

Smith v VCS295 Holdings, LLC
2025 NY Slip Op 35516(U)
March 11, 2025
Supreme Court, Westchester County
Docket Number: Index No. 62826/2024
Judge: Elena Goldberg-Velazquez
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To commence the statutory time period for appeals as of right (CPLR § 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
LATOYA SMITH,

Plaintiff,

DECISION & ORDER
Index No. 62826/2024
Motion Seq. 1

-against-

VCS295 HOLDINGS, LLC, VCS295 HOLDINGS, INC.,
and NILAJA CARLTON,

Defendants.

-----X
Hon. Elena Goldberg-Velazquez, J.S.C.

The following papers numbered 1 – 4 were read and considered on the motion (Seq. No. 1) of Defendant Nilaja Carlton (“Carlton”) for an Order: (a) pursuant to CPLR §§ 3211(a)(5) and (7) dismissing the Verified Complaint dated February 2, 2024 (the “Complaint”) of Plaintiff Latoya Smith (“Plaintiff”) as against Carlton; and (b) for such other and further relief as this Court deems just and proper:

PAPERS

NUMBERS

Notice of Motion	1
Affirmation of Nilaja Carlton and Exhibits A-B	2
Affirmation of Victor M. Feraru, Esq. and Exhibit 1	3
Affirmation in Opposition of Mark P. Cambareri, Esq.	4

This is an action in which Plaintiff seeks compensation for personal injuries sustained by her in connection with alleged acts of negligence and assault by Carlton that occurred on June 28, 2022 at a hair salon located at 295 Saw Mill River Road in Yonkers, New York (the

“Premises”). Plaintiff’s Complaint asserts a first cause of action sounding in negligence and/or negligent touching against Carlton as well as Defendants VCS295 Holdings, LLC and VCS295 Holdings, Inc. (together, “VCS”). Her second cause of action seeks damages for assault as against Carlton.

PROCEDURAL HISTORY

Plaintiff commenced the instant action with the filing of her Summons and Complaint on May 22, 2024, naming Carlton and VCS as Defendants. *See* NYSCEF Doc. No. 1. Plaintiff thereafter effectuated service of process on VCS on June 6, 2024. *See* NYSCEF Doc. No. 2. On July 23, 2024, VCS appeared by counsel and filed a Verified Answer in which it, *inter alia*, denied the material allegations of the Complaint and asserted 15 affirmative defenses thereto. *See* NYSCEF Doc. No. 4.

On August 1, 2024, counsel for Carlton filed a Notice of Appearance, indicating that the Complaint and any papers thereafter should be served upon such counsel. *See* NYSCEF Doc. Nos. 5-6. On August 8, 2024, counsel for Carlton filed a Verified Answer in which Carlton, *inter alia*, denied the Complaint’s material allegations and raised 16 affirmative defenses in response thereto. *See* NYSCEF Doc. No. 7.

On October 24, 2024, Carlton made the instant motion (Seq. No. 1) seeking dismissal of the Complaint’s two causes of action against her pursuant to CPLR §§ 3211(a)(5) and (7). *See* NYSCEF Doc. Nos. 8-13. Plaintiff timely opposed the motion (*see* NYSCEF Doc. No. 22); and the motion was deemed to be fully submitted on December 10, 2024.

This action, which had originally been assigned to Hon. Damaris E. Torrent, J.S.C., was transferred to this Court (Hon. Elena Goldberg-Velazquez, J.S.C.) on January 8, 2025. *See* NYSCEF Doc. No. 36.¹

FACTS

As noted above, the instant action arises out of Carlton's alleged negligent touching and/or assault of Plaintiff that occurred on June 28, 2022 at the Premises. *See* NYSCEF Doc. No. 1. Plaintiff asserts that Carlton had previously engaged in violent conduct directed at Plaintiff, and alleges in her first cause of action that both Carlton and VCS, which allegedly jointly owned, operated and/or managed the Premises, should be held liable for negligence in connection with the June 28, 2022 incident. *Id.* at ¶¶ 1-46. In her second cause of action against Carlton, Plaintiff seeks monetary damages stemming from the alleged June 28, 2022 assault. *Id.* at ¶¶ 47-55.

ARGUMENTS

Carlton's Arguments

In support of her motion to dismiss the Complaint as against her, Carlton furnishes an affirmation as well as an affirmation from her counsel setting forth Carlton's legal arguments. *See* NYSCEF Doc. Nos. 10-13.

In her affirmation, Carlton avers that although she denies the allegations in the Complaint, the incident underlying this action occurred on June 28, 2022, which was nearly two years prior to Plaintiff's filing of this lawsuit. *See* NYSCEF Doc. No. 12. Carlton avers that she had nonetheless acted in self-defense, and that the criminal charges that had been brought against

¹ For purposes of brevity, the Court declines to recite herein procedural history that is not directly relevant to the instant motion, such as, *inter alia*, Justice Torrent's granting counsel's motion for leave to withdraw as Carlton's counsel. *See* NYSCEF Doc. No. 32.

Carlton for allegedly assaulting Plaintiff were dismissed on October 25, 2022. *See* NYSCEF Doc. Nos. 12, 13.

As Carlton's legal argument set forth in counsel's affirmation, Carlton contends that the first cause of action, which sounds in a claim of negligent assault, should be dismissed against Carlton pursuant to CPLR § 3211(a)(7). *See* NYSCEF Doc. No. 10. She argues that because there exists in New York no cause of action for either "negligent assault" or "negligent battery," the first cause of action fails to state a claim and should be dismissed against Carlton. *Id.*

Carlton also asserts that the second cause of action should be dismissed as time-barred pursuant to CPLR § 3211(a)(5). *Id.* She contends that, pursuant to CPLR § 215, the statute of limitations for a civil assault claim is one year from the act itself or one year from the termination of the underlying criminal action. *Id.* Carlton argues that because the alleged assault occurred on June 28, 2022, and because the underlying criminal action was terminated on October 25, 2022, the second cause of action had been time-barred when Plaintiff filed her Complaint on May 22, 2024. *Id.* As such, Carlton concludes that the first cause of action should be dismissed against her pursuant to CPLR § 3211(a)(7) for failure to state a claim, and the second cause of action should be dismissed as time-barred pursuant to CPLR § 3211(a)(5). *Id.*

Plaintiff's Arguments in Opposition

In opposition to Carlton's motion to dismiss, Plaintiff furnishes an affirmation from her counsel that sets forth Plaintiff's legal arguments. *See* NYSCEF Doc. No. 22.

Plaintiff contends that the first cause of action should not be dismissed pursuant to CPLR § 3211(a)(7). *Id.* Specifically, she argues that the first cause of action is not a claim for "negligent battery" or "negligent assault" as Carlton contends in her motion; rather it alleges that Carlton "negligently, carelessly and recklessly caused injury to the Plaintiff." *Id.* Plaintiff

asserts that this claim plainly sounds in negligence; and particularly given that Carlton in her moving affirmation denies that she assaulted Plaintiff, the negligence claim should be deemed true for purposes of this CPLR § 3211(a)(7) motion and should not be dismissed. *Id.*

However, Plaintiff in her opposition concedes that the second cause of action should be dismissed as time-barred. *Id.* In particular, counsel avers that “[t]he Second Cause of Action sounds exclusively in assault [and] is untimely.” *Id.* As such, Plaintiff concludes that while the first cause of action should not be dismissed against Carlton pursuant to CPLR § 3211(a)(7), she sets forth no arguments in defense of the second cause of action and indeed concedes its dismissal herein. *Id.*

ANALYSIS

Regarding the branch of Carlton’s motion seeking to dismiss the first cause of action against her pursuant to CPLR § 3211(a)(7), it is well-established that “the complaint must be liberally construed, giving the plaintiff the benefit of every favorable inference.” *Cunningham v Nolte*, 188 AD3d 806, 807 (2d Dept 2020), *citing Leon v Martinez*, 84 NY2d 83, 87-88 (1994). “Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action.” *Cunningham*, 188 AD3d at 807, *citing Hartman v Morganstern*, 28 AD3d 423, 424 (2d Dept 2006). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002).

Upon review of the parties’ submissions, the Court determines that Plaintiff has adequately stated a claim sounding in negligence against Carlton for purposes of surviving this CPLR § 3211(a)(7) motion. In order to plead a negligence claim, a plaintiff must allege: “(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately

resulting therefrom.” *Solomon v City of New York*, 66 NY2d 1026, 1027 (1985); *Porcasi v Oji*, 220 AD3d 899, 900 (2d Dept 2023); *Fernandez v Romero*, 219 AD3d 1407, 1408 (2d Dept 2023). Without opining regarding whether Plaintiff may ultimately prevail on the merits of her claim, a plain reading of the 46 paragraphs comprising the first cause of action demonstrates that Plaintiff has alleged that Carlton in owning, managing and/or controlling the Premises owed a duty to Plaintiff; that Carlton breached that duty by “negligently, carelessly and recklessly caus[ing] injury to the Plaintiff” and by “negligently touch[ing]” Plaintiff; and that Plaintiff was injured as a direct result thereof. *See* NYSCEF Doc. No. 1 at ¶¶ 1-46. As such, notwithstanding Carlton’s attempt to frame the first cause of action as one for “negligent battery” or “negligent assault,” Plaintiff has adequately set forth the elements of a negligence claim against Carlton in her first cause of action.

In fact, the case law cited by Carlton supports denial of the CPLR § 3211(a)(7) motion under the circumstances presented herein. Carlton cites *Smiley v North. Gen. Hosp.*, 59 AD3d 179, 180 (1st Dept 2009) for the proposition that “[i]t is well settled that once intentional offensive contact has been established, the actor is liable for assault and not negligence inasmuch as there is no such thing as a negligent assault.” *See* NYSCEF Doc. No. 10. However, Carlton in her moving affirmation avers that she “firmly den[ies] the allegations in the Complaint,” *i.e.*, that she assaulted Plaintiff, and further avers that she “was defending [her]self.” *See* NYSCEF Doc. No. 12 at ¶¶ 3-4. Given that Carlton has unambiguously denied that she assaulted Plaintiff, it cannot be said that “intentional conduct has been established.” On the contrary, Carlton disputes that she engaged in any intentional offensive conduct, and Plaintiff’s claim against her sounding in an allegation of negligent and/or inadvertent touching should not be dismissed for failure to state a cause of action. *See Van Buren v Lacerra*, 151 AD3d 1003, 1005 (2d Dept

2017) (holding that a negligence claim should not have been dismissed in light of the parties' disparate accounts regarding a physical collision where the parties may have "unintentionally walked into each other's paths"); *Rubino v Ramos*, 226 AD2d 912, 913 (3d Dept 1996) (stating that "plaintiff properly pleaded a negligence cause of action" where "the touching of plaintiff . . . was not intentional, but rather inadvertent and accidental").

Accordingly, because Plaintiff has adequately stated a claim sounding in negligence against Carlton, the branch of Carlton's motion seeking to dismiss the first cause of action against her pursuant to CPLR § 3211(a)(7) is denied. *See Katsorhis v 718 W. Beech St, LLC*, 2025 N.Y. App. Div. LEXIS 234, *6 (2d Dept Jan. 15, 2025) (stating that in "construing the allegations in the complaint in the light most favorable to the plaintiffs . . . the complaint adequately stated a cause of action alleging negligence against [defendant]"); *Davila v Orange County*, 215 AD3d 632, 635 (2d Dept 2023) (holding that CPLR § 3211[a][7] dismissal was unwarranted where "the plaintiff adequately stated a cause of action alleging negligence against the [defendant]"); *Rd Legal Funding Partners v Worby Groner Edelman & Napoli Bern*, 195 AD3d 968, 971 (2d Dept 2021) (finding that "the complaint adequately stated a cause of action alleging negligence, and thus, the Supreme Court should have denied that branch of the defendant's motion which was to dismiss that cause of action").

With respect to the branch of Carlton's motion seeking to dismiss the second cause of action as time-barred, it is well-established that pursuant to CPLR § 3211(a)(5), a party may move to dismiss a Complaint in whole or in part on the ground that "the cause of action may not be maintained because of . . . statute of limitations." *See Bellissimo v Mitchell*, 122 AD3d 560, 561 (2d Dept 2014) (affirming the dismissal of several causes of action pursuant to CPLR § 3211[a][5] as being time-barred); *Reiner v Jaeger*, 50 AD3d 761, 762 (2d Dept 2008) (holding

that the Supreme Court properly dismissed the Complaint in its entirety as being time-barred pursuant to CPLR § 3211[a][5]).

The Court agrees with Carlton that the second cause of action is time-barred. CPLR § 215 sets a one-year limitations period for “an action to recover damages for assault.” It further provides that the statute of limitations is one year from the date of the act of itself or “at least one year from the termination of the criminal action” as defined in section 1.20 of the criminal procedure law in which to commence the civil action, notwithstanding that the time in which to commence such action has already expired or has less than a year remaining.” *See* CPLR § 215(8)(a) (emphasis added).

Plaintiff alleges in the Complaint, and Carlton acknowledges, that the alleged assault occurred on June 28, 2022. *See* NYSCEF Doc. Nos. 1, 12. Moreover, Carlton has furnished documentary evidence demonstrating that on October 25, 2022, the charges stemming from the alleged assault were reduced and given a “conditional discharge.” *See* NYSCEF Doc. No. 13. Given that Plaintiff first commenced this action more than 18 months after the discharge and nearly two years after the underlying alleged assault, *i.e.*, on May 22, 2024, the Court agrees with Carlton that the second cause of action is time-barred under the one-year limitations period of CPLR § 215. Indeed, Plaintiff concedes as much, expressly admitting in her counsel’s affirmation that “[t]he Second Cause of Action sounds exclusively in assault [and] is untimely.” *See* NYSCEF Doc. No. 22 at ¶ 8. Accordingly, the second cause of action is hereby dismissed pursuant to CPLR § 3211(a)(5).

In arriving at this decision, the Court has reviewed, evaluated, and considered all of the issues framed by these motion papers, and the failure of the Court to specifically mention any particular issue in this Decision and Order does not mean that it has not been considered by the

Court in light of the appropriate legal authority.

Accordingly, it is hereby

ORDERED that Carlton's motion to dismiss (Seq. No. 1) is granted in part and denied in part; and it is further

ORDERED that the branch of Carlton's motion seeking dismissal of the Complaint's first cause of action is denied; and it is further

ORDERED that the branch of Carlton's motion seeking dismissal of the Complaint's second cause of action is granted; and it is further

ORDERED that the Complaint's second cause of action is dismissed pursuant to CPLR § 3211(a)(5); and it is further

ORDERED that the parties are to appear for an in-person Conference on May 6, 2025 at 10:00a.m.

Dated: White Plains, New York
March 11, 2025



HON. ELENA GOLDBERG-VELAZQUEZ, J.S.C.

To:

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