

Ishaq v Godduhn

2019 NY Slip Op 35150(U)

July 24, 2019

Supreme Court, Bronx County

Docket Number: Index No.: 31491/2017E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 14

-----X
ISHAQ, SHAIKH

Index No. 31491/2017E

- against -

Hon. JOHN R. HIGGITT,

GODDUHN, JASON, et al

A.J.S.C.

The following papers in the NYSCEF System were read on this motion for DISMISSAL, noticed on July 23, 2019 and duly submitted as No. 18 on the Motion Calendar of July 23, 2019

	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	33-41
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	42
Replying Affidavit and Exhibits	
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, the moving defendants’ motion to “dismiss non-negligent claims,” deemed one pursuant to CPLR 3024(b) seeking to “strike any scandalous or prejudicial matter unnecessarily inserted in a pleading,” is granted in part, in accordance with the annexed decision and order.

Dated: 07/24/2019

Hon. *John R. Higgitt*
JOHN R. HIGGITT, A.J.S.C.

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted GIP
- Denied Other

Check if appropriate:

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

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

-----X
SHAIKH ISHAQ,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 31491/2017E

JASON GODDUHN, PENSKE TRUCK LEASING CO.,
KEY COURIER LOGISTICS,

Defendants.
-----X

John R. Higgitt, J.

Upon defendants’¹ June 26, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff’s July 22, 2019 affirmation in opposition; and due deliberation; the moving defendants’ motion to “dismiss non-negligent claims,” deemed one pursuant to CPLR 3024(b) seeking to “strike any scandalous or prejudicial matter unnecessarily inserted in a pleading” (*see* CPLR 2001), is granted to the extent set forth below.

In this action emanating from a motor vehicle accident, plaintiff alleges in paragraph 11 of the complaint and paragraph 3 of the bill of particulars that the accident was due solely to the carelessness, recklessness and negligence of the defendants. The court presumes that in moving “to strike any/all non-negligence claims from this case,” the moving defendants seek to strike the references to carelessness and recklessness. To the extent they also seek to dismiss plaintiff’s claim for punitive damages, plaintiff has not asserted such claim in the complaint. In any event, a claim for punitive damages cannot exist as an independent cause of action (*see Rocanova v Equitable Life Assur. Society*, 83 NY2d 603 [1994]; *Mayer v UVI Holdings, Inc.*, 280 AD2d 153 [1st Dept 2001]; *Greenview Trading Co. v Hershman & Leicher, P.C.*, 108 AD2d 468 [1st Dept

¹ Although the motion is made on behalf of all defendants, the court notes that the action against defendant Penske Truck Leasing Co. was dismissed by the September 5, 2018 decision and order of the undersigned.

1985]), and plaintiff's complaint alleges ordinary negligence, for which punitive damages are not available (*see Munoz v Puretz*, 301 AD2d 382 [1st Dept 2003]).

The inquiry on a motion to strike scandalous or prejudicial material from a pleading pursuant to CPLR 3024(b) is whether the subject allegations are relevant to one of plaintiff's causes of action (*see Soumayah v Minnelli*, 41 AD3d 390 [1st Dept 2007]). Language that is relevant to a cause of action should not be stricken (*see Wittels v Sanford*, 137 AD3d 657 [1st Dept 2016], *lv den* 28 NY3d 902 [2016]), and the motion should be denied (*see N.Y.C. Health & Hosps. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391 [1st Dept 2005]). Matters unnecessary to the viability of the cause of action that would cause undue prejudice to the defendants are properly stricken (*see Irving v Four Seasons Nursing & Rehab. Ctr.*, 121 AD3d 1046 [2d Dept 2014]). The determination whether to strike such material is left to the court's discretion (*see Matter of Albany Law Sch. v N.Y. State Office of Mental Retardation & Developmental Disabilities*, 19 NY3d 106 [2012]). Here, it is apparent that plaintiff seeks recovery under a theory of negligence, and the allegations of carelessness and recklessness are unnecessary to the cause of action.

Furthermore, a bill of particulars is intended to amplify "whatever the pleading pleads" (*Linker v County of Westchester*, 214 AD2d 652, 652 [2d Dept 1995]), and may not be used to allege a theory or claim not asserted in the complaint (*see Paterra v Arc Dev. LLC*, 136 AD3d 474 [1st Dept 2016]; *Martinez v Fields*, 74 AD3d 653, 653 [1st Dept 2010]). Here, plaintiff's bill of particulars contains allegations of carelessness and recklessness that are not relevant or necessary to the cause of action asserted (*see Jurado v Kalache*, 93 AD3d 759 [2d Dept 2012]).

The court notes that while the motion was untimely under CPLR 3024(c), plaintiff did not oppose the motion on that basis. Plaintiff's opposition, while untimely, was not responsive to

the issues raised by the motion; accordingly, an adjournment of the motion is unnecessary and the moving defendants' application for same is denied in the exercise of the court's discretion (*see* 22 NYCRR § 202.8(e)(2); *Park Lane N. Owners, Inc. v Gengo*, 151 AD3d 874 [2d Dept 2017]).

Accordingly, it is

ORDERED, that the moving defendants' motion to "dismiss non-negligent claims," deemed one pursuant to CPLR 3024(b) seeking to "strike any scandalous or prejudicial matter unnecessarily inserted in a pleading," is granted to the extent that references to carelessness and recklessness contained in paragraph 11 of the complaint and paragraph 4 of the bill of particulars are stricken; and it is further

ORDERED, that the motion is otherwise denied; and it is further

ORDERED, that the parties shall appear before the undersigned in Part 14, courtroom 407, at 2:00 p.m. on **September 6, 2019** for a preliminary conference.

This constitutes the decision and order of the court.

Dated: July 24, 2019



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