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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Balaguer, Rodney

INDEX NO. 111577/05

MOTION DATE 4/23/07

- v -

MOTION SEQ. NO. 002

MOTION CAL. NO.

Stanley Kaplan Talent Agency

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

FILED
AUG 02 2007
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Stanley Kaplan Talent Agency, TNE Realty Corp. n/k/a ENT Int'l Realty Corp., and SCPOG (Small Commercial Property Owners Group), LLC for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing Plaintiff's complaint is granted solely to the extent that plaintiff's cause of action against defendants for vicarious liability is dismissed; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 7/31/07

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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RODNEY BALAGUER,

Plaintiff,

-against-

STANLEY KAPLAN TALENT AGENCY, DALE WINGO, TNE REALTY CORP. N/K/A ENT INT'L REALTY CORP., and SCPOG (SMALL COMMERCIAL PROPERTY OWNERS GROUP), LLC.,

Defendants.

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Index No. 111577-2005

Sequence #002

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Rodney Balaguer (the "Plaintiff") commenced this action against Stanley Kaplan Talent Agency (the "Agency"), TNE Realty Corp. n/k/a ENT Int'l Realty Corp., SCPOG (Small Commercial Property Owners Group), LLC (the "Kaplan Defendants") and Dale Wingo ("Mr. Wingo") for personal injuries sustained when he was allegedly attacked by Mr. Wingo on August 31, 2004 in the offices of the Agency. In his complaint, Plaintiff asserts three claims alleging that the Kaplan Defendants: (1) breached the general duty of an owner or occupier of land to provide for the safety and protection of the persons lawfully present at the Agency; (2) negligently supervised Mr. Wingo; and (3) that the Kaplan Defendants are vicarious liable for the negligence of Mr. Wingo.

The Kaplan Defendants now move pursuant to CPLR §3212 for summary judgment in favor of the Kaplan Defendants dismissing Plaintiff's complaint.

FACTUAL BACKGROUND

The instant matter arose from a physical altercation between Plaintiff and Mr. Wingo. Immediately preceding the altercation, Mr. Wingo was engaged in a heated argument with Shawanda McKenzie who worked as a paid intern for the Agency. The argument, which apparently took place in a common area of the Agency, stemmed from Mr. Wingo's untimeliness in providing Ms. McKenzie with some faxed documents. The argument was loud enough that Stanley Kaplan, the Agency's manager, was forced to close his office door in order to concentrate on his work. At some point during the course of the argument Plaintiff was present, he and Mr. Wingo exchanged words, and Mr. Wingo threatened to physically assault Plaintiff. Plaintiff subsequently retreated to his office where he resumed working. During the course of a telephone call, while sitting with his back toward the door, Plaintiff was tackled and thrown out of his chair by Mr. Wingo causing him to strike his head on the radiator. Mr. Wingo then attempted to hit Plaintiff with the chair and stomp on him. Ms. McKenzie notified Mr. Kaplan that there was a fight and he instructed her to call the police. Mr. Kaplan remained in his office until the police arrived.

Kaplan Defendants' Contentions

The Kaplan Defendants contend since they had no control over Plaintiff's work hours, results, or methods, Plaintiff was an independent contractor, and thus, no employer-employee relationship existed that would give rise to a duty to protect Plaintiff from the alleged attack. Plaintiff testified at his deposition that, beginning in the late 1990s, he worked for the Agency as a "volunteer" or independent contractor who determined his own hours and was not paid a salary, but was paid in cash when Plaintiff placed an actor in a job. Further, Plaintiff testified that he

left to work for a competing talent agency, but returned in 2004 under the same arrangement. Thus, no employer-employee relationship existed so as to give rise to a duty to protect the Plaintiff from Mr. Wingo's attack.

Further, the Kaplan Defendants cannot be held vicariously liable for Wingo's attack, since said defendants had no duty to control or direct Mr. Wingo's actions. The Kaplan Defendants did not assign or direct Mr. Wingo in connection with any work or tasks. Mr. Wingo was not given any work to do, had no assigned desk or work area, and was never paid any money. The Kaplan Defendants further contend that Mr. Wingo was an independent contractor, or a "volunteer" who worked at the office a few days a week on his own schedule in order to secure acting jobs for himself. Accordingly, there is no issue of fact as to whether Mr. Wingo assaulted Plaintiff under the supervision, direction, or control of Mr. Kaplan.

Finally, the Kaplan Defendants argue that even if the Kaplan Defendants had a duty to protect Plaintiff or a duty to control Mr. Wingo, it was unforeseeable that a verbal argument between Mr. Wingo and one of Mr. Kaplan's interns would result in Mr. Wingo's attack on Plaintiff.

Plaintiff's Contentions

In opposition, Plaintiff contends that a triable issue of fact exists as to whether the Kaplan Defendants were negligent in allowing Mr. Wingo to remain as a volunteer at the Agency despite being aware of Mr. Wingo's propensity for violence. Plaintiff further states that landowners, as well as those in control or possession of real property, have a duty to act in a reasonable manner to prevent harm to those on their property. This includes the duty to control third parties on the property when the landowner or possessor of the property has an opportunity to exercise control

and is reasonably aware of the need for such control. Further, Plaintiff contends that Mr. Kaplan was aware of Mr. Wingo's history of verbal and physical violence yet continued to allow him onto the premises where he posed a foreseeable danger to the other workers. The record demonstrates that Mr. Wingo not only assaulted a paid intern and a boy of five or six years of age at the Agency, but also, in the presence of Mr. Kaplan, threatened to hit the boy's grandmother.

Lastly, Plaintiff contends that Mr. Wingo's employment relationship with the Agency has no bearing on the Kaplan Defendants' general duty as possessor of the land to prevent harm to Plaintiff and to bar Mr. Wingo from the premises after his multiple violent altercations.

Defendant's Reply

In reply, the Kaplan Defendants contend that the subject incident did not arise out of an employer-employee relationship and was beyond the scope of Mr. Wingo's voluntary tasks. The Kaplan Defendants also contend that Plaintiff does not dispute that Mr. Kaplan did not have an employer-employee relationship with either Plaintiff or Mr. Wingo. Further, even if Plaintiff and Mr. Wingo were employees of the Kaplan Defendants, Mr. Wingo's attack upon Plaintiff was not in furtherance of the Kaplan Defendants' business or interests and was the result of Mr. Wingo's personal motives. Therefore, liability based on *respondeat superior* does not lie.

Additionally, even if Mr. Kaplan had a duty to control Mr. Wingo's actions, the alleged attack was unforeseeable. Nothing in the record demonstrates the Kaplan Defendants' awareness of any history or prior incidents of physical altercations between Mr. Wingo and Plaintiff. Further, the alleged attack occurred after a verbal altercation between Ms. McKenzie and Mr. Wingo. Despite exchanging words with Mr. Wingo and being threatened by Mr. Wingo during his argument with Ms. McKenzie, Plaintiff turned his back to the argument and returned to work.

DISCUSSION

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr., supra*]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). The motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a genuine factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212[b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). The "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62

NY2d 686 [1984]).

With respect to plaintiff's first cause of action, landowners have a general duty to act in a reasonable manner to prevent harm to those on their premises (*Basso v Miller*, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). This duty includes taking minimal precautions to protect members of the public from reasonably foreseeable criminal acts by third parties *(Evans v 141 Condominium Corp.*, 258 AD2d 293, 685 NYS2d 191 [1st Dept 1999] *citing Leyva v Riverbay Corp.*, 206 AD2d 150, 152, 620 NYS2d 333), such as controlling the conduct of third persons who frequent or use the property (*see Di Ponzio v Riordan*, 89 NY2d 578, 582-83 [1997]). However, the landowner is not an insurer of the safety of those who use his premises and thus cannot, even in the face of a prior history of criminal activity on the premises, "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 a likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor' "(*Nallan v Helmsley-Spear, Inc., supra,* 50 NY2d at 519, 429 NYS2d 606, 407 NE2d 451, quoting Restatement [Second] of Torts § 344, comment f.); *Maheshwari v City of New York*, 2 NY3d 288, 294, 778 NYS2d 442, 445 [2004]). Put another way, landowners 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" (*D'Amico v Christie,* 71 NY2d 76, 85, 524 NYS2d 1, [1987]).

The Court of Appeals eliminated the common law notion that the duty owed by the owner or possessor of land varied with the status of a plaintiff as a licensee, invitee, or trespasser, and established that the liability of an owner or possessor of land is measured by the single standard of reasonable care under the circumstances (*Basso v Miller*, 40 NY2d 233, 386 NYS2d 564

[1976]). Thus, contrary to the contentions of the Kaplan Defendants, whether plaintiff was an employee of the Kaplan Defendants is inconsequential to the obligation imposed on the Kaplan Defendants to exercise reasonable care to undertake protective measures to safeguard persons on their property from assault by third parties (*see Garrett v Twin Parks Northeast Site 2 Houses, Inc.*, 256 AD2d 224, 682 NYS2d 349 [1st Dept 1998] [stating that the landowner's duty does not depend on plaintiff's status as tenant, business invitee or mere visitor]). Thus, the branch of the Kaplan Defendants' motion to dismiss the first cause of action on the ground that no employer-employee relationship existed between the Plaintiff and the Kaplan Defendants lacks merit.

Furthermore, with respect to plaintiff's claim for negligent supervision, New York recognizes claims of negligent supervision against employers where an employee's conduct causes harm to others (*see Kenneth R. v Roman Catholic Diocese,* 229 AD2d 159, 654 NYS2d 791, 795 [2d Dept 1997] [where an employer cannot be held vicariously liable for its employee's torts, the employer can still be held liable under theories of negligent hiring, negligent retention, and negligent supervision"]). To recover under a theory of negligent supervision, a plaintiff must establish that the conduct of the employee presented a foreseeable risk of injury to third parties, which the employer had a duty to prevent in the exercise of due care (14 NYPRAC-TORTS § 9:29). A necessary element of such causes of action is that the employer knew or should have known of the tortfeasor's propensity for the conduct which caused the injury (*N.X. v Cabrini Medical Center*, 280 AD2d 34, 42, 719 NYS2d 60 [1st Dept 2001]; *Steinborn v Himmel*, 9 AD3d 531, 533, 780 NYS2d 412 [3d Dept 2004]).

Contrary to defendants' contention, a claim for negligent supervision is not necessarily defeated because the tortfeasor is a purported volunteer (*see Peter T. v Children's Village, Inc.*,

30 AD3d 582, 819 NYS2d 44 [2d Dept 2006] [former resident of treatment center sued center for negligent supervision, seeking damages for personal injuries allegedly sustained due to his sexual molestation by volunteer who worked at center]; *Steinborn v Himmel*, *supra* [boy scout sued for negligent supervision of volunteer boy scout leader who assaulted him]; *Sanchez v State*, 8 Misc3d 1019, 803 NYS2d 21 [NY Ct Cl 2005] [prisoner sued the state for negligent supervision of volunteer employee inmates who assaulted him]). Thus, the contention that Mr. Wingo was a "volunteer," who was not given any work to do and "just" sat around to "get a job for himself" does not warrant dismissal of plaintiff's claim for negligent supervision.

Furthermore, the Kaplan Defendants also failed to establish that Mr. Wingo's attack on the plaintiff was unforeseeable as a matter of law (*see Mei Cai Chen v Everprime 84 Corp.*, 34 AD3d 321,322, 825 NYS2d 184 [1st Dept 2006]; *Pinero v Rite Aid of New York, Inc.*, 294 AD2d 251, 252, 743 NYS2d 21 [1st Dept 2002]; *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 329, 567 NYS2d 629 [1991]). Although Mr. Wingo's assault on the Plaintiff was sudden, it cannot be said, as a matter of law, that it was unexpected (*compare Scalice v King Kullen*, 274 AD2d 426, 710 NYS2d 632 [2d Dept 2000] [an attack by one customer, who had been arguing with a store clerk, against another customer could not have been anticipated]). The attack followed an argument between Mr. Wingo and Ms. McKenzie during which Plaintiff was personally threatened with physical violence. Although Mr. Kaplan was not made aware of the threat he was aware of the ongoing argument. The record indicates that Mr. Kaplan was also aware of Mr. Wingo's argumentative nature, past threats of physical violence, and propensity for physical violence while on the premises of the Agency. Thus, issues of fact exist as to whether the Kaplan Defendants were reasonably aware of Mr. Wingo's propensity to assault others at the

Agency's premises, and whether such prior assaults were of the same type and degree. Specifically, the record indicates that Mr. Kaplan was present when Mr. Wingo physically attacked a paid intern during a verbal altercation and when he threatened to physically attack a client. Additionally, it is claimed that Mr. Kaplan was promptly informed when Mr. Wingo previously physically attacked a child of five or six years of age. Mr. Kaplan was also aware of the verbal exchange between Mr. Wingo and Ms. McKenzie that preceded Mr. Wingo's attack on Plaintiff. Thus, to the extent the Kaplan Defendants' motion seeks to dismiss the first cause of action for breach of landowner's duty to provide for the safety and protection of the persons lawfully present at the Agency and negligent supervision, the motion is denied.

However, with respect to Plaintiff's cause of action for vicarious liability, under the doctrine of *respondeat superior*, vicarious liability may be established where there is the existence of a master-servant relationship and the tortfeasor was acting in the furtherance of the master's business or purpose (*see N.X. v Cabrini Medical Center*, 97 NY2d 247, 251, 739 NYS2d 348 [2002] [an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment], *citing Riviello v Waldron,* 47 NY2d 297, 302, 418 NYS2d 300 [1979]). The master-servant relationship may be established based upon a determination that the defendant had the power and right to exercise (or refrain from exercising) control over the actions and conduct of the tortfeasor (*see Di Ponzio v Riordan, supra* [filling station owner was not vicariously liable to plaintiff-customer for negligence of another customer; there was no master-servant relationship between owner and customer, and owner lacked legal or actual authority over negligent actor]; *Devlin v City of New York*, 254 AD2d 16, 678 NYS2d 102 [1st

Dept 1998] [issue of fact existed as to whether a car dispatch company exercised sufficient control over individual drivers to give rise to vicarious liability]; 14 NYPRAC-TORTS § 9:2)). An act is within the scope of the servant's authority if it is performed while the servant is engaged in the performance of his or her assigned duties or if the act is reasonably necessary or incidental to the employment (*see Adams v New York City Tr. Auth.*, 88 NY2d 116, 643 NYS2d 511[1996]; PJI 2:235). Whether the tortfeasor is being paid is of no moment (*see Parke-Bernet Galleries, Inc. v Franklyn*, 26 NY2d 13, 308 NYS2d 337 [1970]).

It has also been held that a property owner who engages an independent contractor ordinarily is not [vicariously] liable for the latter's negligent acts, unless certain exceptions are present, such as negligence in hiring the independent contractor, or where an independent contractor is hired to perform inherently dangerous work, or where the owner is subject to a nondelegable duty (*Acevedo v Audubon Management, Inc.*, 280 AD2d 91, 721 NYS2d 332 [1st Dept 2001]).

Notwithstanding whether Mr. Wingo was an independent contractor, it is uncontested that Wingo's assault against the Plaintiff was clearly outside the scope of any of the duties Mr. Wingo may have had and did not further or serve any discernible business purpose of the Kaplan Defendants. Thus, the second cause of action against the Kaplan Defendants for vicarious liability is dismissed (*see Wallace v Gomez*, 296 AD2d 306, 745 NYS2d 16 [1st Dept 2002] *citing Fainberg v Dalton Kent Secs. Group, Inc.*, 268 AD2d 247, 248, 701 NYS2d 41 and *Flowers v New York City Tr. Auth.*, 267 AD2d 132, 700 NYS2d 27, *lv. denied* 94 NY2d 763, 708 NYS2d 52).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by Stanley Kaplan Talent Agency, TNE Realty Corp. n/k/a ENT Int'l Realty Corp., and SCPOG (Small Commercial Property Owners Group), LLC for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing Plaintiff's complaint is granted solely to the extent that plaintiff's cause of action against defendants for vicarious liability is dismissed.

This constitutes the decision and order of the Court.

Dated: July 31, 2007

Hon. Carol Robinson Edmead, J.S.C.