

Hong Jin v 155 Ross St. LLC

2023 NY Slip Op 33617(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 152544/2022

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

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HONG JIN, LI HUA HUANG, WEN HUI ZHANG, WEN HUI ZHANG, SHUI JIN WANG

Plaintiff,

- v -

155 ROSS STREET LLC, CHEMDU TOIVU LLC,

Defendant.

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INDEX NO. 152544/2022

MOTION DATE 08/16/2022

MOTION SEQ. NO. 001

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

were read on this motion to/for DISMISSAL

Upon the foregoing documents and following oral argument, Defendants' motion pursuant to CPLR 3211 (a) (7) to dismiss the Complaint for failure to state a cause of action; pursuant to CLR 3013 to dismiss because the Complaint does not meet the requisite pleading standards; and pursuant to CPLR 3215 (a) (5) to dismiss as barred by the applicable statute of limitations is decided as follows:

This is one of several personal injury actions arising from the same November 26, 2018 motor vehicle accident, including Nenyng Wei v. Henry Herman (Index No. 161972/2018), Hong Jin et al v. Henry Herman et al (Index No. 155675/2019), Saul Perez-Flores v. Henry Herman (Index No. 450823/2019), Tian Yun Chen v. Henry Herman (Index No. 451158/2019), and Leopordo Valentino and Linda Valentino v. Henry Herman (Index No. 159025/2020).

The instant action was commenced on March 24, 2022 and seeks recovery against Defendants on the premise that they are vicariously liable for any negligence by driver Henry Herman (Herman). The Complaint alleges that Herman's vehicle was owned by Defendant Chemdu Toivu LLC and was operated with the permission of Defendant Chemdu Toivu LLC and within the scope of Herman's employment with or as an agent of Defendant Chemdu Toivu LLC. It is alleged that Defendant 155 Ross Street LLC is vicariously liable because Herman was

operating the vehicle while acting within the scope of employment with or as an agent of Defendant 155 Ross Street LLC.

In support of their motion, Defendants contend that in the related action Index No. 155675/2019, Plaintiffs conceded that Herman is the registered owner of the vehicle and Lyehuda Sheiris is the title owner. Thus, Defendants contend, the allegations that Defendant Chemdu Toivu LLC owned the vehicle is a self-contradiction. Defendants further contend that Plaintiffs' allegations that Defendants are vicariously liable for Herman's negligence are conclusory.

Defendants also contend that Plaintiffs' suit is time-barred and therefore must be dismissed. Specifically, the wrongful death causes of action must be commenced within two years after the decedent's death and personal injury actions must be commenced within three years; Plaintiffs commenced this action on March 24, 2022, more than three years, after Plaintiffs' causes of action accrued.

In opposition, Plaintiffs contend that they have alleged a cognizable legal theory of recovery against Defendants on the basis of their vicarious liability for Herman's negligence, and more specifically on the basis of Defendant Chemdu Toivu LLC having an ownership interest in the vehicle, and also on the basis of Mr. Herman acting within the scope of employment or an agency relationship with Defendants at the time of the incident.

In relation to Defendants' contention that the suit is time-barred, Plaintiffs withdrew their Fifth and Sixth Causes of Action brought for pecuniary losses suffered by the deceased Plaintiff's distributes, other than for funeral expenses, as against Defendants Chemdu Toivu LLC and 155 Ross Street LLC. However, with respect to the remaining causes of action, Plaintiffs contend that the applicable statute of limitations was not expired on the date of commencement due to Executive Orders tolling the statute of limitations during the COVID-19 pandemic.

In reply, Defendants contend that Plaintiffs have not alleged the elements of any cause of action. They further contend that the executive orders have caused some confusion concerning the calculations of statutes of limitations, but the weight of authority holds that statutes of limitations that expired after the extensions of the orders, in contrast to those that would have expired during the period affected by the orders, are only suspended and not tolled, and the authorities cited by Plaintiffs are either misconstrued or inapplicable.

Pursuant to CPLR 214, the statute of limitations for a personal injury action is three years. On March 20, 2020, the Governor signed Executive Order No. 202.8 in response to the COVID-

19 public health crisis. The Executive Order “tolled” any “specific time limit for the commencement, filing, or service of any legal action ... until April 19, 2020” (9 NYCRR 8.202.8). That toll was extended through several subsequent executive orders, the last of which remained in effect until November 3, 2020 (*see Gabin v Greenwich House, Inc.*, 210 AD3d 497 [1st Dept 2022]; *Murphy v Harris*, 210 AD3d 410, 2022 NY Slip Op 06086 [1st Dept 2022]). The Governor was empowered to toll the statute of limitations (*New York City Tr. Auth. v Am. Tr. Ins. Co.*, 2022 NY Slip Op 07508 [1st Dept Dec. 29, 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]).

Here, Plaintiffs commenced this action on March 24, 2022. Plaintiff’s claim was tolled on March 20, 2020, at which point 480 days had elapsed. When the claim began to run again after November 3, 2020, 616 days were remaining in the statute of limitations period. Thus, in the personal injury action, the claims for conscious pain and suffering and funeral costs are within the tolled statute of limitations and were therefore timely. Thus, the branch of Defendants’ motion seeking dismissal pursuant to CPLR 3211 (a) (5) is denied.

With respect to Defendants’ motion to dismiss for failure to state a claim, accepting the facts as alleged by Plaintiffs as true, Plaintiffs have stated a cause of action in vicarious liability against the moving Defendants (*Leon v Martinez*, 84 NY2d 83 [1994]). Defendants contend that the complaint in its present form fails to specifically allege their liability to Plaintiffs, and that the complaint is too vague and conclusory. The Court has considered these claims and finds that despite the style of the pleading, Plaintiffs have stated a cause of action in vicarious liability for Herman’s negligence and allege that Defendant Chemdu Toivu LLC had an ownership interest in the vehicle, and that Herman was acting within the scope of his employment at the time of the accident. Pursuant to CPLR 3013, “statements 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.” Here, the Complaint provides sufficient notice of the transactions and occurrences to be proved (*Travelers Ins. Co. v Ferco, Inc.*, 122 AD2d 718 [1st Dept 1986]). Thus, the branch of Defendants’ motion to dismiss the action pursuant to CPLR 3211 (a) (7) and CPLR 3013 is denied. Accordingly, it is

ORDERED that Plaintiffs' Fifth Cause of Action and Sixth Cause of Action brought for pecuniary losses suffered by the deceased Plaintiff's distributes, other than for funeral expenses, as against Defendant Chemdu Toivu LLC and Defendant 155 Ross Street LLC are permitted to be withdrawn; and it is further

ORDERED that Defendants' motion to dismiss pursuant to CPLR 3211 (a) (5), CPLR 3211 (a) (7) and CPLR 3013 is denied; and it is further

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

ORDERED that within 30 days of entry, Plaintiffs shall serve a copy of this Decision and Order upon Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

10/17/2023
DATE


JAMES G. CLYNES, J.S.C.

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