a) (7) motion, “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion for dismissal will fail” (*Ruffino v New York City Tr. Auth.*, 55 AD3d 817, 818 [2008], quoting *Morris v Morris*, 306 AD2d 449, 451 [2003]).

The First Cause of Action – Son of Sam Law

“Executive Law § 632-a, commonly known as the ‘Son of Sam’ Law, broadly permits a crime victim to recover damages from his or her assailant” (*Ciafone v Kenyatta*, 27 AD3d 143, 144 [2005]). The Son of Sam Law “was initially enacted to permit crime victims to recover any profits earned by a convicted defendant from the commission of the crime” and “in 2001, the legislature enacted the present statute to permit victims to bring an action within three years of the discovery of any ‘funds of a convicted person’” (*id.* at 146). “In its present incarnation, Executive Law § 632-a (1) (a) defines ‘crime’ as ‘any felony defined in the penal law or any other chapter of the consolidated laws of the state.’ This provision . . . only serves to limit application of the statute to income earned by convicted felons . . .” (*New York State Crime Victims Bd. v T.J.M. Prods., Inc.*, 265 AD2d 38, 41 [2000]).

Here, McGregor and MSE contend that the first cause of action for damages under the Son of Sam Law must be dismissed because “[i]t is uncontroverted that McGregor plead guilty to a violation, which is clearly not a felony under New York Law.” As McGregor and MSE contend, the amended complaint alleges that McGregor was “arrested and charged with

felony and misdemeanor crimes” and “[t]he case was later disposed following a guilty plea by McGREGOR” (amended complaint at ¶ 82). Because the amended complaint fails to allege that McGregor was convicted of a *felony* in connection with the Barclays incident, dismissal of the first cause of action for damages under the Son of Sam Law is warranted.

The Second Cause of Action – Negligence

“In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom” (*Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). “Negligence is distinguished from assault and battery by the absence of that intent which is a necessary ingredient of the latter” and “New York does not recognize a cause of action to recover for negligent assault or battery” (*Borrerro v Haks Grp., Inc.*, 165 AD3d 1216, 1217 [2018] [internal quotations omitted]). Although “the same act may constitute battery or negligence depending on whether or not it was intentional . . . there cannot be recovery for both” (*id.* at 1218 [internal quotations omitted]).

Here, Chiesa alleges that he was injured as a result of McGregor’s intentional act. Even if McGregor lacked any intent to make physical contact with, or otherwise injure, Chiesa, the conduct attributed to McGregor in the amended complaint constitutes intentional, rather than negligent, conduct. The fact that the amended complaint generally alleged that McGregor acted “negligently” does not change the analysis. As the Second Department has held, “if, based on a reading of the factual allegations, the essence of the cause of action is,

as here, assault, the plaintiff[] cannot exalt form over substance by labeling the action as one to recover damages for negligence” (*Schetzen v Robotsis*, 273 AD2d 220, 220-221 [2000]). Accordingly, Chiesa’s second cause of action for negligence is dismissed.

The Third Cause of Action – Negligent Infliction of Emotional Distress

“A cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff’s physical safety, or causes the plaintiff to fear for his or her own safety” (*Sheila C. v Povich*, 11 AD3d 120, 130 [2004]).

Like Chiesa’s second cause of action for negligence, Chiea’s third cause of action for negligent infliction of emotional distress fails to state a cause of action because McGregor’s alleged conduct was intentional (*see Santana v Leith*, 117 AD3d 711, 712 [2014] [dismissing claim for negligent infliction of emotional distress because “plaintiff’s allegations in the verified complaint that the defendant ‘deliberately and violently’ attacked him with a hammer, while using racial and ethnic slurs, are premised on intentional conduct and not negligence”]).

The Sixth Cause of Action – Intentional Infliction of Emotional Distress

“The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of

causing, severe emotional distress; (3) causation; and (4) severe emotional distress” (*Brunache v MV Transp., Inc.*, 151 AD3d 1011, 1014 [2017] [internal quotations omitted]).

“To state a cause of action to recover damages for the intentional infliction of emotional distress, the conduct alleged must be so outrageous in character and extreme in degree as to surpass the limits of decency so as to be regarded as atrocious and intolerable in a civilized society” (*Leonard v Reinhardt*, 20 AD3d 510, 510 [2005] [internal quotations omitted]).

“Whether the conduct complained of is outrageous is a question of law for the courts in the first instance” (*O’Grady v Russian Bath Co. Inc.*, 52 Misc 3d 1224 [A], 2016 NY Slip Op 51267 [U], *5 [Sup Ct, Kings County 2016]).

Even accepting as true the allegations made in support of Chiesa’s sixth cause of action, and according him the benefit of every possible favorable inference, McGregor’s alleged conduct, while highly offensive, was not so outrageous or extreme to support an actionable claim for intentional infliction of emotional distress (*see, e.g., Saunders v. Taylor*, 6 Misc 3d 1015 [A], 2003 NY Slip Op 51743 [U], *4 [Sup Ct, New York County 2003] [allegations that defendant struck plaintiff’s face and attempted to punch and choke plaintiff “does not even approach” standard for intentional infliction of emotional distress]). For this reason alone, Chiesa’s sixth cause of action for intentional infliction of emotional distress is subject to dismissal.

Furthermore, dismissal of the sixth cause of action for intentional infliction of emotional distress is warranted because it is duplicative of Chiesa’s assault and battery

claims (*see Leonard*, 20 AD3d at 510 [holding that “the cause of action alleging intentional infliction of emotional distress should have been dismissed as duplicative of the causes of action alleging malicious prosecution and assault and battery”]; *see also Melendez v City of New York*, 62 Misc 3d 1206 [A] [Sup Ct, Kings County 2019] [holding that “(w)hen a defendant’s conduct constitutes one of the traditional torts, including assault and battery, and the conduct was not intended only to cause extreme emotional distress to the victim, the tort of intentional infliction of emotional distress will not lie”]).

The Eighth Cause of Action – Punitive Damages

The Appellate Division, Second Department has repeatedly held that “New York does not recognize an independent cause of action for punitive damages” (*Gershman v Ahmad*, 156 AD3d 868, 868 [2017] [quoting *Randi A.J. v Long Is. Surgi-Ctr.*, 46 AD3d 74, 80 (2007)]; *Yong Wen Mo v Gee Ming Chan*, 17 AD3d 356, 359 [2005] [dismissing cause of action for punitive damages because “plaintiff erroneously denominated her request for punitive damages as a separate cause of action”]). As the Court of Appeals explained, “[a] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action . . .” (*Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 616 [1994]). Based on these controlling authorities, Chiesa’s eighth cause of action, which asserts an independent cause of action for punitive damages, is dismissed, as a matter of law.

(2)

“Upon a CPLR 3211 (a) (8) motion to dismiss for lack of personal jurisdiction, it is the plaintiff who bears the ultimate burden of proof to establish a basis for such jurisdiction” (*Am./Int’l 1994 Venture v Mau*, 146 AD3d 40, 51 [2016]). Thus, if the defendant moves to dismiss due to the absence of a basis of personal jurisdiction, plaintiff must come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction.

Chiesa contends that there is long-arm jurisdiction over MSE under CPLR 302 (a) (2), which provides that a court may exercise personal jurisdiction over a nondomiciliary who in person or through an agent “commits a tortious act within the state . . .” Chiesa contends that there is long-arm jurisdiction over MSE because McGregor is allegedly the president of MSE, and MSE, through its agent, McGregor, allegedly committed a tort within New York. However, the amended complaint fails to allege facts showing that McGregor attacked the bus at the Barclays Center *for the benefit and with the consent and knowledge of MSE* (*Aramid Entm’t Fund Ltd. v Wimbledon Fin. Master Fund, Ltd.*, 105 AD3d 682, 683 [2013]). Consequently, McGregor’s alleged assault and battery cannot be attributed to MSE, and defendants are entitled to an order dismissing the amended complaint as against MSE for lack of jurisdiction. Accordingly, it is

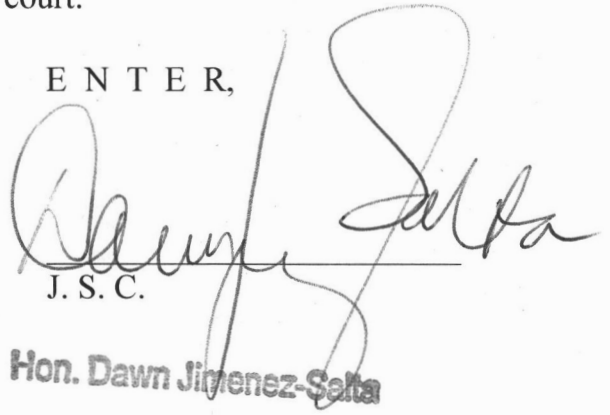
ORDERED that the branch of defendants’ motion seeking to dismiss the first, second, third, sixth and eighth causes of action in the amended complaint, pursuant to CPLR 3211

(a) (7), is granted, and the first, second, third, sixth and eighth causes of action are hereby dismissed; and it is further

ORDERED that the branch of defendants' motion seeking to dismiss the entire amended complaint as against MSE, pursuant to CPLR 3211 (a) (8), is granted, and the amended complaint is hereby dismissed as against MSE.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

Hon. Dawn Jimenez-Salta

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KINGS COUNTY CLERK
FILED