

Santana v City of New York

2022 NY Slip Op 32733(U)

April 20, 2022

Supreme Court, Kings County

Docket Number: Index No. 525338/2020

Judge: Consuelo Mallafre Melendez

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At an IAS Term, Part 20 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of April 2022.

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

-----X
THAVONE SANTANA AND ARRIE
SPENCER,
Plaintiff,

-against-

THE CITY OF NEW YORK, SGT. RITCHARD
BLAKE individually and in his official capacity,
and POLICE OFFICERS JOHN DOES #1-3,

Defendants.

Index No. 525338/2020

DECISION & ORDER
Motion Sequence 002

-----X
Hon. Consuelo Mallafre Melendez

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 1, 10, 11, 12 - 18, 24

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendant SGT. RITCHARD BLAKE moves to dismiss the Complaint pursuant to CPLR 3211(a)(1) on the grounds that documentary evidence in this case conclusively establishes a defense as a matter of law, and pursuant to CPLR 3211(a)(7) on the grounds the complaint fails to state a cause of action under which relief can be granted. *See* CPLR 3211(a)(1); CPLR 3211(a)(7).

Plaintiff, Thavone Santana, alleges on August 2, 2018 defendant, Sgt. Ritchard Blake, shot Mr. Santana in the face. Mr. Santana alleges he was walking in the early morning of August 2, 2018 on Livonia Avenue, Brooklyn to get a charger for his cellphone from a convenience store after leaving a friend’s house. On this walk Mr. Santana encountered Mr. Blake. They had met previously at the apartment building where Mr. Santana’s friend lived and where Mr. Blake’s girlfriend lived. After Mr. Santana was shot, Mr. Blake called for backup. The plaintiffs filed this complaint on December 17, 2020.

“A motion pursuant to CPLR 3211(a)(1) to dismiss based on documentary evidence may be appropriately granted where the documentary evidence utterly refutes the plaintiff’s factual allegations,

thereby conclusively establishing a defense as a matter of law.” See *Feldshteyn v. Brighton Beach 2012*, 153 A.D.3d 670 [2d Dept. 2017] [citing *Sabre Real Estate Group, LLC. v. Ghazvini*, 140 A.D.3d 724 [2d Dept. 2016][internal citations omitted]; *25-01 Newkirk Ave., LLC. v. Everest Nat. Ins. Co.*, 127 A.D.3d 850 [2d Dept. 2015]. “In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as ‘documentary evidence,’ it must be ‘unambiguous, authentic, and undeniable.’” See *Feldshteyn v. Brighton Beach 2012*, 153 A.D.3d 670 [2d Dept. 2017] [citing *Attias v. Costiera*, 120 A.D.3d 1281 [2d Dept. 2014] [internal citations omitted]; *Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d 713 [2d Dept. 2012].

Here, Movant fails to meet the documentary evidence standard for dismissal pursuant to CPLR 3211(a)(1). Movant submitted news articles of the grand jury decision and deposition testimonies from prior criminal proceedings, a photograph of an alleged weapon on plaintiff and a video. Neither news article unequivocally demonstrates a defense as a matter of law because they do not refute plaintiff’s factual allegations of movant’s use of force. Rather, neither news article can be found to be unambiguous and undeniable in determining movant was objectively reasonable in his use of force because they do not discuss reasonableness. See *Feldshteyn v. Brighton Beach 2012*, 153 A.D.3d 670 [2d Dept. 2017] [citing *Attias v. Costiera*, 120 A.D.3d 1281 [2d Dept. 2014] [internal citations omitted]; *Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d 713 [2d Dept. 2012]. Also, under CPLR 3211(a)(1) deposition testimonies are not considered documentary evidence. See *Attias v. Costiera*, 120 A.D.3d 1281 [2d Dept. 2014] [citing *Granada Condominium Ill. Assn. v. Palomino*, 78 A.D.3d 996, 997 [2d Dept. 2010]. Therefore, the deposition testimonies from the prior criminal proceeding cannot be used to refute plaintiff’s factual allegations and does not provide a defense as a matter of law.

Additionally, the photograph of the razor blade and the DNA report of the blood on the razor blade cannot be used as a defense as a matter of law because it does not undeniably refute plaintiff’s factual allegation of who was the initial aggressor. See *Feldshteyn v. Brighton Beach 2012*, 153 A.D.3d 670 [2d Dept. 2017] [citing *Attias v. Costiera*, 120 A.D.3d 1281 [2d Dept. 2014] [internal citations omitted]; *Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d 713 [2d Dept. 2012]. Similarly, the video does not unambiguously refute plaintiff’s factual allegations of excessive use of force or who was the initial aggressor. These issues of fact are for the fact finder to determine. The documentary evidence submitted does not “conclusively establish a defense to the asserted claims as a matter of law.” See *Minchala v. 829 Jefferson, LLC*, 177 A.D.3d 866 [2d Dept. 2019] [citing *Leon v. Martinez*, 84 N.Y.2d 83 [1994]; *Rodolico v. Rubin & Licatesi, P.C.*, 114 A.D.3d 923 [2d Dept. 2014] [citing *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314 [2002]. The motion to dismiss pursuant to CPLR 3211(a)(1) is denied.

Movant's motion pursuant to CPLR 3211(a)(7) must also be denied. "In considering a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." See *Green 333 Corp. v. RNL Life Science, Inc.*, 186 A.D.3d 1334 [2d Dept. 2020]; *Cortlandt St. Recovery Corp. v. Bonderman*, 31 N.Y.3d 30 [2018]; *Korinsky v. Rose*, 120 A.D.3d 1307 [2d Dept. 2014]. "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss." See *Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34 [2d Dept. 2006]. "[A] motion to dismiss pursuant to CPLR 3211(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.'" See *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682 [2d Dept. 2012] [citing *Sokol v. Leader*, 74 A.D.3d 1180 [2d Dept. 2010]]; *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 [1977].


Movant does not unequivocally show that the facts alleged in the complaint are not facts at all. "Indeed, a motion to dismiss pursuant to CPLR 3211 (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.'" *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 683 [2d Dept. 2012] [citing *Sokol v. Leader*, 74 A.D.3d 1180 [2d Dept. 2010]]; *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 [1977]. Rather, movant alleges his use of force in shooting the plaintiff was objectively reasonable because movant believed plaintiff was armed and was in imminent fear for his life. Movant asserts this theory, but this issue is disputed by the plaintiffs. A motion to dismiss under CPLR 3211(a)(7) cannot be granted when a significant dispute exists regarding a material fact. See *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682 [2d Dept. 2012] [citing *Sokol v. Leader*, 74 A.D.3d 1180 [2d Dept. 2010]]; *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 [1977].

The plaintiffs allege intentional infliction of emotional distress, negligence/failure to train, assault and battery, loss of services and punitive damages in their complaint. Movant alleges these causes of actions are unsubstantiated because plaintiffs have not proved them. However, on a motion to dismiss the court must solely interpret whether there are plausible causes of actions based on the complaint; not whether the causes of actions have been proven. See *Moskowitz v. Masliansky*, 198 A.D.3d 637 [2d Dept. 2021]; *Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34 [2d Dept. 2006]. The court finds the plaintiffs have properly asserted these claims in their complaint and movant has not demonstrated the plaintiffs have failed to state a cause of action.

Accordingly, Movant's motion to dismiss pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is Denied.

This constitutes the decision and order of the court.

ENTER.



Hon. Consuelo Mallafre Melendez
J. S. C.