

Kai v Douglas Elliman, LLC
2023 NY Slip Op 30271(U)
January 17, 2023
Supreme Court, New York County
Docket Number: Index No. 160512/2020
Judge: James G. Clynnes
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

-----X

THAI Y. KAI,

Plaintiff,

- v -

DOUGLAS ELLIMAN, LLC, DOUGLAS ELLIMAN
PROPERTY MANAGEMENT

Defendant.

INDEX NO. 160512/2020

MOTION DATE 01/25/2021,
03/04/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON
MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 15,
16, 17, 18, 19, 22, 23, 26, 27, 28, 29, 30, 53

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38,
39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 54

were read on this motion to/for DISMISS

Upon the foregoing documents and following oral argument, Defendants' motions to
dismiss pursuant to CPLR 3211 (a) (5) on the grounds that the action is time barred and CPLR
3211 (a) (7), dismissing the Complaint with prejudice as Plaintiff has failed to state a cause of
action upon which relief can be granted (Motion Sequence #1) and Defendants' motion to dismiss
pursuant to CPLR 3211 (a) (5), (a) (8), and (e), on the grounds that Plaintiff failed to properly
commence the action (Motion Sequence #2) are consolidated for decision and decided as follows:

Plaintiff commenced this action by filing a summons and complaint on December 4, 2020
alleging he sustained serious injuries as a result of a motor vehicle accident between Plaintiff's
vehicle and a vehicle owned and operated by Dawn M. Mazzoni within the scope of her
employment with Defendants, Douglas Elliman, LLC and Douglas Elliman Property Management
(Defendants).

MOTION SEQUENCE NUMBER 001*CPLR 3211 (a) (5) statute of limitations*

Defendants contend that Plaintiff cannot recover for his alleged injuries because he filed his original summons and complaint on December 4, 2020, after the three-year statute of limitations had expired. Defendants request that the Court dismiss the complaint in its entirety as time barred.

Plaintiff contends that the three-year statute of limitations was tolled by Governor Cuomo's Executive Order (EO) 202.8 issued on March 20, 2020 in response to the COVID-19 pandemic, which tolled commencement, filing or service deadlines of legal actions during the pandemic. EO 202.8 was subsequently extended up to and until November 3, 2020 by a series of subsequent executive orders. Plaintiff argues that between March 20, 2020 and November 3, 2020, 229 days passed and therefore, the tolling period extended Plaintiff's deadline to commence an action until June 28, 2021.

Defendants reply that EO 202.67 superseded all prior EOs and stated that the time period between March 20, 2020 and November 3, 2020 be treated as a "temporary suspension," and therefore was not a toll. Defendants note that the argument regarding temporary suspension versus tolling surfaced during the September 11, 2001 terrorist attacks and Hurricane Sandy in 2012, and that the courts rejected the "toll" argument and held that the executive orders served as temporary suspensions in those instances. Defendants contend that the few courts that have faced this issue during the pandemic have determined that the EOs granted a temporary extension and not a toll.

Discussion of statute of limitations

The statute of limitations for a personal injury action is three years (CPLR 214). Although unsettled at the time the parties were filing their submissions, it is now established that the

Governor was empowered to toll the statute of limitations (*Murphy v Harris*, 210 AD3d 410, 2022 NY Slip Op 06086 [1st Dept 2022]; *Brash v Richards*, 195 AD3d 582 [2d Dept 2021]; *Foy v State of NY*, 71 Misc 3d 605 [Ct Cl 2021]). A toll suspends the running of the applicable period of limitation for a finite time period, and the period of the toll is excluded from the calculation of the time in which the claimant can commence an action (*Foy v State of NY*, 71 Misc 3d 605, 606 [Ct Cl 2021], quoting *Chavez v Occidental Chem. Corp.*, 35 NY3d 492 [2020]). The amount of time covered by the original executive order and all extensions is 228 days.

Here, regardless of how the precise calculation to include the toll is measured, Plaintiff accomplished service on December 8, 2020, less than one month after the statute of limitations without any tolled time. Given the Executive Order and extensions, if the minimum tolling period of 228 days is added to March 20, 2020, Plaintiff is well within the timeframe to serve Defendants. As such, this Court finds that the EOs provided for tolls, such tolls were authorized, and therefore the statute of limitations had not lapsed when Defendants were served on December 8, 2020.

CPLR 3211 (a) (7)

Defendants also contend that under CPLR 3211 (a) (7), the Complaint must be dismissed for failure to state a claim upon which relief may be granted because Plaintiff failed to plead the essential elements of knowledge or notice on behalf of the Defendant and failed to plead the propensity of Dawn M. Mazzoni to operate a vehicle in a negligent manner. In opposition, Plaintiff contends that pursuant to CPLR 3025 (a), Plaintiff amended their complaint to adjust their pleadings.

