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M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
IA PART: 7

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MARY CORREIRA, etc.,

Action #1

- against -

Index No. 13355/94

By: DYE, J.

PATRICK BANNON, et al.

-----x
IRENE CAMARDA, etc.

Action #2

- against -

Index No. 14326/94

PATRICK BANNON, et al.

-----x
STEPHEN MORAN

Action #3

- against -

Index # 14839/94

PATRICK BANNON, et al

-----x

On these motions, defendants Bell 39-40 Corp. d/b/a The Palm Club and Alex Kritikos move for summary judgment dismissing the claims against them and to strike the plaintiffs' note of issue for failing to comply with outstanding discovery demands; defendant Joseph Guarino also moves for summary judgment dismissing the claims against him; and defendant Patrick Bannon seeks a subpoena to compel discovery. The determination of these motions will be incorporated into this one decision.

These actions arise out of an incident which occurred, on July 18, 1992, on Bell Boulevard between 39th Avenue and 40th Avenue in Queens wherein three men, Paul Heidelberger, John Camarda and Stephen Moran were shot by defendant Patrick Bannon. Both Paul Heidelberger and John Camarda died as a result of their injuries.

As a result of this incident, defendant Patrick Bannon was tried and convicted of two counts of murder in the second degree, and other related charges, and is currently incarcerated. Each of the defendants in these actions are alleged to either be the owner, manager or employee of two bars located near the site of the incident.

It is undisputed that at the time of the shooting defendant Patrick Bannon was employed as a bouncer at defendant Bell 39-40 Corp. d/b/a/ The Palm Club ("The Palm Club"). It is also undisputed that, on the date of the incident, the Palm Club was owned solely by defendant Alex Kritikos and that Kritikos hired defendant Bannon. Defendant Kritikos testified that he hired Bannon as a bouncer because he watched Bannon at work at another establishment and liked the way he performed the job. Kritikos was also impressed by Bannon's seemingly high level of intelligence and knew that Bannon was accepted for a position as a United States marshal and scheduled to enter the training academy just one month after the incident. Kritikos stated that Bannon was not permitted to carry a gun or consume alcohol while on duty at the Palm Club.

Several months prior to the incident, defendant Joseph Guarino, a long-time friend of Kritikos, began assisting Kritikos in overseeing the workings and employees of the bar while Kritikos was recuperating from injuries he sustained in an accident several months earlier. Guarino was present at the Palm Club on the date of the incident.

Approximately 30 minutes before the shooting, defendant Kritikos was summoned away from the Palm Club and across the street to defendant Michael-Anthony's Restaurant d/b/a T Birds ("the bar") to help the bar's owner calm plaintiff's decedent John Camarda, who was upset about being asked to leave the bar. Kritikos apparently knew the visibly intoxicated Camarda and tried to talk to him. However, Mr. Camarda remained upset and began yelling. Shortly thereafter, defendant Guarino also left the Palm Club and walked across the street to the outside of the bar to see what was happening with Kritikos and Mr. Camarda. Mr. Camarda attacked Guarino and Guarino eventually wrestled Mr. Camarda to the ground. Defendant Patrick Bannon also left the Palm Club to see what was happening in the street and apparently became part of a larger altercation with a few of Mr. Camarda's friends. Defendant Bannon testified at his criminal trial that someone hit him on the back of the head with a bottle as he tried to stop the fighting. Moments later, the police arrived whereupon defendant Bannon reported to the police that plaintiff's decedent Paul Heidelberger, who was an off-duty police officer, hit him with a broken bottle and should be arrested. The police reportedly responded by directing everyone to leave the scene. No arrests were made at that time.

Defendant Patrick Bannon testified that when the fight was stopped he returned to the Palm Club where he remained for approximately five minutes. Since he was cut and bleeding profusely as a result of being hit with the bottle, he was told by his employer and coworkers at the Palm Club to go to the hospital

for treatment. Before he left the Palm Club, defendant Bannon asked his coworkers whether the person who hit him had been arrested. When defendant Bannon learned that no arrests were made, he reportedly told his coworkers that he was not going to let the person who hit him get away with it. Defendant Bannon then admittedly went to his car, retrieved a loaded gun from a locked box that he kept in the car, and drove a short distance to where his victims were seated in a parked car. Defendant Bannon then exited his car, pointed his gun inside the victims' car and shot Paul Heidelberger, John Camarda and Stephen Moran twice each at point blank range.

The motions for summary judgment are granted.

"Among the factors that should be considered in determining whether an employee's tort, whether intentional or negligent, was sufficiently within the scope of his employment to render his employer liable under the doctrine of respondent superior are: the connection between the time, place and occasion for the act; the history of the relationship between the employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated. As to the last factor, while it is not necessary that the precise type of injury caused by the employee's act be foreseeable, it is necessary that the conduct in a general sense is reasonably foreseeable."

(Dykes v McRoberts Protective Agency, Inc., 256 AD2d 2) (citations omitted).

While the question of whether the foregoing factors apply in a particular case is generally a question of fact (see, Young Bai Choi v D&D Novelties, 157 AD2d 777), the evidence submitted by defendants Bell 39-40 Corp. d/b/a The Palm Club, Alex Kritikos and Joseph Guarino on their motions for summary judgment demonstrates as a matter of law that defendant Patrick Bannon was not acting within the scope of his employment when he shot and seriously wounded Stephen Moran and killed John Camarda and Paul Heidelberger. Patrick Bannon's conduct of getting into his car, driving to a location where his victims were sitting in a parked car, and firing several bullets from his gun at close range until he wounded and/or killed his targets was clearly unconnected to and in total contravention of his duties as a bouncer at the Palm Club. Moreover, not only was Bannon motivated by personal revenge for being hit with a bottle and the subsequent failure of the police to arrest the man Bannon identified as his attacker, Bannon's conduct in leaving the Palm Club, retrieving a loaded gun and driving through the neighborhood until he located and attacked his victims was not remotely related to any conduct that Bannon's employer could have foreseen he would engage in as part of his duties as a bouncer at the Palm Club.

Under these circumstances, defendant Patrick Bannon's employers, defendants Bell 39-40 Corp. d/b/a The Palm Club and Alex Kritikos, and his alleged employer, defendant Joseph Guarino, are

entitled to summary judgment dismissing the claims against them on the ground that defendant Patrick Bannon was not acting within the scope of his employment at the Palm Club when he drove to a remote location and shot John Camarda, Paul Heidelberger and Stephen Moran.

Defendant Patrick Bannon's motion for the issuance of subpoenas to compel disclosure of certain police investigation reports concerning Bannon's crime, a copy of the Police Department Division of Internal Affairs file for plaintiff's decedent Paul Heidelberger, and copies of the Department of Corrections inmate files concerning a Mr. Michael Gruce and decedents Stephen Moran and John Camarda is denied. Inasmuch as defendant Bannon does not deny that he committed the subject acts and was convicted after a jury trial for his crimes, the court finds that most of the information sought is cumulative to the existing evidence. Defendant Bannon's request for his victims' prior prison records is irrelevant to this action.

In light of the foregoing determination, the motion by defendants Bell 39-40 Corp. d/b/a The Palm Club and Alex Kritikos to strike the plaintiffs' note of issue for failing to provide them with outstanding discovery is denied as moot.

Settle one order.

Dated: October 25, 2000

J.S.C.