

Tian Yun Chen v 155 Ross St. LLC

2023 NY Slip Op 31143(U)

March 27, 2023

Supreme Court, New York County

Docket Number: 160058/2021

Judge: James G. Clynes

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JAMES G. CLYNES PART **22M**

Justice

-----X

TIAN YUN CHEN,

Plaintiff,

- v -

155 ROSS STREET LLC, HERMAN EQUITIES LLC,
BINYAN LORIMER LLC, CHEMDU TOIVU LLC, SHEIRIS
LYEHUDA,

Defendant.

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INDEX NO. 160058/2021
MOTION DATE 08/05/2022
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISSAL.

In this personal injury action, defendants 155 Ross Street LLC, Herman Equities LLC, Binyan Lorimer LLC and Chemdu Toivu (movants or moving defendants) move, pursuant to CPLR 3211 (a) (7) and CPLR 3013, seeking dismissal of the complaint for failure to state a cause of action and lack of particularity. Defendant Sheiris Lyehuda is not seeking dismissal herein.

On November 26, 2018, plaintiff was hit along with other pedestrians by a motor vehicle operated by Henry Herman (who is not a party to this case) near the intersection of Forsyth Street and Canal Street in New York County.

The Complaint alleges that, at the time of the accident, the vehicle was co-owned by defendant Sheiris Lyehuda (Lyehuda) and Henry Herman (Herman).

Herman allegedly operated the vehicle during the course of his employment "with the knowledge, permission and consent, express and/or implied of" and "in furtherance of the business of" 155 Ross Street LLC, Henry Equities LLC, Binyan Lorimer LLC, Chemdu Toivu, LLC and Lyehuda (Complaint at 2-6).

The Complaint further alleges that plaintiff's serious injuries were caused by the "negligence, recklessness, and carelessness of the defendants, in the ownership, operation, management, maintenance and control" of the vehicle (Complaint, ¶ 78).

I. Background

At the outset, the court notes that Herman allegedly struck several persons who in turn filed separate personal injury/wrongful death actions arising out of the underlying accident.

Specifically, on April 14, 2022, this court issued a decision and order in *Tian Yun Chen v Henry Herman* (index No. 451158/2019, NYSCEF Doc. No. 60; hereinafter, Action #3) indicating that Chen's action against Herman is one of four actions against him arising from the same accident which are currently joined for discovery and trial, and which are expected to be joined with this action and another action (index No. 160386/2021) against these defendants being sued vicariously, arising from that accident.¹

Notably, the court's (Hon. Adam Silvera) February 5, 2020 decision and order in Action #3 (NYSCEF Doc. No. 31) granted plaintiff's motion for summary judgment against Herman establishing that plaintiff was:

“a lawful pedestrian on a sidewalk when defendant's vehicle backed up onto sidewalk striking plaintiff. Defendant has not provided a non-negligent excuse of the incident. As such, summary judgment is granted as to liability in plaintiff's favor and against defendant”

Furthermore, the Appellate Division, First Department issued an order pertaining to Action #4 affirming an order of the court (Hon. Lisa S. Headley)² dated August 16, 2021 denying the motion of defendants Binyan Lorimer LLC and Herman Equities LLC to dismiss plaintiffs' complaint as against them (*Hong Jin v Herman*, 208 AD3d 1102 [1st Dept 2022]). In the underlying decision, the court found that:

“[a]ccepting the facts as alleged by plaintiffs as true . . . plaintiffs have stated a cause of action in vicarious liability as against the moving defendants in as much as they allege that defendant Henry Herman was acting within the scope of his employment with defendant Binyan Lorimer, LLC and/or Herman Equities, LLC, at the time of the alleged accident”

II. Discussion

A. Contentions

Moving defendants argue that plaintiff cannot articulate a cause of action against them or specify any alternative theory of liability. Movants state that plaintiff engaged in improper group pleading.

¹ (Including index Nos. 161972/2018 [Action #1]; 450823/2019 [Action #2]; 451158/2019 [Action #3] and 155675/2019 [Action #4]). See Action #3, NYSCEF Doc. No. 60 and Action #4, NYSCEF Doc. No. 59).

² Action #4, NYSCEF Doc. No. 76.

