

Glaser v Conde

2023 NY Slip Op 34954(U)

March 28, 2023

Supreme Court, Kings County

Docket Number: Index No. 519501/2020

Judge: Richard J. Montelione

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At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the ____ day of _____ 2023

MAR 28 2023

PRESENT: HON. RICHARD J. MONTELLONE, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

DECISION AND ORDER

-----X
EZRA B. GLASER,

Plaintiff,
-against-

Index No.: 519501/2020
Motion Date: 2/1/2023
Motion Cal. No.: 16 & 17
Mot. Seq. 4 & 5

MARION CONDE, aka MARION CONDE DA SILVEIRA, both individually and in her official capacity as Shareholder of 52 KERMIT LLC, ERICK HERNANDEZ MATEOS, both individually and in his official capacity as Shareholder of 52 KERMIT LLC, 52 KERMIT LLC, ALFRED VINUEZA, THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, SHAWN O'CONNOR (Shield #21627), individually and in his official capacity as a Police Officer within THE NEW YORK CITY POLICE DEPARTMENT, "JOHN DOES #1-5" (the names being fictitious as their Identities are presently unknown) and "JANE DOES #1-5" (the names being fictitious as their identities are Presently unknown),

Defendants.

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The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Defendants Conde and Mateos' Motion to Dismiss (MS #4); Attorney Affirmation in Support of Motion to Dismiss affirmed by Joseph Welsh, Esq. on July 7, 2022; Exhibits.....	93-111
Attorney Affirmation in Opposition to Motion to Dismiss (MS #4) affirmed by John O'Hara, Esq. on November 23, 2022; Exhibits; Attorney Affirmation in Opposition to Motion to Dismiss (MS #4) affirmed by Cristina Carollo, Esq. on December 21, 2022, Exhibits.....	125-138
Reply Affirmation (MS #4) affirmed by Christi M. Kunzig, Esq. on January 3, 2023; Reply Affirmation (MS #4) affirmed by William K. Kirrane, Esq. on January 3, 2023.....	163, 165
Defendant 52 Kermit LLC's Motion to Dismiss (MS #5); Attorney Affirmation in Support of Motion to Dismiss (MS #5) affirmed by Sandra L. Leporin, Esq. on July 11, 2022.....	105-110
Attorney Affirmation in Opposition to Motion to Dismiss (MS #5) affirmed by John O'Hara, Esq. on November 23, 2022; Exhibits; Attorney Affirmation in Opposition to Motion to Dismiss (MS #5) affirmed by Cristina Carollo, Esq. on December 21, 2022; Exhibits.....	117-124; 140-142
Amended Reply Affirmation (MS #5) affirmed by John J. Nicolini, Esq. on January 3, 2023.....	166

In an action to recover damages for assault and battery and false arrest, *inter alia*, defendants Marion Conde and Erick Hernandez Mateos, both individually and in their official capacity as members of defendant 52 Kermit LLC, move this court for an order, pursuant to CPLR 3211, dismissing the amended complaint

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and all cross-claims asserted against them (Mot. Seq. 4). Defendant 52 Kermit LLC moves this court for an order, pursuant to CPLR 3211(a)(7), dismissing the amended complaint and all cross-claims (Mot. Seq. 5).

Plaintiff Ezra B. Glaser owned 50% of the shares of defendant 52 Kermit LLC. Defendants Conde and Matteo collectively owned 50% of the shares of defendant 52 Kermit LLC. Plaintiff alleges that on October 17, 2019 in the premises' backyard, he was assaulted and battered by defendant Alfred Vinueza who was living at the premises. Plaintiff maintains Vinueza previously threatened plaintiff with violence and Conde was complicit and encouraged Vinueza's threats. This action was commenced by plaintiff filing a summons and complaint on October 12, 2020. Issue was joined by defendants Conde and Mateos interposing an answer on November 18, 2020. By order dated June 9, 2022 and entered July 10, 2022, the court allowed plaintiff to file an amended complaint *nunc pro tunc*.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff and all allegations must be accepted as true. *Leon v. Martinez*, 84 N.Y.S.2d 83, 87 (1994). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).

