

Diaz v Marion Scott Real Estate, Inc.

2007 NY Slip Op 32126(U)

July 9, 2007

Supreme Court, New York County

Docket Number: 0104828/2005

Judge: Joan Madden

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

PRESENT: MADSEN
Justice

PART 07

WILFRED DIAZ

INDEX NO. 104828/05

MOTION DATE _____

MOTION SEQ. NO. 2

MOTION CAL. NO. _____

- v -

MARION SCOTT ROAC ESTATE INC

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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PAPERS NUMBERED

Cross-Motion: Yes No

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Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision & order.

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

Dated: July 9, 2007

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----x
WILFRED DIAZ,

Plaintiff,

Index No. 104828/05

-against-

MARION SCOTT REAL ESTATE, INC., 1775
HOUSING ASSOCIATES, L.P., TRIANGLE
HOUSING ASSOCIATES, L.P., A.K. HOUSES,
1775 HOUSES, AARGO SUPPORT ORGANIZATION,
INC., and AARGO SERVICES, INC.,

Defendants.
-----x

JOAN MADDEN, J:

Defendants Marion Scott Real Estate, Inc. (Marion Scott),
1775 Housing Associates, L.P. (Housing Assocs.), and Triangle
Housing Associates, L.P. (Triangle) move, pursuant to CPLR §§
3211 and 3212, for an order granting summary judgment dismissing
plaintiff's complaint and cross claims of all co-defendants.

In the alternative, said defendants move, pursuant to CPLR
§§ 3211 and 3212, for a conditional order of indemnification in
their favor against defendant Aargo Support Organization, Inc.
and Aargo Services, Inc. (collectively referred to as Aargo), on
the issue of liability.

This is an action for intentional torts and negligence
arising out of an assault and battery. At the time of the
subject incident, plaintiff resided at 112-126 East 128th Street,

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New York, New York. Triangle, a limited partner of A.K. Houses, was the owner of 112-126 East 128th Street. Housing Assocs. was the owner of 107-129 East 126th Street. Marion Scott managed the residential buildings (the Premises) known as A.K. Houses and 1775 Houses.¹ In between and adjacent to the Premises stood an independent parking lot, neither owned nor operated by the defendants.

Aargo is a security service company, which had a "Security Service Agreement" with "1775 Houses c/o Marion Scott", pursuant to which Aargo was to provide security services and related personnel for the Premises, including uniformed and non-uniformed guards (the Contract). The Contract between the parties provided, inter alia, that Aargo would "be on the premises of the Client at such hours and locations as will be subsequently authorized and directed by the Client."

Plaintiff alleges that, on June 14, 2004, at approximately 9:00 p.m., while he was in the parking lot between the Premises, he was seriously injured in an assault by individuals named Alfred Bland and Edward Watkins. At the relevant time, Bland and Watkins were employed by Aargo. In the complaint, plaintiff alleges that defendants were negligent in their ownership, operation, management, and control of the Premises, which

¹A.K. Houses was the term used for 112-126 East 128ⁿ Street, and 1775 Houses was the term used for 107-129 East 126ⁿ Street.

[* 4]

included the parking lot and common areas where plaintiff was assaulted. In their answer to the complaint, Marion Scott, Housing Assocs., and Triangle generally deny the allegations of the complaint, and assert a cross claim against Aargo for indemnification and/or contribution.² In its answer to the complaint and cross-claim, Aargo generally denies plaintiff's and co-defendants' allegations, and asserts a cross claim for indemnification against all co-defendants.

In his deposition testimony, dated January 18, 2006, plaintiff claimed that the parking lot was a common lot, and that at the time of the incident he went into the lot to feed abandoned cats that lived in the lot. He further related that, as he was leaving the lot, he was stopped and questioned by a "black gentleman with dreadlocks," who pulled a gold shield out of his pocket, flashed it, and twisted plaintiff's hand from behind. Plaintiff further stated that a second man came along who identified himself as the "director of security," grabbed plaintiff's right wrist and twisted it. He alleged that he was cursed at, thrown to the floor, punched and choked, and then

²A Stipulation of Discontinuance was executed by Marion Scott discontinuing all claims and cross claims against Housing Assocs. and Triangle. A.K. Houses and 1775 Houses have not appeared in this action.

taken to Aargo's security office located in plaintiff's building, i.e., 112 East 128th Street.³

The moving defendants argue that they are entitled to summary judgment because, inter alia, the parking lot was not part of either Housing Assocs. or A.K. Houses; they did not own or control the parking lot; Bland and Watkins were employed by Aargo, an independent contractor; Marion Scott did not manage the parking lot; and, Aargo did not have an agreement with the moving defendants to perform any security services, including supplying security officers for patrol, in the parking lot.

Plaintiff argues that issues of fact exist as to whether the moving defendants should be held liable for the acts of Aargo's employees, because the security duties performed by a security firm involve inherently dangerous activities.

As a general rule, a principal of an independent contractor is not liable for injury caused to a third party by an act or omission of the independent contractor or its employees, because in most cases, principals do not control the manner in which the independent contractor's work is carried out (Chainani v Board of Educ. of City of N.Y., 87 NY2d 370 [1995]; Feliberty v Damon, 72 NY2d 112 [1988]). An exception to the general rule is if the activity involved is inherently dangerous, i.e. "the work involves

³These men were later identified as Mr. Alfred Bland and Mr. Edward Watkins, employees of Aargo. Plaintiff claims that neither man was wearing a uniform at the time of the incident.

a risk of harm inherent in the nature of the work itself [and] the employer recognizes, or should recognize, that risk in advance of the contract" (Rosenberg v Equitable Life Assur. Socy. Of U.S., 79 NY2d 663, 669 [1992]). "[B]lasting, certain types of construction and working with high tension electric wires" have been recognized as examples of inherently dangerous activities (Chainani v Board of Educ. of City of N.Y., 87 NY2d at 381).

Further exceptions to the general rule that a principal of an independent contractor remains liable for the tortious acts of the independent contractor, include evidence that the principal had control over the independent contractor's employees, or that the principal was on notice of the contractor's security personnel's alleged violent propensities (Lazo v Mak's Trading, Co., 199 AD2d 165 [1st Dept 1993], affd 84 NY2d 896 [1994]).

Here, it is undisputed that the subject lot was not owned or operated by defendants, nor was it a part of the area that the Aargo security people were to patrol under the Contract. Although the issue of whether a principal had sufficient control over work performed by an independent contractor typically involves a question of fact, where there is no evidence presented which raises an issue of fact, it can be determined as a matter of law (Melbourne v New York Life Ins., Co., 271 AD2d 296, 297 [1st Dept 2000] ["[M]ere retention of general supervisory powers over independent contractors cannot form a basis for the imposition of

liability against the principal"]; see also Vargas v Beer Garden, Inc., 15 AD3d 277 [1st Dept 2005]).

It is undisputed that Aargo provided security for the Premises pursuant to a written contract. The Contract stated that Aargo "will be responsible for the direct supervision of all Personnel through designated representatives" There is no evidence that the moving defendants either supervised or controlled every aspect of the manner in which Aargo's work was performed, nor is there any evidence that the moving defendants were aware of any alleged violent propensities of Aargo's security personnel. Finally, providing security services is not an inherently dangerous activity which would trigger vicarious liability (see e.g. Chainani v Board of Educ., supra).

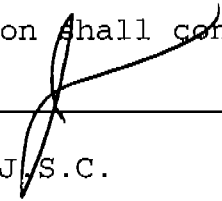
Accordingly, it is

ORDERED that the motion for summary judgment dismissing plaintiff's complaint and all cross claims is granted and the complaint is hereby severed and dismissed as against defendants Marion Scott Real Estate, Inc., 1775 Housing Associates, L.P., and Triangle Housing Associates, L.P., and the Clerk is directed to enter judgment in favor of said defendants, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 9, 2007

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