Cascio v Conwood Corp.
2020 NY Slip Op 34319(U)
November 23, 2020
Supreme Court, Queens County
Docket Number: 713223/2017
Judge: Cheree A. Buggs

Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Present: **Hon. Chereé A. Buggs** **IAS PART 30**
Justice

----------X Index No.
GRACE CASCIO, 713223/2017

Plaintiff, Motion Date:
November 18, 2020

- against -

Motion Cal. No.:10

CONWOOD CORP., BODGAN OLEKSZYK and
LESLIE MCCURDY,

Motion Seq. No.: 6

Defendants.

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The following efile papers numbered 85-95, 97-103 submitted and considered on this motion by defendants Conwood Corp. and Bodgan Olekszyk seeking an Order pursuant to Civil Practice Law and Rules (CPLR) 3211 and 3212 dismissing plaintiff Grace Cascio's causes of action for punitive damages against defendants and negligent entrustment and hiring against defendant Conwood Corp.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 85-95
Affirmation in Opposition-Affidavits-Exhibits.....	EF 97-101
Reply Affirmation-Affidavits-Exhibits.....	EF 102-103

The defendants' motion is denied in its entirety.

The instant litigation arises from a three-car motor automobile accident which occurred on October 17, 2014 on Cross Bay Boulevard at or near its intersection with 156th Avenue, County of Queens, State of New York. Plaintiff Grace Cascio (hereinafter "Cascio") sued to recover damages for serious injuries to her person, initiating this lawsuit against defendants Conwood Corp. (hereinafter "Conwood"), Bogdan Olekszyk (hereinafter "Olekszyk") and Leslie McCurdy (hereinafter "McCurdy"). Discovery is complete. Cascio filed a Note of Issue on April 25, 2019. Conwood and Olekszyk previously moved for

summary judgment pursuant to CPLR 3212 on the issue of serious injury which was denied by the undersigned on November 26, 2019. Now, Conwood and Olekszyk move pursuant to CPLR 3211(a)(7) to dismiss and again under CPLR 3212 for summary judgment.

The motion is denied in its entirety. The branch of the motion seeking relief under CPLR 3211(a)(7) is denied since issue has been joined (*see* CPLR 3211[a][7]; *Hopper v McCollum*, 65 AD3d 669 [2d Dept 2009]). Movants did not assert any arguments in its papers related to dismissal of this matter pursuant to CPLR 3211 (*see Leon v Martinez,* 84 NY2d 83 [1994]; *Hecht v Andover Assocs. Mgmt. Corp., etal.*, 114 AD3d 638 [2d Dept 2014]). The Court finds that Conwood and Olekszyk actually seek relief under CPLR 3212. This motion has been filed more that 120 days from the date that the Note of Issue was filed on April 25, 2019, and movants failed to present good cause for the delay in making the motion (*see* CPLR §2004; 3212[a]; *Miceli v State Farm Mut. Auto Ins. Co.,* 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]; *Lennard v Khan*, 69 AD3d 812 [2d Dept 2010]; *Bejarano v City of New York*, 18 AD3d 681 [2d Dept 2005]; *Dettman v Page*, 18 AD3d 422 [2d Dept 2005]).

Also, this motion is a successive motion for summary judgment. "Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause. Evidence is not newly discovered simply because it was not submitted on the previous motion. Rather, the evidence that was not submitted in support of the previous motion must be used to establish facts that were not available to the party at the time it made its initial motion for summary judgment and which could not have been established through alternative evidentiary means" (*see Hillrich Holding Corp. v BMSL Mgmt., LLC. et al.*, 175 AD3d 474 [2d Dept 2019] [internal citations omitted]). Conwood and Olekszyk were on notice of Cascio's claims related to punitive damages and negligent entrustment very early in this litigation. Movants failed to establish that the evidence submitted in support of this motion for summary judgment was not available when they previously moved for summary judgment and that it could not have been submitted in the prior motion (*see Vinar v Litman*, 110 AD3d 867 [2d Dept 2013]; *Coccia v Liotti*, 101 AD3d 664 [2d Dept 2012]; *compare Alaimo v Mongelli*, 93 AD3d 742 [2d Dept 2012]).