Defendant 52 Kermit LLC moves to dismiss the amended complaint on the ground that the plaintiff owns a 50%, plurality share in defendant 52 Kermit LLC, and therefore cannot bring this action. Defendant 52 Kermit LLC likens plaintiff's commencement of this action to suing himself for the claims he alleges. Under the operating agreement, Conde is the initial, sole member of the Board of Managers (NYSCEF # 130). Plaintiff contends that at all relevant times, Conde was the sole member of the Board of Managers. The operating agreement provides that "no Member or Person other than the Managers shall be an agent of the Company or have any right, power or authority to transact any business in the name of the Company or to act for or on behalf of or to bind the Company." *Id.* The operating agreement is otherwise silent on the members' ability to sue in that capacity. 52 Kermit LLC provides no authority to support its contention that a member of an LLC who owns a plurality share of the LLC cannot sue his LLC. Accordingly, the court declines to dismiss the amended complaint against defendant 52 Kermit LLC, because it is a nominal party.

The first cause of action asserts liability for assault, battery, harassment and other undisclosed intentional acts against defendants Vinueza, Conde, Mateos and 52 Kermit LLC. "For a defendant to be held liable in tort, it must have owed the injured party a duty of care." *Rodriguez v. Judge*, 132 A.D.3d 966, 968 (2d Dep't 2015). "Generally, there is no 'duty to control the conduct of third persons to prevent them from causing injury to others,' even where, as a practical matter, the defendant could have exercised such control." *Engelhart v. County of Orange*, 16 A.D.3d 369, 371 (2d Dep't 2005) quoting *Purdy v. Public Adm'r of County of Westchester*, 72 N.Y.2d 1, 8 (1988). In the instant case, plaintiff has not pleaded any facts or made any allegations showing that defendants Conde, Mateos or 52 Kermit LLC exercised the requisite control over Vinueza to prevent the alleged violence. Plaintiff's amended complaint is devoid of any allegation that Vinueza was an employee or agent of the other defendants. However, in plaintiff's Affirmation in Opposition (NYSCEF # 125), plaintiff alleges that Vinueza was employed as a handyman and tasked with fixing aluminum siding on the premises. Even assuming Vinueza was so employed by the other defendants, under the doctrine of respondeat superior an employer can only be vicariously liable for torts "committed by

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an employee acting within the scope of his or her employment.” *Beachamp v. City of New York*, 3 A.D.3d 465 (2d Dep’t 2004). Plaintiff does not allege that the Vinueza’s conduct fell within the scope of his purported (unpled) employment. The motions to dismiss the first cause of action against Conde, Mateos and 52 Kermit LLC are GRANTED.

The second cause of action alleges *res ipsa loquitur* against defendants Conde, Mateos and 52 Kermit LLC, as plaintiff would not have been attacked if those defendants weren’t negligent. *Res ipsa loquitur* is an evidentiary theory that does not constitute a separate or independent cause of action. *Frew v. Hospital of Albert Einstein Coll. of Medicine Div. of Montefiore Hosp. & Med. Ctr.*, 76 A.D.2d 826 (2d Dep’t 1980); *Smith v. Consolidated Edison Co. of New York, Inc.*, 104 A.D.3d 428, 428-429 (1st Dep’t 2013); *Brumberg v. Cipriani USA, Inc.*, 110 A.D.3d 1198, 1200 (3rd Dep’t 2013). Moreover, *res ipsa loquitur* is a negligence concept and “without a cause of action for negligence there is no viable cause of action to which to apply the doctrine of *res ipsa loquitur*.” *Ianotta v. Tishman Speyer Props., Inc.*, 46 A.D. 3d 297, 299 (1st Dep’t 2007). Since plaintiff’s claims emerge from alleged intentional acts, and not a negligence theory, the motions to dismiss the second cause of action against Conde, Mateos and 52 Kermit LLC are GRANTED.

The third cause of action alleges that defendant Conde and Mateos failed to supervise Vinueza, who was their guest at the premises. A “possessor [of land] cannot be held to a duty to take protective measures unless it is shown that he either knows or has reason to know from past experience” that there is some likelihood the conduct of visitors will endangers others. *Nallan v. Helmsley-Spear, Inc.*, 50 Y.Y.2d 507, 519 (1980). Possessors “have a duty to control third persons only ‘when they have the opportunity to control such persons and are reasonably aware of the need for such control.’” *Crowningshield v. Proctor*, 31 A.D.3d 1001, 1002 (3rd Dep’t 2006) quoting *D’Amico v. Christie*, 71 N.Y.2d 76, 85 (1987). In the instant case, plaintiff alleges that both Conde and Mateos were aware that Vinueza engaged in violence and/or made threats to plaintiff before the alleged incident on October 17, 2019. Accordingly, the motion to dismiss the third cause of action against Conde and Mateos is DENIED.

The fourth cause of action alleges that defendants Conde, and Mateos were aware of violent and threatening behavior of defendant “failed to take proper and adequate precautions to protect the public, in general, and specifically, the safety and well-being of” plaintiff. Ordinarily, the law “does not impose a duty to control the conduct of third persons to prevent them from causing injury to others; liability for the negligent acts of third persons generally arises when the defendant has authority to control the actions of such third persons.” *Purdy v. Public Adm’r of Westchester County*, 72 N.Y.2d 1, 8 (1988). A defendant has no duty to safeguard members of the general public, even where the defendant could have exercised control over a third person tortfeasor. *Id.* Additionally, a landlord has no common law duty to protect a resident “from the criminal acts of another resident of the building as [the landlord] had no ability or authority to control his actions.” *Adelstein v. Waterview Towers, Inc.*, 250 A.D.2d 790, 791 (2d Dep’t 1998). In the instant case, plaintiff does not allege defendants Conde and Mateos had the requisite control over defendant Vinueza’s action to give rise to liability. The motion to dismiss the fourth cause of action are accordingly GRANTED against Conde and Mateos.

The fifth cause of action alleges that defendants Conde and Mateos were negligent as shareholders of defendant 52 Kermit, LLC. “[A] member of a limited liability company will not be held liable for the liabilities of the company solely by reason of being a member of the company or acting in such capacity or

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participating in the conduct of the business of the company.” *Board of Managers of Beacon Tower Condominium v. 85 Adams Street, LLC*, 136 A.D.3d 680, 681 (2d Dep’t 2016); Limited Liability Company Law § 609(a). Members of a limited liability company can only be held liable for the limited liability company’s actions if the members “participate in the commission of a tort in furtherance of company business.” *Smith v. Delta Intern. Machinery Corp.*, 69 A.D.3d 840, 842 quoting *Rothstein v. Equity Ventures*, 299 A.D.2d 472, 474 (2d Dep’t 2002). There is no contention that negligence on the part of Conde or Mateos was in any way committed in furtherance of 52 Kermit LLC’s business. Accordingly, the motion to dismiss the fifth cause of action against defendants Conde and Mateos is GRANTED.

The sixth cause of action alleges that because of false information provided by defendants Conde and Vinueza, plaintiff was falsely arrested by defendant Police Officer Shawn O’Connor and other members of defendant NYPD. “[A] civilian defendant who merely furnishes information to law enforcement authorities who are then free to exercise their own independent judgment as to whether an arrest will be made and criminal charges filed will not be held liable for... false arrest.” *Robles v. New York*, 104 A.D.3d 829, 829-830 (2d Dep’t 2013). For a civilian to be liable for false arrest, “[t]he defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his own volition.” *Mesiti v. Wegman*, 307 A.D.2d 339, 340 (2d Dep’t 2003) quoting 59 NY Jur 2d, False Imprisonment and Malicious Prosecution § 37. “[A] private person can be liable for false imprisonment for actively participating in the arrest such as ‘importuning the authorities to act.’” *Wieder v. Home Depot U.S.A, Inc.*, 208 A.D.3d 535, 538 (2d Dep’t 2022) quoting *Robles* at 830. To the extent this cause of action constitutes any claim against Conde and Mateos, plaintiff does not allege that Conde and Mateos so controlled or importuned the police officers that arrested plaintiff. The motion to dismiss the sixth causes of action is GRANTED against defendants Conde and Mateos.

The seventh cause of action alleges that NYPD and City of New York customs, policies, usages, practices and rules caused plaintiff’s constitutional rights to be violated. Plaintiff seems to claim that his civil and constitutional rights were violated *inter alia* by defendant Conde’s actions. To maintain a cause of action for a violation of the United States Constitution, the plaintiff must allege conduct “committed by a person acting under color of state law.” *Borrerro v. Haks Group, Inc.*, 165 A.D.3d 1216, 1219 (2d Dep’t 2018). Similarly, a violation of the New York State Constitution requires State action. *SHAD Alliance v. Smith Haven Mall*, 66 N.Y2d 496 (1985). The court notes that the City of New York, the New York City Police Department, Police Officer Shawn O’Connor and unnamed police officers are defendants in this action and have not moved to dismiss. Plaintiff does not allege that Conde was acting under the color of law or with any cognizable nexus to State action. To the extent this cause of action constitute a claim against Conde, the motion to dismiss the seventh cause of action against Conde is GRANTED.

The eighth cause of action for constitutional violations under the color of law, the ninth cause of action for unconstitutional customs and policies, tenth cause of action for unconstitutional conduct, and eleventh cause of action for constitutional violations under 42 U.S.C. §1983, make no allegations against the moving defendants Conde, Mateos and 52 Kermit LLC.

The twelfth cause of action alleges Conde and Mateos were acting in concert with other defendants and violated plaintiff’s Federal civil rights under 42. U.S.C. § 1983. “In order to state a claim under § 1983,

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a plaintiff must allege that he was injured by either a state actor or a private party acting under color of state law.” *Ciambriello v. County of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002). “A merely conclusory allegation that a private [party] acted in concert with a state actor does not suffice to state a § 1983 claim against the private [party].” *Id* at 324. As plaintiff does not delineate how defendants Conde and Mateos acted in concert with other defendants to create a civil rights violation, the motion to dismiss the twelfth cause of action against defendants Conde and Mateos is GRANTED.

The thirteenth cause of action alleges that each and every defendant denied plaintiff his constitutional right to a fair trial under 42. U.S.C. § 1983. Plaintiff fails to allege any facts as to how defendants Conde, Mateos and 52 Kermit LLC, as private actors, abridges plaintiff’s right to a fair trial. Plaintiff also fails to allege the defendants Conde, Mateos and 52 Kermit LLC were acting under the color of law. Accordingly, the motions to dismiss the thirteenth cause of action against Conde, Mateos and 52 Kermit LLC is GRANTED.

The fourteenth cause of action for municipal liability and the fifteenth cause of action for pendent state law claims makes no allegation against defendants Conde, Mateos and 52 Kermit LLC.

The sixteenth cause of action alleges defendants Conde, Mateos and 52 Kermit LLC committed intentional infliction of emotional distress against plaintiff. “The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress.” *Klein v. Metropolitan Child Service, Inc.*, 100 A.D.3d 708, 710 (2d Dep’t 2012). “Furthermore, conclusory assertions are insufficient to set forth a cause of action sounding in the intentional infliction of emotional distress.” *Id* at 711. Plaintiff does not allege with any particularity how defendants Conde, Mateos and 52 Kermit LLC engaged in intentional infliction of emotional distress. The motion to dismiss the sixteenth cause of action against Conde, Mateos and 52 Kermit LLC is, accordingly, GRANTED.

