

Ziming Shen v Shapiro
2020 NY Slip Op 32688(U)
August 17, 2020
Supreme Court, New York County
Docket Number: 153310/2018
Judge: Alexander M. Tisch
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER M. TISCH

PART

IAS MOTION 18EFM

Justice

-----X

ZIMING SHEN,

Plaintiff,

- v -

DANIEL SHAPIRO, NYP HOLDINGS, INC D/B/A THE NEW
YORK POST, JOHN DOE

Defendant.

-----X

INDEX NO. 153310/2018MOTION DATE 04/26/2020MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 86

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing papers, Defendants, DANIEL SHAPIRO ("Shapiro") and NYP HOLDINGS, INC., d/b/a THE NEW YORK POST ("NYP") (collectively, "defendants") move this Court to dismiss Plaintiff's complaint with prejudice insofar as asserted against NYP pursuant to CPLR 3212(b).

BACKGROUND

Plaintiff alleges that this action arises out of photography tactics exercised by Shapiro while defendant was allegedly employed by NYP and the facts as alleged in plaintiff's complaint are as follows (NYSCEF Doc. No. 1). On September 16, 2011, Shapiro was allegedly acting within the scope of his employment with NYP when he was assigned to photograph plaintiff who at the time was attending a court proceeding in the U.S. District Court, for the Eastern District of New York. Shapiro physically restrained Plaintiff and prevented him from leaving the area in order to take photographs of him. While plaintiff was attempting to evade Shapiro, plaintiff alleges that Shapiro caused the strap on his camera gear to wrap around plaintiff's arm, which physically restrained him from being able to get away. When plaintiff tried to evade the photographer,

Shapiro continued to pursue and allegedly called plaintiff a variety of derogatory names. A further altercation between plaintiff and Shapiro resulted in plaintiff sustaining injuries that required immediate medical attention including a fractured and dislocated shoulder, and bruising over the majority of his body.

New York City police officers ("NYPD") arrived at the scene and detained the plaintiff who was taken to the hospital to treat his injuries. Through Shapiro's testimony, a felony complaint was filed against plaintiff in Criminal Court of the City of New York, Kings County. Ultimately, all charges against plaintiff were dismissed.

On or about September 11, 2014, plaintiff commenced an action in the U.S. District Court, Southern District of New York (Civil Case No. 14-cv-7358) ("SDNY") seeking to recover damages arising out of the altercation with Shapiro. NYP was not a named defendant in that lawsuit. The case resulted in a dismissal of all of plaintiff's claims. Plaintiff appealed to the U.S. Court of Appeals, Second Circuit ("Second Circuit") which affirmed the decision in part and remanded plaintiff's claim of malicious prosecution back to the SDNY for further proceedings. The order of the Court of Appeals dated February 9, 2018 ruled that Shapiro is responsible for any liability that may arise for the prosecution of plaintiff based on the statements he made and his representation to the NYPD (NYSCEF Doc. No. 67). Once the case was remanded, the SDNY declined to exercise supplemental jurisdiction over the malicious prosecution state claim and dismissed it without prejudice in a March 6, 2018 order (NYSCEF Doc. No. 61). Plaintiff proceeded to file this action on April 11, 2018.

Plaintiff's instant complaint contends that the criminal charges were dismissed because the statements made by Shapiro were false and maliciously presented for the purpose of making plaintiff lose his civil liberties. Plaintiff alleges that defendant, NYP, is not only aware of the tactics and conduct of the photographers to get their subjects to react in a certain manner as they

are photographed but that they also approve and encourage this behavior. Plaintiff alleges that NYP allowed and encouraged another photographer by the name of Spencer Burnett to also make a false report to the NYPD. Plaintiff further contends that NYP hired and paid attorneys to defend the case filed against Shapiro and Burnett in SDNY.

Defendant served the instant pre-note of issue motion for summary judgment in this action on December 6, 2019. Defendant contends that summary judgment should be granted to them on following grounds: (1) plaintiff failed to comply with applicable statute of limitations; (2) NYP cannot be held liable for the acts or omissions of an independent contractor; and (3) that plaintiff's claim for punitive damages should be dismissed due to a lack of evidence of NYP's reckless or willful disregard for plaintiff's rights. In support of their motion for summary judgment, defendant submitted, inter alia, Michael Racano's Affidavit (NYSCEF Doc. No. 72). Mr. Racano was NYP's Executive Vice President of Finance and IT at the time of the incident and states that Shapiro was not an NYP staff photographer on the date of the incident.

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The "evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]).

"In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist" (Rivers v Birnbaum, 102 AD3d 26, 42 [2d Dept 2012]; see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]), and the motion "should not be granted where there are facts in dispute, where

conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2d Dept 2009]). Another instance where summary judgment should not be granted is when the facts upon which the motion is centered upon are exclusively within knowledge of the moving party or where the facts are clearly not within knowledge of the non-moving party (see Crocker-Citizens Natl Bank v L.N. Magazine Distributors, Inc., 26 AD2d 667 [2d Dept 1966]).

I. Statute of Limitations

Due to the fact that the plaintiff never named NYP as a defendant in the federal lawsuit, defendants assert that any claim against NYP is barred due to the statute of limitations. In order to prove the action is time barred, defendants bear the burden of demonstrating *prima facie* that the time to commence the action has truly expired (City of Yonkers v 58A JVD Indus., Ltd., 115 AD3d 635, [2d Dept 2014]). Defendants claim that this action fails to “relate back” to the federal lawsuit because NYP is not “united in interest” with the original defendant named in that lawsuit, Shapiro. In order for the parties to be considered “united in interest”, the parties must have the same defenses to plaintiff’s claim and that co-defendants are only united in interest when one defendant is responsible for the actions or omissions of the other (Kitson v Atlantic Ref. & Mktg. Corp., 227 AD2d 971 [4th Dept 1996]); see also Brock v Bua, 83 AD2d 61, 68 [2d Dept 1981]).

Defendants contend that Shapiro is considered an independent contractor and is therefore unable to be united in interest because NYP is not liable for Shapiro’s actions. Defendants conclude that the “relate back” doctrine does not apply to plaintiff and cannot assert a lawsuit against NYP due to the statute of limitations bar. In support of this claim, defendants submit as evidence a copy of Shapiro’s unsigned contract dated September 2010 and Michael Racano’s affidavit (NYSCEF Doc. No. 72). Racano’s affidavit states that Shapiro was never an employee of the NYP and was never issued any W-2 statements for his services as a freelance photographer

(id.). The affidavit also includes, as an exhibit, the unsigned freelance services contract dated in September 2010 that is alleged to be Shapiro's and shows that he was never formally employed by NYP.

The Court finds that defendants met their prima facie burden that the one-year statute of limitations expired, as plaintiff commenced the instant action in 2018 for a 2011 incident (see CPLR 215[3]). The burden then shifts to plaintiff to prove or raise an issue of fact that would otherwise allow them to commence the instant action past the statute of limitations (see City of Yonkers 115 AD3d 635, [2d Dept 2014]).

In opposition, plaintiff argues that defendants' motion for summary judgment should be denied for several reasons but most prominently that more discovery is needed for plaintiff to oppose the summary judgment motion. In submitting Racano's affidavit, plaintiff claims that defendants have shown that there is a genuine issue of material fact when it comes to Shapiro's employment status with NYP. Plaintiff submits in his affidavit in opposition that Shapiro may be an employee of NYP because he represented on LinkedIn, a professional social media site, that he was a staff photographer for NYP (NYSCEF Doc. No. 74 at 8). Further, in order for the movant to make a *prima facie* showing of entitlement to judgment as a matter of law, the party must provide evidentiary proof in admissible form to demonstrate the absence of a material issue of fact (JMD Holding Corp. v Congress, 795 NY2d 502 [2005]). Plaintiff contends that the unsigned independent contractor form submitted by Racano is insufficient to be deemed as admissible proof because Shapiro has not submitted an affidavit saying that unsigned contract belonged to him.

The relation back doctrine, codified in CPLR 203(b), allows a claim asserted against a defendant in a new or amended filing to relate back to claims previously asserted against a co-defendant if the defendants are "united in interest" and therefore allows the claimant to forego the statute of limitations bar (Buran v Coupal, 87 NY2d 173, 177-178 [1995]). The doctrine therefore

allows the courts a certain amount of discretion to identify cases where it may be justified to relax the standard of a statute of limitations obstacle. In order to do so, three conditions must be satisfied: (1) both claims must arise out of the same conduct, transaction or occurrence; (2) the new party is “united in interest” with the original defendant; and (3) the new party knew or should have known, but for mistake by plaintiff, that the action would have been brought against them as well (*id.*; quoting *Brock v Bua*, 83 AD2d 61, 69 [2d Dept 1981]). Defendants do not argue whether the claims arose out of the same conduct, transaction or occurrence nor whether they knew or should have known that the action could have been brought against them as well. Rather, defendants argue that defendants are not united in interest because they do not have an employer-employee relationship and, therefore, cannot be united in interest. In order for two parties to be considered “united in interest”, the interest of the parties in the matter at hand is such that the judgment against one party will affect the other party as well (*De Sanna v Rockefeller Center, Inc.*, 780 NYS2d 651, 653 [3d Dept 2004]; quoting *Prudential Ins Co v Stone*, 270 NY 154, 159 [1936]). As it pertains to this case, NYP is currently in possession of all evidence that could indicate whether the parties engaged in an employer-employee relationship and, therefore, whether they are united in interest or not.

Pursuant to CPLR 3212(f), if it appears from affidavits submitted in opposition to the motion that facts essential to justify opposition cannot be readily stated, then it is the nonmoving party’s burden to provide an evidentiary basis that further discovery might lead to relevant evidence or assert that discoverable evidence is in the exclusive knowledge and control of the moving party (*Suero-Sosa v Cardona*, 112 AD3d 706, 707-709 [2013]). As it stands, plaintiff submitted an affidavit along with his opposition that shows there is a genuine issue of material fact as it relates to the status of Shapiro’s employment. Plaintiff has also shown that the relevant evidence needed to successfully oppose the motion is in the exclusive control of NYP. By

submitting evidence in Racano's affidavit, which showed the potential existence of contracts and W-2 forms, defendant exhibited that they are in possession of discovery that is solely within their custody and control.

The Court finds that summary judgment is inappropriate based on this record, as there are outstanding issues related to Shapiro's relationship with NYP. An unsigned contract, labeling Shapiro as a freelancer, is insufficient to demonstrate the absence of a material fact as to Shapiro's employment relationship with NYP. Accordingly, it cannot be said, as a matter of law, that the parties are not "united in interest" such that this action was timely commenced against NYP.

II. Vicarious Liability

Defendants argue that NYP cannot be held liable for the acts or omissions of an independent contractor. Accordingly, defendants claim that plaintiff's claim against NYP cannot be maintained to the extent based on Shapiro's conduct, nor the conduct of another photographer named Spencer Burnett, because they were both independent contractors. Plaintiff's complaint also includes allegations related to Burnett, who was allegedly another independent contractor that worked for NYP and who had also reported Plaintiff's conduct to the police. Plaintiff proclaims that he believes Burnett did so at the request of NYP in order to corroborate Shapiro's testimony to the police. NYP asserts that due to the doctrine of res judicata, this lawsuit, as it pertains to vicarious liability, cannot be relitigated because it already had the opportunity to be fully litigated in federal court (Abraham v Hermitage Ins. Co., 47 AD3d 855 [2d Dept 2008]). In order to be able to relitigate the issue, the burden shifts to the non-moving party to prove that they lacked a full and fair opportunity to litigate the issue (*id.*). Defendants contend that since plaintiff failed to oppose defendants' motion for summary judgment in federal court as it related to Mr. Burnett, plaintiff lost his opportunity to fully and fairly litigate the issue and is, therefore, barred from arguing it again in a separate action.

Defendant further relies on Shapiro's deposition in the federal lawsuit as proof that he was an independent contractor for NYP and, as a result, NYP cannot be held liable for Shapiro's conduct. Defendants argue that the law in New York states that "the employer of an independent contractor is not liable for injury caused to a third party by an act of omission of an independent contractor or said contractor's employees" (Lazo v Mak's Trading Company, Inc., 199 AD2d 165 [1st Dept 1993]).

Plaintiff asserts that he was unable to fully and fairly litigate the issue of liability in federal court because all discoverable evidence, as it may relate to vicarious liability, is currently in the possession of NYP, who was not a defendant in the original federal action. Because all of the information related to whether Shapiro and Burnett were acting in the capacity of independent contractors or as employee staff photographers is in the exclusive control of defendant, plaintiff requests further discovery be allowed in order to establish whether a genuine dispute of material fact exists.

As stated previously, under CPLR 3212(f), a party may be permitted to obtain further discovery when it seems the facts supporting the non-movant's position exist but cannot be stated and are also in the exclusive control and knowledge of the moving party (see Baldascano v Bank of N.Y., 199 AD2d 184, 185 [1st Dep't 1993]). As such, where facts essential to justify opposition may exist, the court may deny the order or order a continuance to allow for the appropriate disclosures to be had. However, the mere hope and speculation that evidence might exist to successfully oppose the motion are insufficient grounds to deny the motion (see Williams v Spencer-Hall, 113 AD3d 759, 760-761 [2014]).

As it pertains to this case, plaintiff has satisfied his burden to show that it is beyond mere hope and speculation that these facts may exist. As previously stated, defendants have shown that

whatever discoverable evidence that may exist regarding the issue of Shapiro's employment status is currently in their possession and control.

With respect to Burnett, the Court finds that the principle of res judicata stands. Per the order entered by the Second Circuit, the rationale that required them to remand the malicious prosecution claim back to the SDNY as to Shapiro, does not apply to Burnett (NYSCEF Doc. No. 67). However, as set forth above, the Court is denying the motion for summary judgment without prejudice to the extent it concerns Shapiro's status as an alleged independent contractor, as discovery remains outstanding on that issue.

III. Punitive Damages

Defendants state that Plaintiff's claim for punitive damages should be dismissed because there is no evidence that NYP acted recklessly or with willful conduct as to Plaintiff's constitutional rights. In order for a claim for punitive damages to succeed, more than ordinary negligence must be established and a special focus is put on the recklessness and willful conduct exhibited by a party to merit the award of punitive damages (Munoz v Puretz, 301 AD2d 382 [1st Dept 2003]; see also Rose v Brown & Williamson, 53 AD3d 80 [1st Dept 2008]). Defendants argue that since the practices that plaintiff was a victim of are common in the field of journalism, plaintiff cannot establish more than mere negligence, if any at all, and therefore is not entitled to punitive damages. Defendants press forward that plaintiff's complaint was made in bad faith as it seeks to center its claim against NYP on the actions of Spencer Burnett when there has already been a conclusive ruling on the merits in the federal lawsuit as to Mr. Burnett.

Plaintiff maintains that there has not been a determination by a court on the merits as to Shapiro's employment status with NYP, which is the center focus of this action. As such there has never been a full opportunity to collect discovery related to Shapiro's employment status with NYP. Until plaintiff is able to collect discovery on this matter, there should be no determination

as to whether punitive damages are appropriate at this time. The Court agrees with plaintiff that a determination regarding punitive damages is inappropriate at this time, and that branch of the motion is also denied without prejudice

CONCLUSION

In conclusion, it is hereby ORDERED that the defendant's motion is denied without prejudice to allow for further discovery; and it is further

ORDERED that the parties are directed to appear for a remote status conference on Wednesday, September 9, 2020 at 9:30 am via Skype for Business.

This shall constitute the decision and order of the Court.

8/17/2020

DATE

CHECK ONE:

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CASE DISPOSED

☐

GRANTED

☒

DENIED

☐

SETTLE ORDER

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:



ALEXANDER M. TISCH, J.S.C.