

Liu v MTA Bus Co.

2020 NY Slip Op 30282(U)

February 3, 2020

Supreme Court, New York County

Docket Number: 153480/2019

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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INDEX NO. 153480/2019

MONICA LIU,

MOTION DATE 11/25/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

MTA BUS COMPANY, METROPOLITAN
TRANSPORTATION AUTHORITY, JAMES WILSON

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ORDERED that plaintiff’s motion to dismiss defendants’ fourth, fifth, eighth, and twelfth affirmative defenses is granted.

Issue was joined by service of a Verified Answer which raises twelve affirmative defenses. Plaintiff Monica Liu now moves to dismiss four of defendants’ twelve affirmative defenses as follows: (1) lack of personal jurisdiction over defendant James Wilson; (2) failure to commence the instant action within the applicable statute of limitations; (3) failure to comply with CPLR 306-b; and (4) failure to properly plead as required by the Public Authorities Law.

CPLR 3211(b) states that “[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.” The Appellate Division, First Department has held that, “[o]n a motion to dismiss affirmative defenses pursuant to CPLR 3211(b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law. In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed. [Further, a]

defense should not be stricken where there are questions of fact requiring trial.” *534 East 11th Street Housing Development Fund Corp. v Hendrick*, 90 AD3d 541, 541-542 (1st Dep’t 2011) (internal citations omitted).

Plaintiff alleges that defendants’ fourth, fifth, eighth, and twelfth affirmative defenses lack merit as a matter of law. As to defendants’ fourth affirmative defense, plaintiff argues that the defense must be dismissed pursuant to CPLR § 3211(e), which states that an objection to service of the summons and complaint, raised in a pleading, is waived if such objecting party does not move to dismiss on that ground within 60 days after service of the pleading. In the opposition papers, defendants argue that defendant James Wilson was improperly served pursuant to CPLR § 308(2). Plaintiff has shown that defendants raised a jurisdictional defense in their Verified Answer, which was served on May 8, 2019. Pursuant to CPLR § 3211(e), defendants had sixty days, from May 8, 2019, to move for judgment on jurisdictional grounds, which they failed to do. Thus, defendants’ objection to personal jurisdiction is hereby waived. Accordingly, plaintiff’s motion to the extent that it seeks to dismiss defendants’ fourth affirmative defense, is granted.

As to defendants’ fifth affirmative defense, plaintiff argues that the accident at issue occurred on April 10, 2018 and the instant action was commenced on April 3, 2019. Thus, the action was commenced within the applicable statute of limitations. In opposition, defendants again merely proffer that defendant Wilson was not properly served. Therefore, plaintiff has met their burden of demonstrating that defendants’ fifth affirmative defense is without merit as this action was timely commenced. Thus, plaintiff’s motion, to the extent that it seeks to dismiss defendants’ fifth affirmative defense, is granted.

As to defendants' eighth affirmative defense, plaintiff again argues that this defense must be dismissed pursuant to CPLR § 3211(e) for failure to move within 60 days of May 8, 2019, the date the Verified Answer was served. Plaintiff has shown that defendants raised a defense claiming that plaintiff failed to comply with CPLR 306-b, which requires service of the pleadings within 120 days from the commencement of an action. The Court notes that the summons and complaint was filed on April 3, 2019 and an affidavit of service for defendant James Wilson was filed on April 9, 2019 establishing that service was effectuated as per CPLR 306-b. As such, plaintiff's motion to the extent that it seeks to dismiss defendants' eighth affirmative defense, is granted.

Lastly, plaintiff argues that defendants' twelfth affirmative defense should be dismissed as the pleadings complied with the requirements of the Public Authorities Law. In opposition, defendants argue that it is premature to dispose of their twelfth affirmative defense because plaintiff has yet to attend an MTA statutory hearing. In reply, plaintiff notes that defendants never plead that plaintiff had failed to attend the statutory hearing, that such a hearing is not a condition precedent to this action, and finally that, in any event, plaintiff attended the MTA statutory hearing on September 12, 2019. Here, it is undisputed that plaintiff attended such meeting, and therefore, plaintiff's motion to the extent that it seeks to dismiss defendants' twelfth affirmative defense, is granted.

Accordingly, it is

ORDERED that plaintiff's motion to dismiss is granted as to defendants' fourth, fifth, eighth, and twelfth affirmative defenses; it is further

ORDERED that all parties shall appear on February 28, 2020 at 9:30am in room 106 of 80 Centre Street, New York, NY for a previously scheduled status conference; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the decision/order of the Court.

2/3/2020
DATE


ADAM SILVERA, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE