

<b>Rahim v Sottile Security Company</b>
2005 NY Slip Op 30110(U)
March 31, 2005
Supreme Court, New York County
Docket Number: 0105876/2003
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER  
Justice

PART 30

Adnan Rahim

INDEX NO. 105876/03

- v -

MOTION DATE \_\_\_\_\_

SoHile Security Company

MOTION SEQ. NO. (001)

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

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NEW YORK  
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is decided in accordance with the  
memorandum decision dated 3-31-05

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

Dated: 3-31-05

Sherry Klein Heitler  
SHERRY KLEIN HEITLER  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 30**

-----X  
ADNAN RAHIM,

Plaintiff,

-against-

SOTTILE SECURITY COMPANY,

Defendant.

Index No. 105876/03

**DECISION AND ORDER**

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**SHERRY KLEIN HEITLER, J. :**

Plaintiff is an assistant manager at a Duane Reade drug store located on 59<sup>th</sup> Street and Amsterdam Avenue in New York City. Defendant is a security company that was hired by Duane Reade to provide security guard services pursuant to a contract. On November 2, 2001, plaintiff was assaulted by a former employee, Oulimata Kane, who he had fired. The assault occurred after the store was closed; plaintiff claims he was assaulted due to defendant's negligence in the manner in which it performed its security duties in causing, permitting and allowing the assailant to enter and remain in the store. Plaintiff also alleges that defendant failed to properly inspect and secure the premises prior to leaving the store and, as such, failed to ensure that the store was safe for the Duane Reade employees.

Defendant moves for summary judgment dismissing the complaint on the grounds that it did not have a common law or contractual duty of care to plaintiff, and even assuming a duty of care, the assault on plaintiff was not proximately caused by any acts or omission on behalf of defendant. Defendant states that the contract between itself and Duane Reade provided that defendant was to perform such duties as agreed upon by the parties. According to defendant, these duties did not include bodily protection of customers or employees. The contract included two clauses which

provided as follows:

9. Limits of Liability. Client (Duane Reade) acknowledges that Sottile(defendant) makes no warranty, express or otherwise, that the services furnished will avert or prevent occurrences or consequences therefrom...

10. Third-Parties It is expressly understood and agreed that this contract is entered into solely for the mutual benefit of the parties herein, and that no benefits, rights, duties or obligations are intended or created by this contract as to third parties not a signatory hereto.

Defendant contends that it was understood that defendant's services would not avert or prevent occurrences like the assault on plaintiff and that the plaintiff is not a signatory to the contract or a third-party beneficiary. Defendant further contends that Paragraph 11 of the contract is a Hold Harmless clause that provides that defendant would indemnify Duane Reade and its officers and directors of parent and affiliated companies in the event that defendant caused personal injury to any person. According to defendant, this clause would not effect plaintiff because he is not one of the entities subject to indemnification.

The defendant submits deposition testimony of the plaintiff. In said deposition, the plaintiff testified that the assailant was hiding, that he did not see the assailant enter the store and that he had no idea where she was hiding. He contends that he first noticed the assailant after the store was closed and all the other employees had left.

The store had only one guard and he was unarmed. According to plaintiff, the guard, Opoku Nti, would regularly walk throughout the premises at closing time. An affidavit from the guard states that he would stand near the door and watch a television monitor near the door. He further states that his training included how to prevent theft of merchandise and how to call the police. Mr.

Nti denies having any responsibility to protect customers or employees from injury or criminal attack. He states that Duane Reade gave plaintiff a "signal" to wear around his neck and was told to use the signal in case something happened.

In addition to Nti's check of the store, plaintiff testified that Nti also checked the aisles. Prior to the time of the incident, neither one saw the assailant. Plaintiff claims that Nti left before his shift was over and Nti denies this allegation. Plaintiff testified that he had full responsibility for locking up at closing time and that Nti did not have a key or any responsibility for locking any doors. Plaintiff further alleges that he did not recall locking the door to the downstairs overstock area on the evening of the assault. Defendant assumes that the assailant, who had worked as a cashier, had a familiarity with the store and could easily enter the store in disguise and hide undetected.

Defendant asserts that it is too speculative to allege that by leaving early, Nti was negligent in allowing the assailant to gain access to the premises. Defendant claims that the assault could not be reasonably anticipated and that the violent attack by a former employee seeking revenge for being fired has an unexpected nature which severs the causal nexus between any negligence on behalf of defendant and plaintiff's injury. In effect, defendant argues that the assault was not the foreseeable result of any security breach.

Plaintiff opposes the motion and contends that there is proof of a contractual duty to employees like plaintiff. Paragraph 11 states : "Sottile agrees to be responsible for... any injury suffered by any employee of Sottile including, but not limited to personal injury... any damage or injury to any other person or property caused by or sustained in connection with the actions or omissions of Sottile or any of the Security Officers... ."

In the alternative, plaintiff argues that no provision in the contract limits the duties of security guards. Plaintiff submits an affidavit of a security expert, Leslie Cole Sr., who states that guards are required to protect life and property, prevent crime and enforce and execute the owner's rules and regulations. Cole states that the assault could have been prevented if the security guard had performed the duties under the contract and that defendant deviated from the acceptable practices and procedures in security. According to Cole, the failure of defendant to have implemented proactive measures, to have provided adequate training, to have provided effective supervision and to have provided Nti with Post Orders, was a deviation from acceptable security practices and procedures.

Plaintiff avers that Nti had a common law duty to search the store in a reasonably prudent way and that he relied on Nti's inspection of the premises during closing time. It is argued that the store was not checked or not checked properly, as the assailant was in the store at that time. The alleged failure to make a proper inspection allegedly placed plaintiff in physical danger. Plaintiff argues that there is a triable issue of fact as to whether the assault upon him was proximately caused by the acts or omissions of defendant. According to him, a jury should determine whether a risk was foreseeable under the circumstances.

Plaintiff asserts that there are surveillance tapes currently in the hands of a district attorney which may shed light on what happened that evening and how Nti's acts or omissions may have allowed the assailant to attack plaintiff. There were four cameras which showed various parts of the store. According to plaintiff's former attorney, the prosecution is still open and the district attorney is holding the tapes. Plaintiff deems the tapes to have probative value and, as such, argues that the jury would need to see the tapes before deciding whether such an event was foreseeable. Defendant

argues that the surveillance tapes should not be considered by the court because the Note of Issue has been filed and plaintiff is not in possession of said tapes. Plaintiff states that the court should consider the potential value of the court and/or the jury viewing the surveillance tapes and argues that, in this case, post Note of Issue discovery is warranted. Plaintiff avers that he would be prejudiced if something not within his control precludes the court from seeing all the evidence before rendering a decision.

In reply, defendant states that plaintiff, when deposed, had previously stated that he did not remember if Nti checked the aisles before leaving on the night of the assault. Defendant claims that in his opposition, plaintiff states that he is sure that Nti did not conduct a check that evening, allegedly contradicting his deposition testimony. Plaintiff also submitted an Errata Sheet substantively altering plaintiff's original deposition testimony almost nine months after the deposition was held and over six months after the deposition transcript was duly exchanged. Defendant states that the Errata Sheet should not be permitted or considered by the court. In a sur-reply, plaintiff argues that the validity of the Errata Sheet is a new issue which was raised in the defendant's reply. Plaintiff states that the validity of the Errata Sheet should not be considered or resolved by the court in a summary judgment motion.

In this negligence action, plaintiff must show a duty of due care by defendant toward plaintiff, a breach of that duty by defendant, and that the breach was the proximate cause of the assault. See Espinal v Melville Snow Contractors, 98 NY2d 136 (2002). The court will first consider the duty issue. Defendant claims that it owed no contractual duty toward plaintiff. The contract itself does not spell out the duties of defendant's security guards. It only provides that defendant shall perform services as agreed upon by defendant and Duane Reade, the other party to

the contract. Defendant makes no warranty, express or otherwise, that its services will avert or prevent occurrences, though occurrences are not defined. The contract is clear with respect to defendant's liability toward third parties. Defendant owes no duty to any third parties, which would include plaintiff, though he is an employee of Duane Reade.

It is settled that parties outside a contract are permitted to sue for tort damages arising out of negligently performed or omitted contractual duties. Palka v Servicemaster Mgt. Services, 83 NY2d 579 (1994). To limit an open-ended range of tort duty arising of contractual breaches, an injured non-contracting party must show that the performance of a contractual obligation between others has induced detrimental reliance by the party, and that inaction would result not merely in withholding a benefit, but positively or actively in working an injury. I.d. at 587.

Here, the contract does not elaborate as to the specific duties of defendant. There is an issue of fact as to what those duties are. Defendant claims that its duty basically consisted of averting shoplifting, whereas plaintiff claims that the duty was more inclusive. There is also an issue as to whether plaintiff relied on defendant to carry out said duty to his detriment.

It is also settled that one who assumes a duty to act, even though gratuitously, may thereby become subject to a duty of acting carefully, if his conduct in undertaking a service somehow placed an injured party in a more vulnerable position than he or she would have been in had the actor done nothing. See Nallan v Helmsley, 50 NY2d 507 (1980). Here, Nti claims to have regularly inspected the premises during closing time. On the night of the assault, he alleges that he did inspect the premises, though there is a dispute as to whether he acted reasonably.

Defendant argues that even if there was a duty to act reasonably that was breached, there is the matter of showing that the breach was the proximate cause of one's injuries. A party's liability

for negligent acts or omissions extends to all injuries which are a foreseeable consequence thereof, provided that the negligent conduct was the proximate or legal cause of the injuries sustained. Taib v Hilton Hotels Corp. (131 AD 2d 257 [1987], app dismissed 72 NY2d 1040 [1988]). The court finds that the foreseeability of the assault should be determined by a trier of fact. Whether Nti's action or inaction resulted in the aforesaid assault is a jury issue.

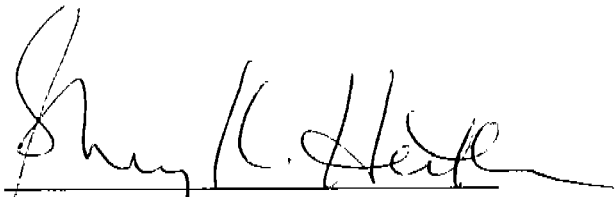
Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied.

The parties are directed to appear for a conference on MONDAY, APRIL 18, 2005 at 10:00 AM at 60 Centre Street, Room 438, New York, New York, 10007.

This shall constitute the decision and order of the court.

DATED: MARCH 31, 2005

  
SHERRY KLEIN HEITLER  
J.S.C.

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