

Zaurova v Rafaq

2020 NY Slip Op 35746(U)

October 30, 2020

Supreme Court, Kings County

Docket Number: Index No. 518052/2019

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 518052/2019
Motion Date: 10-26-20
Mot. Seq. No.: 2

-----X
MARINA ZAUROVA,

Plaintiff,

-against-

DECISION/ORDER

MOHAMMAD RAFAQ, AMERIQUEST
TRANSPORTATION, NESTLE WATERS NORTH
AMERICA, INC. and JOSE Y. SANCHEZ

Defendants.
-----X

The following papers numbered 1 to 2 were read on this motion:

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	
Other.....	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, the defendants Ameriquest Transportation Services i/s/h/a Ameri Quest Transportation (hereinafter “Ameriquest”) and Nestle Waters North America, Inc. (hereinafter “Nestle”) move for an Order (a) pursuant to CPLR 3043(c), striking those portions of the plaintiff’s Verified Bill of Particulars alleging that defendant Nestle was negligent in the training of defendant Jose Y. Sanchez; (b) pursuant to CPLR 3211 (a) (7), dismissing plaintiff’s Complaint insofar as asserted against Ameriquest on the ground that it is not a proper party to the action; and (3) for such other and further relief as this Court deems just and proper.

This action arises out of a motor vehicle accident that occurred on November 1, 2018, at the intersection of East 7th Street and Lancaster Avenue in Brooklyn, NY. Plaintiff Marina

Zaurova alleges that she sustained personal injuries while a passenger in a 2008 Ford Sedan operated by co-defendant, Mohammad Rafaq, that came into contact with a 2016 Ford Box Truck (hereinafter the “truck”) operated by defendant Jose Y. Sanchez.

The motion in so far as it seeks an order striking the claim of negligent training against defendant Nestle is granted. Since the plaintiff did not allege the claim of negligent training in the complaint, the inclusion of the claim in the bill of particulars is improper. A bill of particulars may not be used to allege a new theory not originally asserted in the complaint (*see, Linker v. Cty. of Westchester*, 214 A.D.2d 652, 652, 625 N.Y.S.2d 289, 289; citing *Bryant v. City of New York*, 188 A.D.2d 446, 590 N.Y.S.2d 912; *Willinger v. Town of Greenburgh*, 169 A.D.2d 715, 564 N.Y.S.2d 466; *Mavroudis v. State Wide Ins. Co.*, 102 A.D.2d 864, 477 N.Y.S.2d 45). Moreover, since defendant Nestle admitted in its answer that Sanchez was its employee and that he was operating the truck within the scope of his employment at the time of the accident, Nestle admitted that it would be vicariously liable for any negligent act or omission of defendant Sanchez. In light of these admissions, plaintiff's claim against Nestle for negligent training is academic and subject to dismissal (*see Karoon v. New York City Tr. Auth.*, 241 A.D.2d 323, 659 N.Y.S.2d 27; *De La Cruz v. Dalmida*, 151 A.D.3d 563, 564, 54 N.Y.S.3d 279, 280).

With respect to defendants' motion to dismiss the claims against defendant Ameriquest pursuant to CPLR 3211(a)(7), the motion is denied without prejudice to defendants' right to move for summary judgment dismissing these claims. When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Foley v. D'Agostino*, 21

A.D.2d 60, 64–65, 248 N.Y.S.2d 121). 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”” (*Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d 720, quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26).

Unless a CPLR 3211 motion is converted into one for summary judgment pursuant to CPLR 3211(c), “affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint,” and such affidavits “are not to be examined for the purpose of determining whether there is evidentiary support for the pleading” (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d at 635, 636, 389 N.Y.S.2d 314, 357 N.E.2d 970; *see Nonnon v. City of New York*, 9 N.Y.3d at 827, 842 N.Y.S.2d 756, 874 N.E.2d 720).

Here, the plaintiff alleged in the complaint that Sanchez was an employee of Ameriquest and that he was working within the scope of his employment with Ameriquest at the time of the accident. Clearly, the plaintiff stated the cause of action against Ameriquest for vicarious liability. Defendants’ motion pursuant to CPLR 3211(a)(7) is premised almost primarily on an affidavit that was not part of the complaint. Since the Court is not converting the motion into one for summary judgment, the Court does not deem it appropriate to consider the affidavit at this junction. Accordingly, the motion insofar as it seeks to dismiss the claims asserted against Ameriquest is denied.

For the above reasons, it is hereby

ORDERED that the motion is **GRANTED** solely to the extent that the claims of negligent training alleged against defendant Nestle in plaintiff's bill of particulars is **GRANTED**. The motion is in all other respects **DENIED**.

This constitutes the decision and order of the Court.

Dated: October 30, 2020



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

[*4]