The seventeenth cause of action alleges defendants Conde and Mateos committed negligent infliction of emotional distress against plaintiff. “A cause of action to recover damages for negligent infliction of emotional distress generally requires a plaintiff to show a breach of a duty owed to him which unreasonably endangered his physical safety, or caused him to fear for his own safety.” *Sacino v. Warwick Valley Cent. School Dist.*, 138 A.D.3d 717, 719 (2d Dep’t 2016). A claim of negligent infliction of emotional distress fails where “no allegations of negligence appear in the pleadings.” *Daluise v. Sottile*, 40 A.D.3d 801, 804 (2d Dep’t 2007) quoting *Russo v. Iacono*, 73 A.D.2d 913 (2d Dep’t 1980). Plaintiff does not allege any negligent conduct on the part of Conde or Mateos in this cause of action. Plaintiff alleges that Conde or Mateos “did intentionally commit the tort of negligent infliction of emotional distress.” Accordingly, the motion to dismiss the seventeenth cause of action against defendants Conde and Mateos is GRANTED.

The eighteenth cause of action alleges defendants Conde and Mateos committed abuse of process against plaintiff, in their individual capacity and as shareholders of defendant 52 Kermit LLC, by providing false information to the police in relation to the events on October 17, 2019. “The three essential elements of the tort of abuse of process are ‘(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective.’” *Tenore v. Kantrowitz, Goldhamer & Graifman, P.C.*, 76 A.D.3d 556, 557 (2d Dep’t 2010)

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quoting *Curiano v. Suozzi*, 63 N.Y.2d 113, 116 (1984). “The gist of the action for abuse of process lies in the improper use of process after it is issued.” *Farquharson v. United Parcel Service*, 202 A.D.3d 923, 927 (2d Dep’t 2022) quoting *Williams v. Williams*, 23 N.Y.2d 592, 596 (1969). In the case at bar, plaintiff does not allege that the defendants used his arrest or made false statements to the police in any way after the use of process. Accordingly, the motions to dismiss the eighteenth cause of action against defendants Conde, Mateos and 52 Kermit LLC against GRANTED.

The nineteenth cause of action alleges that defendant 52 Kermit LLC engaged in negligent hiring and retention. The amended complaint does not allege any employment relationship that could establish causes of action for negligent hiring or negligent retention. However, plaintiff’s affirmations in opposition to the motion (NYSCEF #117 and 125) allege an employment relationship where defendant Vineuza was employed as a handyman and to fix aluminum siding on the premises. Affidavits in opposition to motions to dismiss, with sufficient detail, can cure pleading deficiencies in the complaint. *Leiderman v. Gilbert*, 176 A.D.2d 525 (2d Dep’t 1991). In the instant case, the affidavits in question adequately allege an employment relationship between defendants 52 Kermit LLC and Vineuza to bring about negligent hiring and retention claims. Additionally, the complaint alleges that defendants Conde on Mateos had knowledge of specific threats and antisemitic comments defendant Vineuza made to plaintiff before the incident on October 17, 2019. The complaint further alleges the Mateos warned Conde of Vineuza’s violent propensities before the incident. Accordingly, plaintiff has stated a cause of action and the motion to dismiss the nineteenth cause of action is DENIED. For the foregoing reasons it is hereby

ORDERED that motions to dismiss (MS # 4 and 5) are granted to the extent that first cause of action, second cause of action, fourth cause of action, fifth cause of action, seventh cause of action, twelfth cause of action, thirteenth cause of action, sixteenth cause of action, seventeenth cause of action and eighteenth cause of action are DISMISSED against defendants Conde and Mateos; and it is further

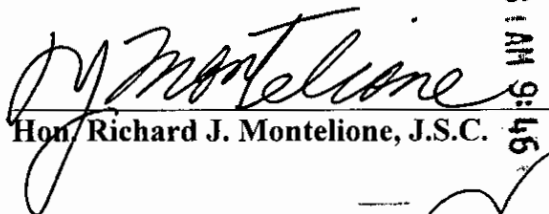
ORDERED that the sixth cause of action is DISMISSED against defendant Conde; and it is further

ORDERED that the first cause of action, second cause of action, thirteenth cause of action and eighteenth cause of action are DISMISSED against defendant 52 Kermit LLC; and it is further

ORDERED that all other requests for relief are DENIED.

This constitutes the decision and order of the court.

ENTER


Hon. Richard J. Montelione, J.S.C.

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