

Pistocco v HHM Hospitality
2022 NY Slip Op 34203(U)
December 12, 2022
Supreme Court, New York County
Docket Number: Index No. 152823/2022
Judge: Dakota D. Ramseur
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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<p>JAMES PISTOCCO,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>HHM HOSPITALITY, HCIN CHELSEA GRAND EAST ASSOCIATES, LLC, CINDAT HERSHA OWNER JV ASSOCIATES, LLC, HCIN MAIDEN HOTEL ASSOCIATES, LLC, HAMPTON INN MANHATTAN CHELSEA, EHRlich PEST CONTROL</p> <p style="text-align: center;">Defendants.</p> <p>-----X</p>	<p>INDEX NO. <u>152823/2022</u></p> <p>MOTION DATE <u>09/08/2022</u></p> <p>MOTION SEQ. NO. <u>001</u></p>
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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for

DISMISS

Plaintiff, James Pistocco (plaintiff), commenced this action seeking damages stemming from injuries he allegedly sustained on April 7 through April 8, 2019, from bed bugs while he was a guest at the Hampton Inn Manhattan Chelsea, located in the County, City, and State of New York (the hotel). Co-defendant, Ehrlich Pest Control (Ehrlich), now moves pursuant to CPLR 3211(a)(7) to dismiss the complaint. The motion is opposed. For the following reasons, the motion is granted in part.

According to the complaint, plaintiff was injured while he was a guest at the hotel, which was owned by co-defendants HHM Hospitality, HCIN Chelsea Grand East Associates, LLC Cindat Hersha Owner JV Associates, LLC, HCIN Maiden Hotel Associates, LLC, and Hampton Inn Manhattan Chelsea (Hotel defendants). The Hotel defendants contracted with co-defendant Ehrlich, a pest control service company, to provide pest control services at the hotel. Plaintiff claims that Ehrlich failed to properly remediate all bed bug conditions at the hotel, and as result, plaintiff was caused to be bitten by bed bugs and injured.

In support of its motion, Ehrlich argues that plaintiff's eighth cause of action contains three separate claims: negligence, breach of express warranty, and breach of implied warranty of fitness. Ehrlich contends that there is no cause of action for breach of a warranty for the performance of a service. Ehrlich further argues that plaintiff fails to state a cause of action for breach of express or implied warranty, as the complaint fails to set forth the terms of the alleged warranty with sufficient particularity to give fair notice thereof. Ehrlich further argues that plaintiff's claim for negligence should also be dismissed because the plaintiff only pleads bare legal conclusions, fails to plead that Ehrlich breached its duty, and that the alleged breach

proximately caused plaintiff's injury. Ehrlich next argues that plaintiff's seventh and tenth causes of action for punitive damages should also be dismissed, because plaintiff failed to allege that Ehrlich's actions were egregious or reckless. Ehrlich further argues that plaintiff's second cause of action for intentional infliction of emotional distress and fifth cause of action for fraudulent concealment are time barred.¹

In opposition, plaintiff first argues that Ehrlich's pre-answer motion to dismiss should be denied as untimely, because it was filed on August 15, 2022, four days after the time it was required to be filed pursuant to CPLR 2103. Plaintiff further contends that his eighth cause of action is for negligent hiring, retention, and supervision, not for breach of warranty. Plaintiff further argues that

The Court initially notes that plaintiff fails to identify which defendants the following claims are asserted against: negligence (first cause of action), intentional infliction of emotional distress (second cause of action), negligent infliction of emotional distress (third cause of action), nuisance (fourth cause of action), fraudulent concealment (fifth cause of action), deceptive trade practices (sixth cause of action), punitive damages (seventh cause of action), and negligent hiring/retention of Ehrlich (ninth cause of action). As Ehrlich states, the above claims are directed to and instead refers to "Defendants" without distinction. causing further confusion, plaintiff's opposition argues that the fourth, sixth, and ninth causes of action are directed at the hotel defendants and not to Ehrlich, but that other causes of action are directed to all defendants. Accordingly, the parties shall appear at a pre-answer conference to address the contents of the complaint.

At the outset, plaintiff's request that the motion be denied on the basis that it is untimely is denied. Ehrlich demonstrates that plaintiff's counsel received the notice of motion and supporting papers on August 11, 2022 and August 12, 2022, but due to human error, the motion was filed in Kings County and not New York County. The motion was eventually filed in New York County on August 15, 2022. The Court finds that that any delay was de minimis and that plaintiff was not prejudiced by the delay.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPhanna Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). Although factual allegations in a pleading may be accorded favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration (*see Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

Plaintiff's eighth cause of action alleges that Ehrlich failed to hire, retain and supervise proper licensed exterminators who were knowledgeable as to the bed bug remediation procedures and protocols. "A cause of action for negligent hiring and retention requires allegations that an employer knew of its employee's harmful propensities, that it failed to take

¹ Ehrlich withdraws the branch of its motion to dismiss plaintiff's claim for fifth cause of action for fraudulent concealment.

necessary action, and that this failure caused damage to others” (*Waterbury v. New York City Ballet, Inc.*, 205 AD3d 154, 160, 168 [1st Dept 2022]; *O’Neil v. Roman Cath. Diocese of Brooklyn*, 98 AD3d 485, 487 [2d Dept 2012]). Here, plaintiff’s claim for negligent hiring fails because the complaint fails to allege the propensity element. There is no indication from the allegations that Ehrlich had actual or constructive knowledge of its employee’s harmful propensity. Accordingly, plaintiff’s claim for negligent hiring, supervision, and retention is dismissed as against Ehrlich.

“To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom” (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). Here, plaintiff states a claim for negligence. While the first cause of action does not specifically state a negligence claim against Ehrlich, the allegations contained in the eighth cause of action—that Ehrlich failed to properly service the subject hotel with the appropriate techniques to remediate the bed bug condition that ultimately caused plaintiff’s injuries—are sufficient to state a claim for negligence.

As for the third cause of action for negligent infliction of emotional distress, Ehrlich does not argue that plaintiff failed to state a claim, but rather that the claim was asserted against the Hotel defendants and not Ehrlich. Since Ehrlich does not contend that the allegations concerning the claim for negligent infliction of emotional distress fails to state a cause of action, the Court declines that claim at this time.

Plaintiff’s second cause of action for intentional infliction of emotional distress and his seventh and tenth claim for punitive damages are dismissed as against Ehrlich as unopposed. The remainder of plaintiff’s claims, the fourth cause of action for nuisance and the sixth cause of action made under deceptive trade practice under the provisions of the General Business Law § 349, are asserted against the Hotel defendants. Accordingly, plaintiff’s fourth and sixth causes of action are not dismissed.

Accordingly, it is hereby

ORDERED that Ehrlich’s motion to dismiss pursuant to CPLR 3211(a)(7) is granted in part, and plaintiff’s claims for negligent hiring, supervision, and retention, intentional infliction of emotional distress and for punitive damages are dismissed as against Ehrlich; and it is further

ORDERED that Ehrlich shall file and serve its answer within thirty (30) days of entry of this decision and order; and it is further

ORDERED that the parties shall appear for a pre-answer conference on December 20, 2022 at 10:00 a.m.; and it is further

ORDERED that Ehrlich shall serve a copy of this decision and order within ten (10) days of entry.

This constitutes the decision and order of the Court.

12/12/2022
DATE

BR
DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE