

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

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DURPATTEE CHUNNULAL and  
MARKHANLALL CHUNNULAL

Plaintiff

-against-

DAVID P. ROSEN, JAMAICA HOSPITAL  
MEDICAL CENTER and RABINDRANA SHARMA

Defendant

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Index No: 5907/05

Motion Date: 8/22/07

Motion Cal. No.: 10

Motion Seq. No.: 2

The following papers numbered 1 to 11 read on this motion by defendant, JAMAICA HOSPITAL MEDICAL CENTER, for summary judgment dismissing the complaint insofar as it is asserted against it.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits .....	1 - 4
Answering Affidavits-Exhibits.....	5 - 9
Replying Affidavits.....	10 -11

Upon the foregoing papers it is ordered that this motion is determined as follows.

The motion is granted to the extent that the causes of action asserted against the defendant, JAMAICA HOSPITAL MEDICAL CENTER, for negligent hiring, retention and supervision, and for assault based upon the doctrine of vicarious liability are dismissed.

The branch of the motion to dismiss the cause of action asserted against the defendant, JAMAICA HOSPITAL MEDICAL CENTER, to recover damages for negligence in the maintenance, operation and control of the premises in failing to provide adequate security is denied.

This is an action to recover for personal injuries plaintiff sustained on March 2, 2004 when she was sexually assaulted by the

defendant, Rabindrana Sharma, an employee of the defendant, Jamaica Hospital Medical Center (herein after the Hospital), in the women's restroom on the Concourse level of the Hospital. Plaintiff commenced this action against the Hospital for assault based upon the doctrine of vicarious liability as well as asserting causes of action for negligent hiring, retention and supervision and for common law negligence in the ownership operation and maintenance of the premises, more specifically for failure to provide adequate security for the persons on the premises and claim.

The Hospital now moves for summary judgment dismissing all claims asserted against it on the grounds that it cannot be held vicariously liable for the assault because Sharma was not acting within the course of his employment; that it cannot be held liable for negligence in the hiring, retention and/or supervision as the Hospital had no notice, actual or constructive, of any propensity to commit rape or an assault on the part of Sharma at the time of his hiring or at any time thereafter, and that it cannot be held liable for failure to provide adequate security as the conduct of Sharma was a sudden and unforeseeable act.

The branch of the Hospital's motion to dismiss the cause of action for assault based upon the Hospital's vicarious liability for Sharma's act is granted. An employer may be held vicariously liable for the tortuous acts, including intentional acts, of its employee where those acts were committed in furtherance of the employer's business interest, within the scope of employment and not solely for personal motives (see Judith M. v. Sisters of Charity Hosp., 93 NY2d 932, 933 [1999]; Riviello v. Waldron, 47 NY2d 297 [1979]; Sauter v. New York Tribune, Inc., 305 NY 442, 444-445 [1953]; Mataxas v. North Shore Univ. Hosp., 211 AD2d 762 [1995]).

In opposition the plaintiff maintains that Sharma was acting in the scope of his employment by purportedly taking plaintiff to where her husband was located, that Sharma's assault was made possible because Sharma was an employee and plaintiff had no reason to distrust him. Even if Sharma was said to be acting in the course of his employment by escorting plaintiff to her husband his sexual assault of the plaintiff is not in furtherance of hospital business and is a clear departure from the scope of his employment (N. X. v. Cabrini Medical Center, 97 NY2d 247, 251 [2002] ; see also Riviello v. Waldron, supra at 302 [1979], Mataxas v. North Shore Univ. Hosp., supra). Under no view of the undisputed facts could it be reasonably concluded that the sexual assault of the plaintiff was committed in furtherance of the Hospital's business.

Plaintiff also cannot recover on the cause of action for negligent hiring, retention and supervision and, thus, this cause of action is also dismissed. To be liable for negligent hiring, retention and/or supervision, an element which must be established is that the employer knew or should have known of the employee's propensity for the kind of conduct which caused the injury (Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 AD2d 159, 161). The defendant submitted sufficient evidence to establish that it acted with reasonable care in the hiring, retention and supervision of Sharma and that it had no reason to suspect that Sharma had a propensity to commit a sexual assault.

In opposition, plaintiff maintains that Sharma's employment record is sufficient to raise a question of fact as to the Hospital's constructive knowledge of Sharma's propensity. The plaintiff's claim is without merit and insufficient to raise a triable issue of fact. Contrary to plaintiff's claim, none of the incidents reported in Sharma's personnel file involved "violent" behavior on the part of Sharma and were not of such a nature as to place the Hospital on notice that Sharma had a propensity to commit a sexual assault.

The branch of the Hospital's motion to dismiss the cause of action based upon negligence in the maintenance operation and control of the premises by failing to provide adequate security is denied. The defendant has failed to submit sufficient evidence to establish, as a matter of law, that it did not have notice of similar criminal activity on its premises or that it provided reasonable security measures.

As the owner or occupant of the property, the Hospital had the duty to exercise reasonable care to maintain the property in a reasonably safe condition, including the undertaking of minimal precautions to protect members of the public from the reasonably foreseeable criminal acts of third persons (see Sandra M. v. St. Luke's Roosevelt Hosp. Center, 33 AD3d 875, 878 [2006] citing Miller v. State of New York, 62 NY2d 506, 513-514 [1984]; Nallan v. Helmsley-Spear, 50 NY2d 507, 518-519 [1980]).

The defendant's argument that it cannot be held liable because Sharma's act was unforeseeable is misplaced and without merit. "To establish foreseeability the criminal conduct at issue must be shown to be reasonably predictable based upon prior occurrences of the same or similar criminal activity at a location sufficiently proximate to the subject location" (Novikova v. Greenbriar Owners Corp., 258 AD2d 149 [1999]). This does not mean that the act of a particular person must be foreseeable, but only that criminal conduct of the type which occurred here is reasonably foreseeable. In this regard, the Hospital submitted the deposition testimony of its employee,

Leonard Ramdas, director of nursing for psychiatric and preoperative services, who testified that he knows of approximately 25 incidents of sexual misconduct committed by hospital employees during his twelve years at the Hospital. In addition, while Ramdas was able to testify about some security measures in his department, he was unable to testify about the kind and extent of the security provided for the hospital as a whole. Moreover, what safety precautions may reasonably be required in a particular case, is almost always a question of fact for the jury (Nallan v. Helmsley-Spear, Inc., supra at 520, n. 8). Rather than resolve the issues raised with respect to this cause of action, this evidence raises triable issues of fact as to whether the Hospital knew or should have known that the same or similar criminal conduct was reasonably predictable and whether the safety measures provided were reasonable. The existence of these and other issues of fact precludes granting summary judgment dismissing this cause of action.

Dated: October 9 , 2007

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J.S.C.