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

PRESENT: HON. DORIS LING-COHAN PART 36
Justice

Joseph Armacida,

- v -

D.G. Neary Rlty Ltd & Thomas J. Wray, Jr.

INDEX NO. 108517/04

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4
Interim orders dated 10-15-07 & 3-5-07	5, 6

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant D.G. Neary Rlty Ltd. is granted in accordance with the attached memorandum decision.

FILED
JAN 14 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/8/08

HON. DORIS LING-COHAN
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; PART 36

JOSEPH ARMACIDA,

Plaintiff,

-against-

D.G. NEARY REALTY LTD. AND THOMAS J. WRAY, JR.,.

Defendants.

Index No. 108517/2004

Motion Seq. #003

DORIS LING-COHAN, J.:

Plaintiff brought this action to recover monetary damages for personal injuries allegedly sustained on June.16, 2003, when plaintiff was allegedly assaulted by defendant Thomas J. Wray Jr., a licensed real estate salesperson, at the offices of DG. Defendant D.G. Neary Realty Ltd. (DG) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it.

According to plaintiff, plaintiff was walking down 6th Avenue sometime after 6:00 PM when he noticed a sign for DG's office. Plaintiff entered the vestibule of the building and used the intercom to gain access to the building. Upon entering the building, plaintiff went up the stairs leading to DG's office. When plaintiff reached the doorway to the office, he was eventually met by Mr. Wray, who admitted plaintiff into the office.

Plaintiff informed Mr Wray that he was looking for a two room studio apartment. Mr. Wray explained that there was no such thing as a two room studio apartment and that what plaintiff sought was in fact a one bedroom apartment. The conversation then turned to whether there was such a thing as a two room studio apartment and the difference

between a two room studio apartment and a one bedroom apartment. The conversation allegedly became heated.

According to plaintiff, Mr. Wray stood up at his desk and told plaintiff that plaintiff would have to leave. Plaintiff claims that when he got up to leave, and walked toward the door, Mr. Wray followed him and, as he reached the door, Mr. Wray pushed him out the door causing plaintiff to fall down the first three steps. Plaintiff further claims that, at that point, he told Mr. Wray that he was going to call the police and Mr. Wray responded by kicking him in the lower back, causing plaintiff to fall down the rest of the stairs. Plaintiff claims that he was then punched repeatedly by Mr. Wray, causing him to fall down another set of stairs leading to the ground floor.

The complaint contains three causes of action. The first cause of action seeks to recover from Mr. Wray on a theory of common-law battery. The second cause of action seeks to recover from DG on a theory of vicarious liability. The third cause of action seeks to recover from both defendants on a theory of negligence.

"The general rule is that the employer 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 (citation omitted)." Wright v Esplanade Gardens, 150 AD2d 197, 198 (1st Dept 1989).

> "The distinction between an employee and an independent contractor has been said to be the difference

> between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used. (citations omitted) 'What, then, is the test of this distinction between a servant and an independent contractor? The test is the existence of a right of control over the agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it -- he is bound by his contract, but not by his employer's orders.' (Salmond on The Law of Torts [9th ed.], p. 90.)."

Matter of Morton, 284 NY 167, 172 (1940).

Where the alleged tortfeasor came and went as he pleased, worked at his own convenience, was free to hold other employment, was never placed on defendant's payroll, received no fringe benefits, had no taxes withheld from the payment he received and defendant did not exercise or have control over the performance and manner in which the work of the alleged tortfeasor was performed, the tortfeasor was an independent contractor. Lazo v Mak's Trading Co., 84 NY2d 896, 897 (1994).

"Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule (citations omitted)."Bynog v Cipriani Group, 1 NY3d 193, 198 (2003).

"The mere retention of general supervisory powers over the acts of the independent contractor will not impose liability (citation omitted)." Wright, 150 AD2d 198. Thus, in Marino v Vega (12 AD3d 329 [1st Dept 2004]) and Santella v Andrews (266 AD2d 62 [1st Dept 1999]), where the alleged tortfeasors were hired by co-defendants Tri-State Newspapers Services, Inc. and co-defendant New York Times to deliver the latter's newspapers, the alleged tortfeasors were found to be independent contractors despite the fact that the agreement required the delivery of the newspapers before a certain hour and in an undamaged condition. Similarly, in Smith v Pizza Hut of Am., (289 AD2d 48 [1st Dept 2001]), where Pizza Hut hired an advertsement company which in turned hired a production company to produce a television advertisement, the production company was found to be an independent contractor, even though Pizza Hut and the advertisement company retained the right to approve the director, attend auditions, be present on the set during the shoot, and to veto the manner in which the commercial was being shot, because this was found to only be the retention of general supervisory powers.

In the case at bar, the record reveals that Mr. Wray set his own hours, came and went as he pleased, worked at his own convenience, was never directed to be at the office at a certain time, was never required to stay at the office until a certain time, was never directed by someone from DG in the manner or method of how to do his work, never had a supervisor to report to, never had any set duties, never received a W-2, only received a 1099, never

received any weekly, monthly or annual salary, was paid strictly on a commission basis, when he received his commissions no taxes were withheld, never was given or allowed to participate in a 401K plan, IRA or profit sharing plan, never received any medical or dental benefits or any other fringe benefits, and was free to hold other employment.

In opposition, plaintiff points to various items in DG's office manual which plaintiff contends are indicia that DG's real estate salespersons are employees. However a review of the manual shows that nothing therein controverts DG's claim that Mr. Wray kept his own hours and did his work without any supervision or control by DG. At best, some of these items might come under the rubric of "the retention of general supervisory powers", which would not affect Mr. Wray's status as an independent contractor.

Plaintiff also points out that under Real Property Law § 440 (3), a real estate salesperson is defined as a person associated with a licenced real estate broker. Plaintiff argues that based on the language of the statute and based on the supervision, control, and relationship, the Real Property Law and the regulations promulgated thereto requires the broker to maintain control over a sales person, that a salesperson is an employee and not an independent contractor.

However, plaintiff's argument is flawed. In 1980, article 12-A of the Real Property Law was amended to substitute language that describes a real estate salesperson as someone who is employed by a broker with language that describes the salesperson as

someone who is associated with a broker. "The legislative intent in the 1980 amendment of (the) Real Property Law ... was to clarify the relationship of a real estate salesperson to his or her broker as one of an independent contractor and not as an employee-employer type of relationship as set forth in the old statute. (See, mem of Senator Barclay, 1980 NY Legis Ann, at 99.)." Boxhoorn v C.P. realty Assoc., 145 Misc 2d 64, 66 (Civ Ct, NY County 1989). Thus, not only does the statutory scheme not require a salesperson to be an employee, but the statute was specifically amended to reflect that a salespersons could be an independent contractor.

The issue of whether someone is an independent contractor or an employee usually presents a question of fact. "However, where the evidence on the issue of control presents no conflict, the matter may properly be determined by the court as a matter of law." Melbourne v New York Life Ins. Co., 271 AD2d 296, 297 (1st Dept 2000). In this case, the evidence on the issue of control in this case, as summarized above, is undisputed and establishes as a matter of law that Mr. Wray was an independent contractor and not an employee. In addition, plaintiff has provided no cases in which a real estate broker was held to be an employee.

Moreover, regardless of whether Mr. Wray was an employee or an independent contractor, DG cannot be held vicariously liable for the alleged assault as such actions were clearly outside of the scope of any alleged employment. See Demas v. Levitsky, 291 AD2d 653, lv denied 98 NY2d 728 (2002); Flowers v. New York City Transit Authority, 267 AD2d

132 (1st Dept 1999), lv denied 94 NY2d 763 (2000); Wallace v. Gomez, 296 AD2d 306 (1st Dept 2002); Fainberg v. Dalton Kent Securities Group, Inc., 268 AD2d 247 (1st Dept 2000). Accordingly, with respect to the second cause of action on the theory of vicarious liability, the motion is granted.

Plaintiff's third cause of action of negligence as against DG is based on two distinct theories: (1) negligent hiring; and (2) a property owner's duty to protect persons lawfully present on its premises from the reasonably foreseeable criminal or tortious acts of third persons.

> "While an employer is generally not liable for the torts or negligent acts of an independent contractor under the doctrine of respondent superior, the common law has developed certain recognized exceptions that fall roughly into three categories: (1) negligence of an employer in selecting, instructing or supervising the contractor, (2) employment for work that is especially or 'inherently' dangerous, and (3) instances in which the employer is under a nondelegable duty...
>
> Since an employer has the right to rely on the supposed qualifications and good character of the contractor, and is not bound to anticipate misconduct on the contractor's part, the employer is not liable on the ground of his having employed an incompetent or otherwise unsuitable contractor unless it also appears that the employer either knew, or in the exercise of reasonable care might have ascertained, that the contractor was not properly qualified to undertake the work (La Manna v Colucci, 138 AD2d 901, 904 , affd 73 NY2d 898)"

Maristany v Patient Support Servs., 264 AD2d 302, 302-303 (1st Dept 1999).

Here, nothing has been submitted to show that DG knew or should have known that Mr. Wray had a history of, or propensity for assaultive behavior; thus, plaintiff's negligence claim cannot be sustained on a theory of negligent hiring. Similarly, the negligence claim cannot be upheld on the basis of failing to protect plaintiff from the acts of a third party, because this theory requires a showing that the wrongdoer's conduct was foreseeable to the defendant. Sandra M. v St. Luke's Roosevelt Hosp. Ctr., 33 AD3d 875, 878 (2d Dept 2006). The submissions fail to contain any proof that Mr. Wray's conduct on the day of the subject incident, was foreseeable.

For the foregoing reasons, it is

ORDERED that the motion for summary judgment is granted and the complaint is severed and dismissed as against defendant D.G. Neary Realty Ltd., and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue as against defendant Wray; and it is further

ORDERED that within 30 days of entry of this order, movant shall serve a copy upon all parties with notice of entry.

Dated: January 8, 2008

HON. DORIS LING-COHAN

Hon. Doris Ling-Cohan, J.S.C.

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