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

PRESENT: Shirley Werner Kornreich, J. PART 54
Justice

INDEX NO. 4037/04

MOTION DATE 1/30/05

MOTION SEQ. NO. 005

MOTION CAL. NO.

OSCAR ARROYO

-v-

COLISEUM BOOKS + GIFTS

The following papers, numbered 1 to 3 were read on this motion to/for amend answer / summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision and order.

Dated: 4/5/06

SHIRLEY WERNER KORNREICH J.S.C.

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

[* 1]

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

----------X

OSCAR ARROYO and MARTA RAMIREZ,

Plaintiffs,

-against-

COLISEUM BOOKS & CAFE, LLC., JOHN DOE 1 AND JOHN DOE 2, SAID NAMES BEING FICTITIOUS AND PRESENTLY UNKNOWN,

Defendants.

----------X

DECISION and ORDER

Index No.: 104037/04

KORNREICH, SHIRLEY WERNER, J.

Motion Sequences 003 and 005 are hereby consolidated for disposition.

This is an action arising from an incident that occurred when employees of defendant Coliseum Books & Cafe, LLC ("Coliseum") followed plaintiff Oscar Arroyo out of Coliseum's store and accosted him on suspicion of shoplifting. Plaintiff moves for summary judgment (Motion Sequence 003) against defendant Coliseum on an unpleaded cause of action for assault and/or battery. Defendants oppose plaintiff's motion on the following grounds: a) summary judgment cannot be granted on an unpleaded cause of action; b) if the individual defendant, identified now as Allan Kelin, committed an assault he was acting outside the scope of his authority as employee of Coliseum, which cannot be held to be liable on the theory of respondeat superior, or, alternatively, there is a question of fact regarding whether Kelin acted in the scope of his employment; and c) there is a question of fact as to whether plaintiff's culpable conduct was a substantial factor in causing his injuries and comparative fault must be apportioned by a jury.

Defendants cross-move for leave to serve an amended complaint adding a defense under General Business Law § 218, and for summary judgment dismissing the complaint based on the amendment, and on the theory that Kelin acted outside the scope of his employment (Motion Sequence 005).

Plaintiff commenced this action seeking recovery on five causes of action: (1) negligent contact with plaintiff causing him to fall down a flight of stairs; (2) negligent hiring, training and supervision and retention; (3) wrongful detention and infliction of emotional distress; (4) loss of consortium and services on behalf of plaintiff's wife, Marta Ramirez; and (5) punitive damages.

However, according to plaintiff's memorandum of law, its motion for summary judgment is predicated on "willful conduct and admitted assault and battery of Mr. Arroyo by two Coliseum Bookstore managers, acting within the scope of their employment."

In support of his motion, plaintiff relies primarily on the deposition testimony of Anthony Urciuoli and Allan Kelin, respectively the general manager and a manager of Coliseum. The following facts are undisputed:

Coliseum operates a book store and cafe located on 42nd Street between 5th and 6th Avenues in Manhattan. Urciuoli was in charge of overseeing the operations of Coliseum and, Kelin, also a manager, reported to Urciuoli. Coliseum did not employ security personnel in its 42nd Street store. Instead its managers were responsible for detaining persons suspected of shoplifting.

On January 6, 2004, plaintiff was in the Coliseum store. As he left the store, Urciuoli and Kelin (collectively "managers") believed that plaintiff might have stolen some merchandise. The managers followed plaintiff across 5th Avenue and to the subway entrance on Madison Avenue

and 42nd Street. Plaintiff refused to stop or permit the managers to open his bag. At or near the top step of the stairs leading down to the subway, Kelin, believing that plaintiff had stolen items concealed in his sports bag, grabbed the strap of plaintiff's bag. Plaintiff fell backwards down the subway stairs and was injured. Urciuoli witnessed the accident. When plaintiff was lying on the ground waiting for an ambulance, Urciuoli looked in the bag and didn't see any Coliseum books. There were, in fact, no Coliseum books in the bag. The managers testified that the store alarm was known to go off in error, "frequently," according to Urciuoli's testimony.

The remaining facts are contested. Although the managers testified that they did not see plaintiff take any merchandise, they claim, and plaintiff disputes, that the security alarm sounded as plaintiff passed through two gates or poles located at the front of the store near the door.

The parties are at odds as to when plaintiff was first asked by the managers to stop: the managers say that they were just in front of the door to the store, which is located midway between 5th and 6th Avenues, when they first asked plaintiff to come back and go through the security gate again, or to allow an inspection of his bag. Plaintiff claims that he was first approached by the managers on the west side of 5th Avenue at the intersection of 42nd Street.

The managers testified that as they followed plaintiff to the subway, Kelin was on his cell phone with the police, they told plaintiff the police were on their way, and that sirens were audible by the time they reached the subway entrance, just prior to plaintiff's fall. Plaintiff denies hearing sirens or being aware that Kelin was talking with the police on his cell phone.

The manner in which the accident occurred is in dispute. The managers claim that once they reached the top of the subway steps, Kelin grabbed the strap of plaintiff's bag, plaintiff refused to relinquish it, and during the ensuing struggle for possession of the bag, the strap broke

and plaintiff fell down the stairs backwards.

Plaintiff's version differs. He claims that Kelin grabbed the strap of the bag while pushing plaintiff's shoulder, attempting to wrest the bag from him, then Kelin let go of the bag, and pushed plaintiff down the stairs with both hands saying "you black son of a bitch." According to plaintiff, he was not in the process of falling when Kelin let go of the bag.

A. Defendants' Motion to Amend and for Summary Judgment

General Business Law §218, in pertinent part, provides:

> In any action for false arrest, false imprisonment, unlawful detention, defamation of character, assault, trespass, or invasion of civil rights, brought by any person by reason of having been detained ***on or in the immediate vicinity of the premises of (a) a retail mercantile establishment*** for the purpose of investigation or questioning ... as to the ownership of any merchandise, ... it shall be a defense to such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer acting pursuant to his special duties, police officer or by the owner of the retail mercantile establishment ..., his authorized employee or agent, and that such officer, owner, employee or agent had reasonable grounds to believe that the person so detained ... was committing or attempting to commit larceny on such premises of such merchandise .... As used in this section, "reasonable grounds" shall include, but not be limited to, knowledge that a person (I) has concealed possession of unpurchased merchandise of a retail mercantile establishment, ... and a "reasonable time" shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise.... (emphasis supplied)

Parties may amend their pleadings, or supplement them at any time, by leave of the court. CPLR 3025(b). The decision whether to grant the amendment is committed to the court's discretion. *Heller v. Provenzano, Inc.*, 303 A.D.2d 20, 22 (1st Dept. 2003). Although CPLR 3025 provides that leave to mend pleadings is to be freely granted, "leave should be denied where the proposed claim is palpably insufficient." *Pasalic v. O'Sullivan*, 294 A.D.2d 103, 104

(1st Dept. 2002). *See Monteiro v. R.D. Werner Co.*, 301 A.D.2d 636, 637 (2d Dept. 2003) ("A proposed amendment that is plainly lacking in merit will not be permitted.") . "It is incumbent upon the movant to make some evidentiary showing that the claim can be supported." *Morgan v. Prospect Park Associates Holdings, L.P.*, 251 A.D.2d 306 (2d Dept. 1998), quoting *Cushman & Wakefield, Inc. v. John David, Inc.*, 25 A.D.2d 133, 135 (1st Dept. 1966).

Here, General Business Law §218 is not a defense available to defendants under the uncontested facts because plaintiff's accident did not occur "on or in the immediate vicinity of the premises of ... a retail mercantile establishment." The testimony of all parties is that plaintiff left the store and was followed for one and a half long blocks, across 5th Avenue, to the subway entrance on Madison Avenue. Defendants have not cited any authority, and research has disclosed none, which extended the "immediate vicinity" requirement of the statute to such an extent. Precedents in which a suspected shoplifter was detained in a store parking lot, or brought to a police station following detention by store personnel, are distinguishable from the facts of this case.

Accordingly, the motion to amend defendants' answer and for summary judgment based on the amendment is denied.

B. The Plaintiff's Motion for Summary Judgment

Plaintiff is moving for summary judgment on an unpleaded cause of action for assault and/or battery, but that is not, as defendants suggest, fatal to the motion. *John William Costello Associates, Inc. v. Standard Metals Corp.*, 99 A.D.2d 227, 229 (1st Dept.1984). ("[S]ummary judgment may be awarded to the movant on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice.") Here, there would be

no prejudice to defendants as plaintiff's assault theory was clearly set forth in plaintiff's bill of particulars dated August 4, 2004, and defendants deposed plaintiff on this issue in May of 2005.

However, it is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make such a prima facie showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman, supra*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept. 1997).

Here, plaintiff's motion for summary judgment must be denied because there are issues of fact, including whether Kelin was acting in the scope of his authority when the accident happened and whether plaintiff's culpable conduct was a substantial factor in causing his injuries.

The case of *Sims v. Bergamo*, 3 N.Y.2d 531 (1957), involving a violent assault by a bartender on a patron, is instructive. The evidence in that case was that the defendant's bartender refused to serve the plaintiff because she appeared to be "intoxicated" and "unruly." The plaintiff left the defendant's bar and went to drink next door in another one. The bartender

claimed that after she left, the plaintiff broke a window in the defendant's bar. The plaintiff claimed she did not, but she did throw a glass on the sidewalk outside the defendant's bar. Plaintiff testified that afterward the bartender invited the plaintiff back into the defendant's bar, offered to make peace, but then assaulted her.

The Court of Appeals held that it was error to for the Appellate Division to dismiss the complaint on appeal after a jury verdict for the plaintiff:

> Upon this record we cannot say that as a matter of law there was no evidence presented from which it could be reasonably inferred that the bartender's assault -- though undertaken through a lack of discretion or infirmity of temperament -- was committed in the scope of his employment and in furtherance of his employer's interests. The circumstances that the assault took place a considerable period of time after the bartender's original refusal to serve the plaintiff and after the window was broken are not sufficient justification for concluding that as a matter of law the assault was not committed within the scope of the bartender's employment and in furtherance of his employer's interests. From the fact that the bartender refused to serve the plaintiff when she first entered the defendant's establishment because she appeared "rather unruly" and "intoxicated" and from the fact that he suspected and accused her of breaking his employer's window, it may reasonably be inferred that the bartender believed that she was in an irascible mood and would persist in destroying his employer's property and in disturbing the peace and order of his employer's establishment if he did not take steps to prevent her. The perpetration of the assault for either of these purposes -- protecting his employer's property from further damage and the maintenance of peace and order therein -- would have been pursuant to unexpressed rules and in the performance of duties enjoined upon him by his employment and in the furtherance of his employer's interests....That the assault was not the most prudent or expeditious manner of accomplishing either purpose does not exclude it from the scope of the bartender's employment. As we said in the De Wald case ... "It is established law in this jurisdiction that 'The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another.'"

Id. at 533-535. *See also, Riviello v. Waldron*, 47 NY2d 297, 304 (1979).

Here, defendants admit that it was the managers' responsibility to deal with shoplifters. However, it is a question of fact whether Kelin gave up trying to grab the bag and intentionally pushed plaintiff down the stairs while uttering a racial slur, as plaintiff testified, or whether the strap of plaintiff's bag broke and caused him to fall. It is also for a jury to determine whether, if Kelin intentionally pushed plaintiff, he did so to further his employer's interest in apprehending a suspected shoplifter, or whether at the moment that Kelin gave up trying to get the bag, he was furthering some interest unrelated to his work for Coliseum. A jury could infer that the push was an attempt to insure that plaintiff would not disappear into the subway with Coliseum's merchandise before the police arrived on the scene, or it could infer that Kelin had some other motive unrelated to Coliseum's interests.

In addition, there is an issue of fact as to whether the plaintiff's actions were a substantial factor in causing him to fall down the stairs. CPLR §1411 provides that:

> In any action for personal injury...the culpable conduct attributable to the claimant ... including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant bears to the culpable conduct which caused the damages.

CPLR §1411 requires apportionment of damages even where the defendant has committed an intentional tort. *Lomonte v. A & P Food Stores,* 107 Misc. 2d 88 (App. Term, 1st Dept. 1981).

Here, the jury is entitled to consider whether plaintiff's failure to stop and open his bag, or his failure to relinquish the bag to Kelin at the top of the subway steps, were substantial factors in causing his injuries.

The Court grants plaintiff leave to serve an amended complaint adding causes of action for assault and/or battery.

Accordingly, it is

ORDERED that defendants' motion to amend the answer and for summary judgment is denied; and it is further

ORDERED that plaintiff's motion for summary judgment is denied; and if is further

ORDERED that plaintiff may serve an amended complaint adding causes of action for assault and/or battery within twenty days after service upon plaintiff of a copy of this order with notice of entry.

Dated: April 6, 2006

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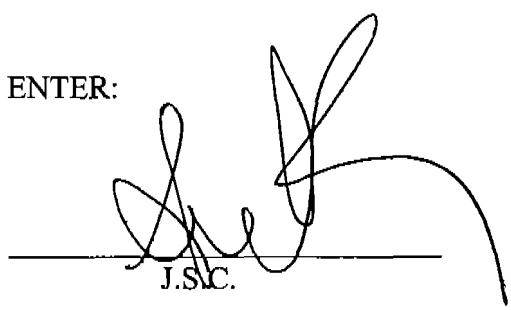

J.S.C.