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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 113962/2005
KOVACEVIC, BRANKO
vs.
CRYSTAL PALACE CCTERERS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 3/6/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FOR THE FOLLOWING REASON(S):

FILED
MAY 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Crystal Palace Caterers, Inc. for summary judgment dismissing the complaint is granted; and it is further

ORDERED that complaint in the main action (Index No. 113962/2005) is dismissed against Crystal Palace Caterers, Inc.; and it is further

ORDERED that the third-party action (Index No. 590394/2006) is severed and shall continue, and the third-party plaintiff is directed to obtain a no-fee Index Number and file an RJI; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that defendant Crystal Palace Caterers, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: 5/27/08

This constitutes the decision and order of the Court.

HON. CAROL EDMEAD J.S.C.

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

----------X

BRANKO KOVACEVIC,

Plaintiff, Index No. 113962/2005

-against-

CRYSTAL PALACE CATERERS, INC.,

Defendant.

----------X

CRYSTAL PALACE CATERERS, INC.,

Third-Party Plaintiff, Index No. 590394/2006

-against-

PARKING SYSTEMS,

Third-Party Defendant.

----------X

MEMORANDUM DECISION

In this action for personal injuries, defendant Crystal Palace Caterers, Inc. ("defendant") moves for summary judgment dismissing the complaint by the plaintiff, Branko Kovacevic ("plaintiff") for failure to establish that defendant owed any duty to plaintiff.

Factual Background

The material facts in the case are largely uncontested.

On October 3, 2004, plaintiff and his friends attended a wedding reception at a catering establishment owned by defendant in Astoria, New York. Defendant also owns the vacant lot adjacent to the catering hall, which was used as a parking lot for its patrons. Defendant contracted with third-party defendant Parking Systems ("Parking Systems") to facilitate the parking of the patrons' vehicles.

On October 3 and 4, 2004, Parking Systems had three employees at the parking lot in uniform.

Plaintiff contends that he and his friend arrived at the catering hall and went to the parking lot to park his friend's vehicle. They were told by one of the defendant's employees that the lot was full. However, when the employee was given $20.00, the employee found a parking spot for plaintiff's vehicle. According to plaintiff, they were told that a ticket was not required, and therefore, neither he nor his companion received a ticket. According to Parking Systems, however, a ticket was given to them.

At about 1:00 a.m., plaintiff and his friend returned to the parking lot and spoke to a different employee about retrieving the vehicle. When this employee inquired about the ticket, plaintiff stated that they never received one. According to plaintiff, this employee became abusive and pushed plaintiff to the ground, causing injuries to plaintiff's face. However, according to Parking Systems, plaintiff was drunk, abusive and cursed at the employees in demanding the vehicle; plaintiff kicked an employee named Hamid, and spit on him; another employee ran inside the catering hall to call security; and a third employee attempted to separate Hamid and plaintiff, and in so doing, pushed plaintiff, causing him to fall.

As a result of this altercation, plaintiff commenced this action against defendant, who in turn, commenced a third-party action against Parking Systems.

Motion

In support of summary judgment dismissing the plaintiff's complaint, defendant argues that plaintiff cannot demonstrate that there was any relationship between defendant and plaintiff so as to give rise to any duty owed to the plaintiff. Defendant contends that Parking Systems, an independent contractor, provided valet service for defendant pursuant to a contract. The subject

incident did not occur in defendant's catering hall, and the parking attendants were not and never have been employees of the defendant. Additionally, the parking attendants were never hired, trained or supervised by defendant. Further, the testimony of defendant and Parking Systems indicates that any issues concerning the parking attendants' services were directed to Parking Systems, and not the defendant. Edward Palaghita, a Parking Systems parking attendant, testified that his supervisor, Rajah Lula, also of Parking Systems, is the person with whom the parking attendants checked in. All of the instructions came from Mr. Lula, and none of the Parking Systems employees had to check in with defendant upon arrival at the parking lot. Parking Systems employees were required to wear a uniform of black pants and shoes, a white shirt and a red jacket with a Parking Systems logo. Nor can plaintiff show an "assumed duty" or "a duty to go forward," which only arises where a person undertakes a certain course of conduct upon which another justifiably relies. Plaintiff cannot establish that defendant did anything to warrant justifiable reliance on the defendant, and there is no evidence that plaintiff detrimentally relied on the defendant for any parking services, let alone security to protect him against an alleged attack outside of the catering hall.

Further, Parking Systems is an independent contractor. Thus, defendant is not liable for the torts of Parking Systems, unless defendant exercised control over or expressly or impliedly authorized the independent contractor's actions. Plaintiff cannot demonstrate that defendant retained any control over the acts of Parking Systems.

Nor is there any merit to plaintiff's claim against defendant for negligent security. There is no evidence that the defendant had notice of any prior criminal activity in the vicinity of defendant's establishment so as to give rise to a duty to protect plaintiff against criminality on the premises. According to Abid Farooq, one of the parking attendants working at the time of

the incident, he valeted cars at the parking lot for one or two years prior to the incident, and never experienced any prior similar incidents.

Furthermore, the common-law indemnification claims against Parking Systems should be sustained. There is both express and implied indemnity as indicated on the contract between the parties and Parking Systems own employment application, and defendant cannot be held liable for the acts of Parking Systems.

Plaintiff's Opposition

In opposition, plaintiff argues that defendant owed him a nondelegable duty to keep the premises safe, and that its parking contract with Parking Systems does not absolve defendant of such duty. Although an employer or owner of property who hires a contractor is not liable for the independent contractor's acts, where an owner of property invites patrons onto its premises, the owner retains the duty to keep the premises safe. In this case, the employees of Parking Systems, as they relate to plaintiff, are for all intents and purposes employees or agents of defendant. The issue of whether plaintiff was assaulted by the employees of defendant or whether plaintiff assaulted these employees is a question of fact for the jury.

Parking Systems' Response

Third-party defendant Parking Systems, however, has no objection to the dismissal of the complaint, and contends that if summary judgment is granted dismissing the action, the third-party action against it also fails. If the main action is dismissed, the third-party action should also be dismissed as there is "no liability to be indemnified for." Parking Systems also points out that there is no basis for a claim for contractual indemnification, given that the document attached to defendant's motion is not a contract between defendant and Parking Systems, but is simply an unauthenticated employment agreement between Parking Systems and its employees.

Parking Systems also argues that defendant failed to establish that it is free from fault to support its common law indemnification claim. Nor has it been established that the alleged liability is vicarious between the defendant and Parking Systems. Further, Parking Systems is not liable, as its employees and agents were acting in self-defense.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Supreme Court New York County 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the

proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

The general rule is that a party who employs an independent contractor for a particular task on the premises is generally not liable for the negligent acts of that contractor, absent a showing of a specifically imposed duty or knowledge by the principal of an inherent danger (*Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 381, 639 NYS2d 971 [1995]; *Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668, 584 NYS2d 765 [1992]; *Laecca v New York Univ.*, 7 AD3d 415, 777 NYS2d 433 [1st Dept 2004]). Such knowledge can be imputed where the owner or principal created the hazardous condition or otherwise had actual or constructive notice of it (*Juarez v Wavecrest Mgt. Team,* 88 NY2d 628, 646, 649 NYS2d 115 [1996]), or where he exercised supervisory control over the contractor's operation (*see Lombardi v Stout*, 80 NY2d 290, 295, 590 NYS2d 55 [1992]). An exception exists where the party supervises the contractor, and does so negligently, or where there has been employment of an

unqualified or incompetent contractor or interference by the employer with the contractor's work (*see, Kormanyos v Champlain Val. Fed. Sav. & Loan Assn.*, 182 AD2d 1036, 583 NYS2d 538 [3d Dept 1992]; *Wright v Esplanade Gardens*, 150 AD2d 197, 540 NYS2d 805 [1st Dept 1989]; *see Kleeman v Rheingold*, 81 NY2d 270, 274, 598 NYS2d 149 [1993]). While it is clear that defendant owed plaintiff a duty to control the conduct of persons on their premises so as to prevent harm to him (*see*, *D'Amico v Christie*, 71 NY2d 76, 85, 524 NYS2d 1 [1987]), this duty is limited to conduct which defendant had an opportunity to control and of which it was reasonably aware (*see, Fishman v Beach,* 214 AD2d 920, 922-923, 625 NYS2d 730 [3d Dept 1995]). And, the retention of general supervisory authority over the acts of an independent contractor is generally insufficient for the imposition of such vicarious liability (*see Saini v Tonju Assoc.,* 299 AD2d 244, 245, 750 NYS2d 55 [1st Dept 2002]). Therefore, contrary to plaintiff's contention, that defendant invited plaintiff onto its premises or even advised Parking System employees to park cars in another lot when the lot at issue was full, is not dispositive as to whether defendant is liable for the acts of its independent contractor, Parking Systems.

In the instant matter, the submissions clearly demonstrate that the employee who allegedly assaulted the plaintiff was not an employee of the defendant, but an employee of Parking Systems.

Nor is there is any evidence indicating that defendant is liable for plaintiff's injuries under the theory of negligent security. The common-law duty of a possessor of land to maintain the public areas of his property in a reasonably safe condition for those who use, includes the obligation to take minimal precautions to protect members of the public from the reasonably foreseeable criminal acts of third persons (*Leyva v Riverbay Corp.*, 206 AD2d 150, 620 NYS2d

3 [1st Dept 1994], *citing Miller v State of New York*, 62 N.Y.2d 506, 513, 478 NYS2d 829; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519, 429 NYS2d 606, *supra*).

However, the owner or possessor is not an insurer of safety of those who use the premises and it cannot, even when there is a history of crime committed on the premises, be held to a duty to take protective measures unless it is shown that it knows or, from past experience, has reason to know, that there is a likelihood of third-party conduct likely to endanger the safety of those using the premises (*Moskal v Fleet Bank*, 180 Misc 2d 819, 694 NYS2d 555 [Supreme Court New York County 1999] *citing Nallan v Helmsley-Spear, Inc., supra*). It is knowledge, actual or constructive, that creates the duty to take reasonable precautions for the safety of those lawfully using the premises (*Leyva v Riverbay Corp.*, 206 AD2d 150, *supra*; *Moskal v Fleet Bank*, 180 Misc 2d 819, *supra*).

The incident herein occurred in the parking lot, and not at the catering hall, and there is no showing of recurring criminal activity in the parking lot or by any Parking Systems employee to justify any greater security measures than were in place on the night of the incident (*Leyva v Riverbay Corp.*, 206 AD2d 150). Even affording plaintiffs the benefit of every favorable inference, there is no evidence that defendant had any notice of the assaultive nature of any of Parking Systems' employees.

Plaintiff's argument that Parking Systems' employees were, for all intents and purposes relating to plaintiff's incident, employees of the defendant is belied by the record and unsupported by any caselaw. There is no indication that defendant controlled, directed, or provided instruction on the manner in which Parking Systems employees conducted their services *(Del Signore v Pyramid Sec. Services, Inc.*, 147 AD2d 759, 537 NYS2d 640 [3d Dept 1989] [the fact that SPAC participated in determining how many security guards would be

needed at a particular concert and pursued a no-reentry policy at this concert may indicate control over the results to be achieved, but does not establish active participation in the manner of performance]). In fact, Parking Systems employees did not report to defendant, but reported only to their supervisor who was also an employee of Parking Systems.

Even if this Court were to adopt the plaintiff's contention that the alleged assailant was an employee of defendant, which this court does not, defendant would be entitled to summary judgment nonetheless. An employer is vicariously liable for its employees' torts, even where the offending employee's conduct was intentional, if the acts were committed while the employee was acting within the scope of his or her employment (*Riviello v Waldron*, 47 NY2d 297, 302 [1979]; *Cornell v State of New York*, 46 NY2d 1032, 1033 [1979]). However, the employer bears no vicarious liability where the employee committed the tort for personal motives unrelated to the furtherance of the employer's business (*see N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]; *Adams v New York City Tran. Auth.*, 88 NY2d 116, 118 [1996]). Furthermore, the employer is not vicariously liable where the employee's tortuous conduct could not have been reasonably expected by the employer (*Vega v Northland Mktg. Corp.*, 289 AD2d 565 [2001]). Even assuming that plaintiff's assailant was an employee of the defendant, the assault was not undertaken in furtherance of defendant's catering business, nor was the use of force implicit in the assailant's duties as a parking attendant, whose job was to park vehicles. There is also no claim that the assault was in any way authorized by, instigated or condoned by the defendant, or reasonably foreseeable by the defendant. Therefore, there is no basis to hold defendant liable for the acts of the assailant in this case.

The Court also notes that there is no basis to hold defendant liable for negligent hiring, retention or supervision of the parking attendants. Plaintiff presented no evidence, and the

record before court fails to reveal any indication that defendant knew or should have known of the assailant employee's propensity for violence.

Plaintiff failed to raise an issue of fact as to any of the grounds for dismissal of this action as against defendant. Accordingly, and based on the foregoing, defendant is entitled to summary dismissal of the complaint.

Parking Systems' contention that the third-party complaint should be dismissed along with the complaint is unsupported by the record. The third cause of action in the third-party complaint alleges that the contract between defendant Crystal Palace and Parking Systems contains indemnification and hold harmless clauses, which obligated Parking Systems to "pay any and all attorneys' fees, costs or investigations and disbursements." (Third-party complaint, pages 8-11). Notably, Parking Systems did not properly serve a notice of cross-motion seeking dismissal of the third-party complaint. In any event, Parking Systems did not establish entitlement to such relief. Although defendant failed to submit the contract between it and Parking Systems, Parking Systems does not deny the existence of such a contract, failed to establish that Parking Systems is not liable to defendant for such fees, costs or investigations pursuant to such a contract, as a matter of law, and alternatively, failed to establish that no such contract exists. Therefore, third-party plaintiff's complaint cannot be dismissed at this juncture.

Conclusion

ORDERED that the motion by defendant Crystal Palace Caterers, Inc. for summary judgment dismissing the complaint is granted; and it is further

ORDERED that complaint in the main action (Index No. 113962/2005) is dismissed against Crystal Palace Caterers, Inc.; and it is further

ORDERED that the third-party action (Index No. 590394/2006) is severed and shall continue, and the third-party plaintiff is directed to obtain a no-fee Index Number and file an RJI; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that defendant Crystal Palace Caterers, Inc. shall serve a copy of this order with notice of entry upon all partics within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 27, 2008

Hon. Carol R. Edmead, J.S.C.