Peterson v Columbia Univ.
2020 NY Slip Op 33262(U)
October 5, 2020
Supreme Court, New York County
Docket Number: 158789/2019
Judge: Kathryn E. Freed
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
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

----------X

INDEX NO. 158789/2019

ARA PETERSON,

MOTION SEQ. NO. 001

Plaintiff,

- v -

COLUMBIA UNIVERSITY, TRUSTEES OF COLUMBIA UNIVERSITY and THE COLUMBIA MAKERSPACE,

DECISION AND ORDER

Defendants.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this personal injury action, plaintiff Ara Peterson ("plaintiff") moves, pursuant to CPLR 3025 (b) and 203 (f), to amend the summons and complaint to add a cause of action for negligent hiring, training, retention and supervision pursuant to the relation back doctrine, and for an order deeming the proposed supplemental summons and amended complaint served, *nunc pro tunc*, by virtue of service of the within motion (Doc. 22). Defendants Columbia University, Trustees of Columbia University and The Columbia Makerspace ("defendants") oppose the motion and cross-move for, *inter alia*, dismissal of the complaint based on plaintiff's failure to provide outstanding discovery (Doc. 30). After a review of the parties' contentions, as well as the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On September 14, 2017, plaintiff, a student of Columbia University, was allegedly injured in the Seeley M. Mudd Engineering Building located at 500 W. 120th Street in Manhattan ("the premises") when Mohammed Haroun ("Haroun"), plaintiff's lab supervisor and an employee of defendants, asked plaintiff to help install a 60-pound air filtration unit in the ceiling, which ultimately collapsed on her when the installation was attempted (Docs. 1; 23 ¶ 9). In September 2019, plaintiff filed a summons and complaint against defendants, the owners/managers of the premises, alleging negligence (Doc. 1 ¶ 3, 14-20). Issue was joined by defendants in October 2019 (Doc. 2).

In November 2019, in response to a demand for statements, plaintiff produced a text message conversation between herself and an individual who she claimed was Haroun, wherein he allegedly admitted that the accident was his fault (Doc. 33). By notice for discovery and inspection dated December 3, 2019, defendants demanded a complete copy of all text messages exchanged between plaintiff and Haroun, to which plaintiff objected on the grounds that said demand was overbroad, unduly burdensome and not reasonably calculated to lead to admissible evidence (Docs. 34-35). On May 18, 2020, defendants served plaintiff with another notice for discovery and inspection, this time demanding "a complete copy of all texts exchanged between the plaintiff and . . . Haroun from [September 14, 2017] to [September 28, 2017]," as well as any text messages "which reference or mention the subject accident, the subject filtration unit, or any of . . . plaintiff's claimed injuries" (Doc. 36). Plaintiff objected to this discovery on similar grounds raised in her response to defendants' December 2019 demand (Doc. 37).

Plaintiff now moves to amend her summons and complaint to add a claim for negligent hiring, training, retention, and supervision, arguing that that the proposed amended claims has

merit because Haroun was not qualified to install the air filtration system (Doc. 23 ¶ 9). Plaintiff further asserts that defendants will not be prejudiced by the amendment because their depositions have not yet occurred, Haroun was clearly not qualified to install the air filtration unit, and this application was filed well within the applicable statute of limitations (Doc. 23 ¶ 9).

In opposition to the motion, defendants argue, *inter alia*, that plaintiff fails to allege that Haroun was not working within the scope of his employment when the incident occurred (Doc. 28 ¶ 4-5). However, in reply, plaintiff contends, in relevant part, that whether an employee's actions fall within the scope of his or her employment is not a requisite element for this cause of action (Doc. 40 ¶ 4).

Defendants cross-move for dismissal of the summons and complaint on the grounds that it was improper for plaintiff to provide selective portions of her text messages with Haroun regarding the incident, which they assert are material and necessary to the defense of this case (Doc. 31 ¶ 9). In the alternative, defendants request that this Court direct plaintiff to produce the requested text messages or risk preclusion from using the text messages at trial or dismissal of the complaint (Doc. 31 ¶ 11).

Plaintiff opposes the cross motion arguing, *inter alia*, that the "[d]efendants could have easily asked [Haroun] to produce the text messages they now seek"; that plaintiff no longer has the same phone and that she has nevertheless produced all discovery that she had in her possession (Doc. 41 ¶ 3).

In a reply affirmation, defendants represent that they have no control over Haroun, who is a former employee, and that they are therefore not responsible for producing any personal text messages exchanged between he and plaintiff that he may have in his possession (Doc. 44 ¶ 3).

LEGAL CONCLUSIONS:

Plaintiff's Motion to Amend the Summons and Complaint

Pursuant to CPLR 3025 (b), a party may amend a pleading at any time by leave of Court and leave shall be freely given upon such terms as may be just. Moreover, it is well-settled that "[o]n a motion for leave to amend a pleading, movant need not establish the merit of the proposed new allegations, but must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015] [internal quotation marks and citations omitted]; *see Cartagena v City of NY*, 2020 NY Slip Op 32002[U], 2020 NY Misc LEXIS 2935, *4 [Sup Ct, NY County 2020]).

"Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training" (*Quiroz v Zottola*, 96 AD3d 1035, 1037 [2d Dept 2012] [internal quotation marks and citations omitted]; *see Watson v Strack*, 5 AD3d 1067, 1068 [4th Dept 2004]; *Karoon v NY City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]; *Andrade v Hilton Worldwide Holdings, Inc.*, 2019 NY Slip Op 32206[U], 2019 NY Misc LEXIS 4114, *4 [Sup Ct, NY County 2019]). Thus, "[a]n employer may be liable for a claim of negligent hiring or supervision if an employee commits an 'independent act of negligence outside the scope of employment' and the employer 'was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act'" (*Lamb v Baker*, 152 AD3d 1230, 1231 [4th Dept 2017]), quoting *Seiden v Sonstein*, 127 AD3d 1158, 1160-1161 [2d Dept 2015]). This Court finds that plaintiff's failure to allege that Horoun's actions were independent of defendants' instruction or outside the scope of his employment warrants denial of

her motion (*see Med. Care of W. NY v Allstate Ins. Co.*, 175 AD3d 878, 880 [4th Dept 2019]; *see also Lamb v Baker*, 152 AD3d 1230, 1231 [4th Dept 2017]).

Defendants' Cross Motion to Compel Discovery

It is well-settled that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). "The words 'material and necessary' are 'liberally interpreted to require disclosure, upon request, of any facts bearing on the controversy which will assist in sharpening the issue for trial'" (*Cole v 376 W. Broadway LLC*, 2019 NY Slip Op 30442[U], 2019 NY Misc LEXIS 762, *3-4 [Sup Ct, NY County 2019], quoting *R.C. Church of the Good Shepherd v Tempco Sys.*, 202 AD2d 257, 257-258 [1st Dept 1994]).

The text messages that defendants seek, which are limited to two weeks after the accident and specific to any conversation between plaintiff and Haroun about the accident itself, the subject air filtration unit and the claimed injuries, are clearly discoverable (*see Simons v Petrarch LLC*, 2017 NY Slip Op 30457[U] [Sup Ct, NY County 2017]). Contrary to plaintiff's response to defendants' demands, the discovery sought is not "overly broad, vague, ambiguous, unduly burdensome and not reasonably calculated to lead to admissible evidence" (Doc. 37) (*see generally Gunzburg v Related Cos.*, 2012 NY Slip Op 30026[U], 2012 NY Misc LEXIS 61, *5-6 [Sup Ct, NY County 2012]). In an attorney affirmation submitted in opposition to the cross motion, plaintiff's counsel represents that "*[u]pon information and belief*, [p]laintiff no longer has the same phone [that] she did at the time of the accident" and that any "discovery she had in her possession" was already produced (Doc. 41 at 2 [emphasis added]). However, since plaintiff has not submitted an affidavit attesting to these facts, she is hereby directed to search for the subject text messages referenced in the May 2020 notice for discovery and inspection and provide them to defendants.

If plaintiff does not have the text messages demanded, or there are no text messages other than those already provided to defendants, plaintiff must furnish an affidavit stating as much, and detailing the circumstances and extent of her search.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion, pursuant to CPLR 3025 (b), to add a claim for negligent hiring, training, retention and supervision is denied; and it is further

ORDERED that defendants' motion to compel discovery is granted to the extent that, within 30 days of service of a copy of this order with notice of entry, plaintiff shall provide the outstanding discovery in accordance with this Court's decision and order; and it is further

ORDERED that, within 20 days after this order is uploaded to NYSCEF, defendants shall serve a copy of this order, with notice of entry, on plaintiff; and it is further

ORDERED that the parties are to appear for a discovery conference in Part 2 on January 11, 2021 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of this Court.

10/5/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE