

Holder v Friedman Mgt. Co.

2007 NY Slip Op 31841(U)

June 18, 2007

Supreme Court, New York County

Docket Number: 0104378/2005

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

MATTHEW N. HOLDER

INDEX NO. 104378/05

- v -

MOTION DATE _____

FRIEDMAN MANAGEMENT

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


**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
JUN 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

JUN 18 2007

Dated: _____



J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

Matthew N. Holder and Rita Verdecchia,

Plaintiffs

-against-

Friedman Management Co., Deborah
Realty Co., and Victor Camillari,
Defendants.

DECISION/ORDER

Index No.: 104378-05

Seq. No.: 001

Present:

Hon. Judith J. Gische, JSC

-----X

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of
this/these motion(s):

Papers **Numbered**

Motion Seq #4 ("Holder" case) Index No. 113264/03

Defs' amended n/m (§3212) w/TF affid, exhs	1
Pltff's opp w/DS affirm, exhs	2
Reply w/TF affidavit	3

Motion Seq #3 ("Verdecchia" case) Index No. 121700/03

Defs' OSC #3 (§3212) w/SEW affirm, exhs	1
Pltff's opp w/PD affirm, exhs	2

Motion Seq #3 ("Holder- Verdecchia" case) Index No. 104378/05

Defs' OSC #1 (§3212) w/SEW affirm, exhs	1
Pltff's opp w/PD affirm, exhs	2

FILED
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Upon the foregoing papers the court's decision is as follows:

GISCHE, J.;

There are three related actions among the parties, each involving claims by Rita Verdecchia and Mark N. Holder, a married couple and former tenants of an apartment located within the building owned by Deborah Realty Co., Inc. ("owner"), and managed

by Friedman Management Co. a/s/h/a, Alfred S. Friedman Management Corp. ("Friedman"). The claims all stem from an alleged assault by the owner's former live-in superintendent, Victor Camillari ("Camillari").

Holder is the main plaintiff in the case of Holder and Verdecchia v. Friedman Management Corp., Alfred S. Friedman Management Corp., Deborah Realty Co., and Camillari, Index No. 113264/03 ("Holder case"). Verdecchia, his wife, has a derivative cause of action for loss of consortium. Verdecchia is the main plaintiff in the case of Verdecchia and Holder v. Friedman Management Corp., Alfred S. Friedman Management Corp., Deborah Realty Co., and Camillari, Index No. 121700/03 ("Verdecchia case") with Holder having the derivative cause of action. In the third action [Holder and Verdecchia v. Friedman Management Co., Deborah Realty Co., and Camillari, Index No. 104378/05 case], both spouses are plaintiffs ("Holder-Verdecchia case").

The defendants (owner and managing agent) seek summary judgment in each of these three cases dismissing plaintiffs' claims against them. A prior motion by plaintiff in the Holder case for entry of a default judgment against Camillari was granted. Justice Evans directed an inquest on damages at the time of trial. Order, Evans J., 6/1/05.

Although all sides have stipulated that the three separate motions should be consolidated for decision by the court because they all rely upon the same arguments and documents, only the motion in the Holder case is timely and will be decided. The motion in the Holder case is the only motion that was brought within 120 days of the

note of issue having been filed. The other motions in the Verdecchia and Holder-Verdecchia cases are untimely and will not be considered in light of the Court of Appeals authority directly on this point. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). Thus, notwithstanding the parties' written stipulation (so ordered by the court) that the motions would be jointly considered, the parties have otherwise failed to show "good cause" for why the motions were delayed and their lateness should be excused.

Thus only the motion for summary judgment in the Holder case is considered and decided by the court on its merits.

Background

Holder contends that on June 12, 2003 he was assaulted by Camillari, the superintendent of 404 East 75th Street while the superintendent was acting, or attempting to act, on behalf of, or serving the owner and managing agent's interests. Holder also contends that the owner and managing agent were negligent in their hiring, supervision or retention of Camillari because they did not do a background check on him when they hired him. Holder contends further that he frequently complained to management about how Camillari and his wife conducted themselves, expressing concern for his personal safety, and that these complaints were completely disregarded. Thus, it is Holder's contention that the defendants had actual notice or reason to know that Camillari was a violent man with violent propensities and subject to angry outbursts. He has asserted the following causes of action: 1st- assault, 2nd- negligent hiring, retention and supervision, 3rd and 5th -loss of consortium, and 4th-

complaints about Camillari being violent or abusive and he testified that Camillari is an average person.

Defendants argue, alternatively, that even if Camillari did assault Holder with a chair as Holder has described, Camillari was acting independently when he did so and not on their behalf or in the course of his employment as a superintendent. Defendants contend that Holder's deposition testimony proves that it was Holder who was aggressive towards Camillari and that any ensuing altercation was entirely personal matter between these two neighbors.

Discussion

Before addressing the legal standard applicable to a motion for summary judgment, the court considers defendants' legal argument that this case is time barred. The applicable statute of limitations for a negligent hiring or supervision claim is three years. CPLR § 214 (5); Green v. Emmanuel African Methodist Episcopal Church, 278 AD2d 132 (1st Dept 2000). A claim of negligent hiring and retention is separate apart from a claim for negligent supervision. T.W. v. The City of New York, 286 AD2d 243 (1st Dept 2001). Under either theory of liability the statute of limitations begins to run from the date of the commission of the act or injury complained of. Bouchard v. New York Archdiocese, 2006 WL 3025883 (S.D.N.Y. 2006) (*nor*). Therefore, based upon the operative date of the alleged assault (e.g. June 12, 2003), this action was timely commenced, and is not time barred, and the court will proceed to consider the whether defendants are entitled to summary judgment.

To prevail on their motion for summary judgment, the defendants must present

a *prima facie* case demonstrating entitlement to judgment as a matter of law.

Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If successful, the burden then shifts to the party opposing summary judgment (here, plaintiff) who must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. Zuckerman v. City of New York, supra. The moving party cannot rely upon or point to deficiencies in the opposition to bolster its own motion. Therefore, the burden on the movant is greater than on the party who is opposed. Friends of Animals v. Assoc Fur Mfrs., 46 NY2d 1065 (1979).

Where an employee is acting within the scope of his or her employment, the employer is liable for any damages caused by the employee's negligence under a theory of *respondent superior*. Therefore, if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training. Karoon v. New York City Transit Authority, 241 A.D.2d 323 (1st dept 1997). The tortious act must, in some way, however, "been effectuated, however improvidently, to advance the employer's interest." SantaMarina v. Citrynell, 203 A.D.2d 57, 59 (1st dept. 1994). An employer will not, however, be liable under the doctrine of *respondent superior* if the alleged acts of its employee were: 1) not a part of his job, 2) would not have served his employer's interests, 3) were done for purely personal motives, and 4) were an obvious departure from his normal duties. White v. Hampton Management Co. L.L.C., 35 AD3d 243 (1st dept. 2006).

Defendants' have failed to prove that Camillari was not acting within the scope of his employment when the altercation occurred. As a live-in 24 hour super, Camillari

was always "on duty."

Even assuming defendants have sustained their burden on this motion, shifting the burden to plaintiff to raise triable factual disputes, plaintiff meet this burden easily, precluding the grant of summary judgment to the defendants. There is at least an issue of fact about whether Camillari was acting within the scope of his employment. In any event, a reasonable jury could also decide that even if Camillari's actions were, in fact, a normal departure from his duties as a superintendent, his actions were foreseeable or could have been anticipated in light of Holder's prior complaints to the defendants about Camillari's behavior. Ramos v. Jake Realty Co., 21 AD3d 744 (1st Dept 2005). This is a separate basis for liability under plaintiff's pleadings.

Although defendants contend they did not condone, know of or expect that Camillari would ever react in a violent manner (as alleged), there are two letters by Holder to management. These letters present disputes for the jury to decide, including whether management turned a deaf ear to Holder's complaints. Of particular relevance are these statements in Holder's correspondence: "I am writing to inform you that the quality of life for myself and my wife, and our safety are impugned due to the actions and the volatile nature of your employee and his wife . . ." On another occasion Holder wrote that "[I], my wife and other tenants I have spoken with in this building, are physically afraid of Miriam and Victor Camillari due to their harassment and violent outbursts . . ."

Any argument, that Holder provoked Camillari into a rage, and that the super was otherwise a mild mannered person, is based upon the personal opinions of people

who testified on behalf of the defendants, having no probative value. The persons who testified merely expressed surprise that Camillari allegedly hit Holder with a chair. They did not, however, witness the accident or have any personal knowledge of the preceding events. Camillari himself has defaulted in this action and has not been deposed. Therefore, not only do the defendants have the heavy burden of proving their defenses, they have to prove that what Holder claims happened did not, in fact, occur. This presents the quintessential "factual dispute" for the jury to decide [Riviello v. Waldron, 47 N.Y.2d 297 (1979)] since issues of credibility cannot be decided by the court on a motion for summary judgment. A reasonable jury could decide that the defendants knew of, tolerated, and condoned Camillari's abusive and violent outbursts because this behavior helped them keep the tenants in "check."

Having failed to prove that they are entitled to summary judgment against the plaintiff, defendant's motion for summary judgment is denied as there are factual disputes to be tried. Since the note of issue has been filed, this case is ready for trial. Plaintiff shall serve a copy of this decision/order on the Trial Support Office so that it may be scheduled and assigned for trial.

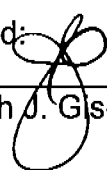
Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
June 18, 2007

So Ordered:

Hon. Judith J. Gische, J.S.C.



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