An essential element of a cause of action for negligent hiring and retention is that the employer knew, or should have known, of the employee's propensity for the sort of conduct which

caused the injury (*Sheila C. v Povich*, 11 AD3d 120, 122 [1st Dept 2004]). If a plaintiff's complaint is devoid of any allegations concerning this essential element, or the identity of the employees involved, and, in the face of a defendant's motion to dismiss the complaint, a plaintiff may opt to make additional submissions to cure these deficiencies or to establish that additional discovery was necessary (*Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]; *Sheila C. v Povich*, 11 AD3d 120 [1st Dept 2004]).

Here, Plaintiff's original complaint did not provide the specific elements necessary for a cause of action for negligent hiring. However, Plaintiff filed an Amended Complaint, remedying any defects in the complaint. Therefore, Defendants' motion to dismiss under CPLR 3211 (a) (7) is denied.

MOTION SEQUENCE NUMBER 002

Defendants also move to dismiss the Amended Complaint pursuant to CPLR 3211 (a) (5), on the grounds that the action is time barred, CPLR 3211 (a) (8), on the grounds that the Court lacks jurisdiction as Plaintiff has failed to properly serve the Defendants, and CPLR 3211 (e) on the grounds that Plaintiff has failed to properly commence the action. Alternatively, Defendants seek dismissal of the Second Cause of Action in the Amended Complaint (negligent hiring and retention).

CPLR 3211 (a) (5)

Defendants contend that as this is an action to recover for personal injuries, Plaintiff had three years from the date of the accident to commence the action. Plaintiff filed the original Complaint on December 4, 2020 and the Amended Complaint on February 19, 2021. Defendants contend that the Plaintiff's Amended Complaint is time barred by the statute of limitations.

Due to the COVID-19 pandemic, Governor Cuomo set forth an Executive Order, with several amendments tolling the statute of limitations during the period of March 20, 2020 and November 3, 2020. As discussed above, Governor Cuomo's Executive Order, and amendments, provided for tolls, such tolls were authorized, and therefore the statute of limitations had not lapsed when Plaintiff commenced this action.

CPLR 3211 (a) (8)

Defendants contend that the Amended Complaint must be dismissed because Plaintiff failed to serve a supplemental summons and as such service was improper and the Court lacks jurisdiction. In opposition, Plaintiff contends that there is no need for a supplemental summons when serving an Amended Complaint because the Amended Complaint did not change or add additional parties. Plaintiff goes on to argue that Defendants do not contest service of the original summons and complaint and therefore there is no need for a supplemental summons.

Where the party defendant is already in the action there is no need, generally, to lay a basis for personal jurisdiction anew or to give any notice other than that which is obtained through the proceedings brought to add the new claim whether on behalf of a new party or not. Thus, the practice statutes before CPLR were unequivocal in requiring the service of such original process only on newly added defendants, and CPLR refers to service only on, and not by, the newly added party (*Patrician Plastic Corp. v Bernadel Realty Corp.*, 25 NY2d 599, 607 [1970])

In this case, Defendants were a party to the original action. The service of a summons together with the amended pleadings then was not necessary to bring Defendants within the Court's jurisdiction. Despite the supplemental summons never having been sent, jurisdiction over Defendants had already been obtained. As such, Defendants' motion to dismiss on the grounds

that the Court lacks jurisdiction is denied. In the alternative, Defendants contend that if the Court does not dismiss the Amended Complaint in its entirety, Plaintiff's Second Cause of Action for negligent hiring, negligent retention and negligent training, in Plaintiff's Amended Complaint must be dismissed.

When a plaintiff alleges a claim that arises while an employee is acting within the scope of his/her employment, a plaintiff is precluded from also claiming negligent hiring, training, and supervision (*see Leftenant v City of NY*, 70 AD3d 596 [1st Dept 2010] [First Department held that since the officers were acting within the scope of their employment, the claim of negligent hiring, training, and supervision must also fail]; *see also Moran v County of Suffolk*, 189 AD3d 1219, 1219 [2d Dept 2020] [Second Department held that plaintiff failed to state a cognizable cause of action under negligent hiring or training against the County because plaintiff alleged that the shooting occurred while the officer was acting within the scope of his employment]). Here, Plaintiff alleges that the accident occurred while the employee driver was acting within the scope of her employment. Thus, Plaintiff has failed to state a cognizable cause of action for negligent hiring or training. As such, Defendants' motion to dismiss Plaintiff's Cause of Action for negligent hiring, retention, supervision or training claim is granted.

Accordingly, it is

ORDERED that Defendants' motion to dismiss pursuant to CPLR 3211 (a) (5) on the grounds that the action is time barred and to dismiss pursuant to CPLR 3211 (a) (7) the Complaint with prejudice on the grounds that Plaintiff has failed to state a cause of action upon which relief can be granted (Motion Sequence 001) is denied and it is further

ORDERED that Defendants' motion to dismiss the Amended Complaint pursuant to CPLR 3211 (a) (5), (a) (8), and (e), is granted only to the extent that the Second Cause of Action

of the Amended Complaint (Negligent Hiring) is dismissed and is otherwise denied; and it is further

ORDERED that within 30 days of entry, Movants shall serve a copy of this Decision and Order upon Plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

1/17/2023

DATE

James G. Clynes
JAMES G. CLYNES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE