

Cruzado v Samadder
2023 NY Slip Op 31640(U)
May 15, 2023
Supreme Court, New York County
Docket Number: Index No. 153187/2021
Judge: Denise M. Dominguez
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as to Transit and Rabinowitz. Plaintiff's complaint does not state a third cause of action and the fourth cause of action alleges Respondent Superior as to Transit and Rabinowitz.

Transit now move pre-note of issue to dismiss the second cause of action pursuant to CPLR §3211(a)(7). Alternatively, Transit also moves to dismiss the claim of negligent entrustment pursuant to CPLR §3211(a)(1). Plaintiff cross-moves for leave to amend the complaint pursuant to CPLR §3025 (b).

Transit's Motion to Dismiss

In considering a motion to dismiss, pleadings must be liberally construed, the facts alleged taken as true, and the benefit of every possible favorable inference given (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 37 NY3d 169 [2021], quoting *Leon v. Martinez*, 84 NY2d 83 [1994]; *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137[2017]). Whether a plaintiff can ultimately establish his or her allegations is not part of the equation in deciding a motion to dismiss (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11 [2005]). Nor does the cause of action need to be pleaded with specificity (see *Waterbury v New York City Ballet, Inc.*, 205 AD3d 154 [1st Dept 2022]; *JG v. Goldfinger*, 161 AD3d 640 [1st Dept. 2018]). The pleadings, however, must plead the essential elements of the claims (see *Kornfeld v. Chen Hua Zheng*, 185 AD3d 420 [1st Dept 2020]).

A cause of action alleging that an employer was negligent in the supervision and training of an employee requires more than just pleading the elements of negligence (*Coffey v. City of New York*, 49 AD3d 449 [1st Dept 2008]; *Kornfeld*, 185 AD3d 420). The pleadings at least must allege that an employer-employee relationship exists, and that the employer knew or should have known of the employee's tortious wrong-doing (*id*; see e.g. *Naegele v. Archdiocese of New York*, 39 AD3d 270 [1st Dept 2007]).

Here, Plaintiff's cause of action for negligent supervision and training states in part that "as common carriers, Defendants Rabinowitz and [Transit] owed a duty of care to exercise reasonable care and caution in owning/operating/maintaining the Vehicle and its operators. Defendants Rabinowitz and [Transit] breached their duty to Plaintiff by failing to properly supervise and train its employees, agents and servants to exercise reasonable care in operating/driving its AAR vehicles, including the Vehicle on December 31, 2019. As a result of Defendants Rabinowitz and [Transit] breaching their duty to Plaintiff, Plaintiff was seriously

injured.....when the vehicle crashed into/'rear ended'/struck non-party Rayon Morgan's disabled vehicle, described supra (NYSCEF Doc. 1).

Upon review, while Plaintiff's second cause of action alleges negligence language and other parts of the complaint allege an employee and employer relationship, it is bare and silent as to the slightest allegation that Samadder had any history of prior driving accidents, that he was an inexperienced or reckless driver, or any other allegation of driving wrong-doing. Nor does the complaint allege that Transit knew or should have known of any such history. Further, in opposition, Plaintiff's papers do argue in favor of this cause of action or attempt to cure it. Rather, Plaintiff's amended complaint appears to remove the second cause of action all together (NYSCEF Doc. 32).

Accordingly, even upon generously and liberally construing the pleadings, a viable claim of negligent supervising and training is not plead. Thus, the second cause of action against Transit is dismissed.

Transit also moves to dismiss a claim for negligent entrustment, alleging that Plaintiff's bill of particular attempts to raise such a claim. Since the purpose of the bill of particulars is to amplify the pleadings and not to introduce a new cause of action, any claim of negligent entrustment against Transit is dismissed as this time (*Paterra v. Arc Dev. LLC*, 136 AD3d 474 [1st Dept 2016] *quoting Alami v. 215 E. 68th St., L.P.*, 88 AD3d 924 [2d Dept. 2011] and *Melino v. Tougher Heating & Plumbing Co.*, 23 AD2d 616 [3d Dept. 1965]; *Kornfeld* 185 AD3d 420).

Plaintiff's Cross-Motion to Amend the Complaint

At the court's discretion, pleadings may be freely amended as long as amended pleadings are sufficient or have merit (see CPLR §3025 (b); *Edenwald Contracting Co. v. City of New York*, 60 NY2d 957 [1983]; *Mendoza v. Akerman Senterfitt LLP*, 128 AD3d 480 [1st Dept 2015]; *Cafe Lughnasa Inc. v. A & R Kalimian LLC*, 176 AD3d 523 [1st Dept 2019]; *see also Zabas by Zabas v. Kard*, 194 AD2d 784 [2d Dept 1993]; *Heller v. Louis Provenzano, Inc.*, 303 AD2d 20 [1st Dept 2003]).

Here, Plaintiff alleges that the proposed amended complaint seeks to (1) insert additional factual allegations relating to and further amplifying the plead claims; (2) remove the second cause of action and (3) amend the remaining causes of action. Yet, the submitted proposed amended complaint is not legible and appears to be a draft with edits. Furthermore, the reasoning for the proposed edits and changes is not provided. Accordingly, Plaintiff's cross-motion to amend the

complaint is denied without prejudice.

It is hereby

ORDERED that Defendant METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY's motion to dismiss is granted to the extent that Plaintiff's second cause of action is dismissed; and it is further

ORDERED that Defendant METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY's motion to dismiss is granted to the extent that Plaintiff's claim of negligent entrustment is dismissed; and it is further

ORDERED that Plaintiff's cross-motion to amend the complaint is denied without prejudice; and it is further

ORDERED that counsel are directed to submit a joint proposed preliminary conference order by July 10, 2023, as per Part 21 rules.

5/15/2023

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

APPLICATION:

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SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

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GRANTED IN PART

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SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☒

OTHER

☐

REFERENCE

HON. DENISE M. DOMINGUEZ
J.S.C.