Moreover, the motion is also denied on the merits. The facts of this case are similar to the facts in the matter *Quiroz v Zottola*, 96 AD3d 1035 (2d Dept 2012). In *Quiroz*, prior to the completion of discovery, defendant moved to dismiss plaintiff's cause of action alleging negligent hiring, management and supervision, and effectively, the demand made by plaintiff for punitive damages pursuant to CPLR 3211(a)(7). The injured plaintiff and his wife, suing derivatively initiated the action seeking to *inter alia* recover damages for personal injuries and negligent hiring, management and supervision, and asserting a demand for

punitive damages in the complaint, based upon allegations of gross negligence, which was also asserted in the verified bill of particulars. Plaintiff was driving a school bus which was involved in an accident with a garbage truck owned and operated by defendants. The Supreme Court granted defendant's motion. Plaintiffs moved to renew upon the deposition testimony of defendants' supervisors and the defendant driver's employment file, which were not in their possession at the time of the motion. The Supreme Court granted leave to renew, however, upon renewal it adhered to its prior determination. On appeal, the Appellate Division, Second Department reversed. The Second Department held "[w]hen a party moves to dismiss a complaint pursuant to CPLR 3211 (a)(7) the standard is whether the pleading states a cause of action, and in considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory... a motion to dismiss pursuant to CPLR (a)(7) must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it. The burden never shifts to the nonmoving party to rebut a defense asserted by the moving party." *Quiroz v Zottola*, 96 AD3d 1035 (2d Dept 2012 [internal citations omitted]). "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 of training. However, such a claim is permitted when punitive damages are sought based upon facts evincing gross negligence in the hiring or retention of an employee" (*Id*; *see also Coville v Ryder Truck Rental,* 30 AD3d 744 [3d Dept 2006]; *Talavera v Arbit*, 18 AD3d 738 [2d Dept 2005]; *Watson v Strack*, 5 AD3d 1067 [4th Dept 2004]; *Karoon v New York City Tr. Auth.*, 241 AD2d 323 [1st Dept 1997]). The Second Department found that defendants had received complaints that defendant's driver had driven the garbage truck, which weighed more than 10,000 pounds when it was empty, in a negligent and reckless fashion, and that the defendant driver had one or more violations on his driver's license prior to the subject accident, which defendants may have had knowledge of. Thus, the Second Department held that the Supreme Court improperly adhered to it original determination.

Here, evidence was presented that defendant owner Conwood should have known of Olekszyk's prior driving record, by inquiring of same prior to hiring him or by at least obtaining a copy of Olekszyk's driving abstract prior to hiring him. Conwood had a policy that drinking was not permitted while on the job, and Olekszyk violated the policy by drinking right before driving causing the accident. Testimony elicited from the parties demonstrated that at the time of the accident, Olekszyk smelled of alcohol and he begged Cascio and McCurdy not to contact the police. According to sworn testimony, Olekszyk attempted to flee and was pursued by police officers and arrested and cited for driving while intoxicated, to which he plead guilty. The owner of Conwood who testified, Augstyn Lech

(hereinafter "Lech") testified that he was responsible for hiring and training Olekszyk; that he was hired a few months prior to the accident; that the hiring process did not include a written application; it was his custom and practice to ask an applicant if they had alcohol or any other problems, and he could not recall if he asked Olekszyk that question. Lech also did not ask Olekszyk if he had any criminal history, and he testified that if he had known about Olekszyk's prior conviction for driving while intoxicated he would not have hired him. Further, Olekszyk was not required to submit to drug testing before or while working for Conwood, and Conwood did not obtain a copy of Olekszyk's driving abstract prior to hiring him, or perform any background check whatsoever. Olekszyk testified that he was not asked about his prior conviction or driving record prior to being offered the job by Lech. Therefore, plaintiff's claims of negligent hiring and punitive damages are permitted when punitive damages are sought based upon facts evincing gross negligence in the hiring or retention of Conwood's employee, Olekszyk, (*see Quiroz v Zottola*, 96 AD3d 1035 [2d Dept 2012]; *Coville v Ryder Truck Rental,* 30 AD3d 744 [3d Dept 2006]).

Therefore, defendants motion is denied in its entirety.

This constitutes the decision and Order of the Court.

Dated: November 23, 2020

Hon. Chereé A. Buggs, JSC