In particular, movants argue that plaintiff falls short on facts supporting any cause of action against them; that plaintiff fails to state any facts specific to them and relies solely on bareboned, improper and conclusory group allegations set forth in his Complaint. Movants assert that plaintiff fails to put them on notice of the basis of the suit against them.

They point out that plaintiff concedes that movants did not own the vehicle, which was allegedly owned by Herman and Lyehuda. They argue that plaintiff concedes that Herman was operating the vehicle which struck plaintiff. Movants also stress that plaintiff's statement about their negligence is scant.

Movants argue that plaintiff did not offer any additional information concerning any theory of liability or articulate any basis for liability as to each of the movants. Instead, they stress that the Complaint merely refers to the defendants as a group without providing any notice to each of the movants as to why they are on the caption.

Moving defendants rely on CPLR 3013 and case law in support of their argument that a complaint containing indefinite and conclusory allegations without factual specificity warrants dismissal, pursuant to CPLR 3211 (a) (7) even in spite of New York's generally liberal pleading standards.

They claim that the Complaint only includes bald conclusions and group accusations about movants being domestic limited liability companies organized in the State of New York and their employment or business relation to Herman. While they argue that, even if they were put on notice of plaintiff's grievance against them, plaintiff fails to provide the material elements of a cause of action or even identify one.

Movants surmise for the sake of argument that plaintiff intends to assert a general theory of negligence or gross negligence against all defendants. Yet, they point out that plaintiff concedes that movants never owned the vehicle and that he never alleged that movants operated, managed, maintained or controlled the vehicle. Neither does plaintiff allege a duty owed to him by any of the movants, or breach of any duty and injury resulting from any action or omission of any of the defendants herein. They highlight that not only does the plaintiff rely on an impermissible group pleading but he fails to identify a single fact to point to any tortious conduct by either of them or a single specific fact that would support any unidentified alternative basis of liability.

Finally, they argue that plaintiff should not be afforded the opportunity to replead as years of discovery in the actions related to this matter have not produced a single factual basis to impose liability on any of the movants.

In opposition, plaintiff points out that he first initiated an action against Herman under index No. 451158/2019³ in which plaintiff was granted summary judgment against Herman, as operator and registered owner of the vehicle on the issue of liability. He relates that that action was joined for discovery and trial with other actions arising out of the same occurrence.

Plaintiff then argues that he initiated the underlying action against moving defendants alleging that Herman was in the course of his employment with one or more of these entities at the time of the accident, rendering them vicariously liable for his negligence.

Third, plaintiff refers the court to *Hong Jin et al. v Henry Herman et al.* (index No. 155675/2019),⁴ where he states plaintiffs brought suit not only against Herman but also various entities they believed to be vicariously liable based on the contention that Herman was in the course of his employment for one or more of these entities at the time of the accident. Namely, plaintiff highlights that, on August 16, 2021, the court denied defendants Herman Equities, LLC and Binyan Lorimer LLC's motion to dismiss, pursuant to CPLR 3211 (a) (7). Plaintiff further highlights that the Appellate Division, First Department affirmed the decision and held that the Complaint stated a valid cause of action for vicarious liability based on the allegations that Herman was acting within the scope of his employment at the time of the accident (*Hong Jin v Herman*, 208 AD3d 1102).

Plaintiff argues that that finding is dispositive in the underlying action against named defendants and that the same allegations are equally applicable to 155 Ross Street, LLC and Chemdu Toivu, LLC. Furthermore, plaintiff states that the underlying Complaint is far more specific on its face that the *Hong Jin* complaint in its factual allegations against these defendants notwithstanding defendants' assertions to the contrary.

Plaintiff alleges that he contacted opposing counsel to request the withdrawal of moving defendants' motion after the Appellate Division's decision was issued as he argued that it rendered the motion moot. However, he claims that he did not receive a response.

³ Action #3

⁴ Action #4

Plaintiff stresses that the underlying motion is boilerplate and overlooks, intentionally or otherwise, the specific allegations in the Complaint as to defendants' vicarious liability based on employment and/or agency.

Plaintiff refers the court to the Complaint by quoting paragraphs 14 through 57 as they relate to the moving defendants to purportedly highlight how the basis for liability for each of the defendants is specifically particularized.

Next, plaintiff relies on CPLR 3026 and *Leon v Martinez* as it relates to CPLR 3211 (a) (7) for the proposition that pleadings should be liberally construed, that facts as alleged in the complaint should be accepted as true and that the court should give plaintiff the benefit every favorable inference (84 NY2d 83 [1994]). Specifically, plaintiff points out that, in *Leon*, the court noted that the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one. Plaintiff stresses that case law demonstrates that the court's function is to determine whether factual allegations fit within any cognizable legal theory without regard to whether allegations can be established.

Plaintiff argues that the Complaint clearly articulates that the liability of each of the defendants arises out of the operation, maintenance, and control of the vehicle in the course of Herman's agency or employment with any or all said defendants. Plaintiff relies on the doctrine of respondeat superior for the proposition that it will render an employer vicariously liable for torts committed by an employee or agent acting in furtherance of the employer's business and within the scope of his or her employment or agency.

Plaintiff stresses that Herman had a relationship to each of the defendants in this action on the accident date. Plaintiff argues that there is a factual documentary predicate for the relationship between Herman and these defendants. However, no deposition has been conducted in the *Chen* or *Hong Jin* actions to date. Accordingly, plaintiff states that moving defendants are in the best position to know their relationship with Herman. Furthermore, plaintiff underscores that Herman is the sole managing member of Herman Equities LLC and a managing member of 155 Ross Street LLC, as shown in the documents submitted in opposition (see NYSCEF Doc. No. 23).

In reply, movants argue that plaintiff's opposition boils down to arguments that other plaintiffs' pleadings against a subset of the defendants here were found to be sufficient, and the

plaintiff⁵ has essentially copy/pasted the same allegations over and over and substituted each defendant's name.

Moving defendants argue that the question of the sufficiency of other parties' pleadings against some of the defendants has no relevance here as the instant motion. They stress that the instant motion concerns the plaintiff's pleadings and no other.

They assert that plaintiff does not attempt to argue any particular legal theory or cite any authority in support of his proposition. They reiterate that allegations against defendants as a group are insufficient; that plaintiff's contradictory and implausible rote repetition of the same allegations against each of the movants fails to remedy defects of the group pleadings and simply highlights the contradictory and speculative nature of the allegations.

Finally, movants' counsel addresses plaintiff's assertion that he refused to consent to an adjournment. Counsel asserts that plaintiff's counsel's allegations are misleading. He states that he consented to a lengthy adjournment as a matter of course (see NYSCEF Doc. No. 15) but that he did not have the authority to consent to plaintiff's extraordinary request for an additional 60-day adjournment, which he states that plaintiff requested in order to be able to cite the First Department's decision concerning a separate pleading in support of his specious argument that the decision is dispositive here.

B. Analysis

On a motion to dismiss, pursuant to CPLR 3211 (a) (7), the movant has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*Leon*, 84 NY2d at 87-88; *Han v New York City Tr. Auth.*, 203 AD3d 511, 512 [1st Dept 2022]).

Generally, a complaint will be deemed sufficiently particularized where there is substantial compliance with CPLR 3013 (*Foley v D'Agostino*, 21 AD2d 60, 62 [1st Dept 1964]). CPLR 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." As such, a cause of action will be dismissed if the allegations are not sufficiently particular to give the court and parties notice of the subject matter of the controversy (3 Weinstein-Korn-Miller, CPLR 3013.30).

⁵ Although movants' counsel refers to "plaintiffs" in his brief, it appears from the context that he meant to refer to Tian Yun Chen's counsel's opposition papers and write "plaintiff" in the singular.

The question is whether plaintiff's pleading states a cause of action assuming the court accepts the facts alleged by the plaintiff as true and according him the benefit of every favorable inference (*Leon*, 84 NY2d at 87-88).

Here, the court finds that plaintiff has stated a cause of action in vicarious liability as he alleges that Herman was acting within the scope of his employment with moving defendants at the time of the accident. Based on the foregoing, the moving defendants' motion to dismiss the action is denied.

Accordingly, it is

ORDERED that the motion by defendants 155 Ross Street LLC, Herman Equities LLC, Binyan Lorimer LLC and Chemdu Toivu to dismiss the complaint is denied; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, defendants 155 Ross Street LLC, Herman Equities LLC, Binyan Lorimer LLC and Chemdu Toivu shall serve a copy of this decision and order upon the plaintiff and remaining defendant with notice of entry.

This constitutes the Decision and Order of the Court.

3/27/2023
DATE


JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE