

Sosa v Serrano

2019 NY Slip Op 35104(U)

July 2, 2019

Supreme Court, Bronx County

Docket Number: Index No. 30424/2018E

Judge: John R. Higgitt

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

-----X
HENRY SOSA,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 30424/2018E

SANTIAGO SERRANO, GEICO CORP. and CURRY
CHEVROLET,

Defendants.
-----X

John R. Higgitt, J.

Upon the March 5, 2019 notice of motion of defendant Curry Motor Cars, LLC sued herein as Curry Chevrolet (“Curry”), and the affirmation, affidavit, exhibits and the memorandum of law submitted in support thereof; the April 18, 2019 affirmation in opposition of defendants Serrano and Geico Corp. (“Santiago defendants”); and due deliberation; defendant Curry’s motion to dismiss the complaint as against it and the cross claims against it is granted.

This is a negligence action to recover damages for personal injuries plaintiff allegedly sustained in a motor vehicle accident that took place on July 2, 2017. Plaintiff commenced this action by filing a summons and complaint on October 5, 2017. Defendant Curry moves to dismiss the complaint for, among other reasons, failure to state a cause of action upon which relief could be granted as against it under CPLR 3211(a)(7).

On a motion to dismiss the complaint for failure to state a cause of action under CPLR 3211(a)(7), the court must accord the pleadings a liberal construction, accept the facts alleged as true, afford the plaintiff every reasonable favorable inference, and determine whether the facts alleged fit within a cognizable legal theory (*see Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137 [2017]). Where a defendant submits evidence in support of the motion, the important criterion is whether the plaintiff has a valid cause of action, not whether plaintiff has stated one (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128 [1st Dept 2014]).

Defendant Curry asserts that the complaint fails to sufficiently plead a cause of action against it and that any cause of action that could be inferred against it is time barred. Plaintiff's first cause of action requests payment from defendant Geico for the post-accident repairs conducted on plaintiff's vehicle, and the second cause of action asserts that the alleged negligence of defendant Serrano in the operation of his vehicle resulted in the accident. Neither the first nor the second cause of action apply to defendant Curry. Moreover, defendant Curry submits the affidavit of Robert A. Conti, the general manager of Curry Motor Car LLC, who alleges that defendant Curry performed repairs to plaintiff's vehicle but had no involvement with the accident or with Geico's warranty and payment decisions described in the complaint.

The third cause of action alleges that "defendant falsely and grievously accused plaintiff of a serious crime that he did not commit." It is not clear which defendant plaintiff is referring to. Defendant Curry asserts that if the court is to infer that plaintiff's third cause of action refers to defendant Curry, that cause of action should be dismissed as against it because the third cause of action sound in defamation as is barred by the relevant statute of limitation (*see* CPLR 215[3]).

Because the complaint fails to allege any wrongdoing committed by defendant Curry and plaintiff does not specifically allege any cause of action as against defendant Curry, the complaint as against defendant Curry is dismissed.

With regard to the counterclaims by the Santiago defendants seeking indemnification against defendant Curry, those counterclaims are dismissed. The Santiago defendants failed to allege that defendant Curry owed a duty to co-defendant or plaintiff (*see Razdolskaya v Lyubarsky*, 160 AD3d 994 [2d Dept 2018]).

In opposition to defendant Curry's motion, the Santiago defendants assert that if the motion is granted, it should be without prejudice because no discovery has been conducted in the case. The court agrees: the dismissal is based on a legally insufficient pleading, not the merits, and without prejudice dismissal is appropriate.

The aspects of defendant Curry's motion seeking dismissal under CPLR 3211(a)(2), (5) and (8)

are denied as moot.

Accordingly, it is

ORDERED, that the motion of defendant Curry Motor Cars, LLC, sued herein as Curry Chevrolet, for an order dismissing the complaint as against it and the counterclaim against it is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Curry Motor Cars, LLC sued herein as Curry Chevrolet dismissing the complaint without prejudice insofar as asserted against it and the counterclaim against it.

The remaining parties are reminded of the July 26, 2019 preliminary conference before the undersigned.

This constitutes the decision and order of the court.

Dated: July 2, 2019



John R. Higgin, A.J.S.C.