

Hreat v Starwood Hotels & Resorts Worldwide, Inc.
2008 NY Slip Op 31493(U)
May 21, 2008
Supreme Court, New York County
Docket Number: 0103737/2006
Judge: Judith J. Gische
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PRESENT: **HON. JUDITH J. GISCHE**

PART 10

Index Number : 103737/2006

HREAT, YASER

VS.

STARWOOD HOTELS & RESORTS

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for §3212

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

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

JUN 02 2008

COUNTY CLERK'S OFFICE

NEW YORK

Dated: May 21, 2008

HON. JUDITH J. GISCHE 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: PART 10**

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Yaser Hreat,
Plaintiff,

DECISION/ ORDER
Index No.: 103737/06
Seq. No.: 001

-against-

Starwood Hotels & Resorts Worldwide, Inc.,
W Hotels Real Estate, LLC,
W New York Times Square Hotel and
John Doe, et al.,

Present:
Hon. Judith J. Gische
J.S.C.

Defendants.

FILED
JUN 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Papers	Numbered
Defs' n/m (§3212) w/GKM affirm, DJ and MD affid, exhs	1
Pltff's opp w/DLK affirm	2
Defs' reply w/ GKM affirm, exhs	3

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action arising from an alleged assault and battery on plaintiff, a limousine driver, that took place outside of the W Hotel in Times Square, New York ("hotel"). Defendant Starwood Hotels & Resorts Worldwide Inc. is the manager/operator of the hotel ("Starwood").

Before the court is defendants' motion for summary judgment which was made after issue was joined and the note of issue was filed. Since the motion was timely made, it will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Arguments presented

Plaintiff, a limousine driver, contends that on July 20, 2005, he drove up to defendant's hotel to pick up his passenger, a hotel guest. Following an escalating, heated verbal exchange between plaintiff and Ivan Moran, a doorman at the hotel¹, Moran became physically combative. Plaintiff was deposed and at his deposition testified that Moran starting cursing and yelling at him, telling to move the limousine because he had parked too long in a "no standing" zone in front of the hotel's entrance. According to plaintiff, he tried to reason with the doorman, but Moran started pounding on the car. This is when plaintiff stepped out of the limousine and tried to stop the doorman from damaging the vehicle.

Plaintiff testified at his deposition that he put his hands on the doorman's chest and pushed him. He contends he did this just hard enough to get the doorman away from the car so he would not damage it. Plaintiff claims that Moran responded by slamming the open car door against the side of plaintiff's head, striking him on the ear. Plaintiff contends he has suffered injuries, including hearing loss.

Plaintiff has asserted two causes of action. The first cause of action is for negligent hiring, supervision and retention against defendant Starwood and the other named defendant, W Hotels Real Estate, LLC ("LLC") (1st cause of action). Plaintiff also claims that the defendants are vicariously liable under the doctrine of *respondeat superior* for the actions of their employee, the doorman. Plaintiff contends that the doorman's acts were within the scope of his employment, and therefore, in furtherance of his employer's business (2nd cause of action).

¹The doorman is not a named party to this action.

LLC argues that both causes of action against it should be dismissed because the LLC has no managerial or operational responsibility for this hotel. Plaintiff has agreed to the dismissal of all claims against the LLC. Therefore, defendants' motion, to dismiss the claims against the LLC is granted.

Starwood's motion, to dismiss the first cause of action for negligent hiring is likewise unopposed. It is, therefore, granted as well.

Starwood argues that the *respondeat superior* cause of action should be dismissed as well. In support of its motion Starwood provides and relies upon the deposition testimony of plaintiff, and of non-party witness Renee Moffat, who was standing outside the hotel when the incident occurred. Starwood also relies upon the deposition testimony of its security supervisor, Mr. Rosario, the director of security, Mr. Jackson, Starwood's human resources manager, Ms. Palana, the police report, and the doorman's employment records which this court ordered Starwood to produce to plaintiff (Order, Gische J., 3/29/07). Based upon this evidence, Starwood contends that the doorman acted in self defense because plaintiff pushed him first, and therefore, no tort was committed. Starwood contends that until plaintiff pushed the doorman, there were only verbal exchanges. Plaintiff testified that he asked the doorman to stop hitting the car and when the doorman continued to punch it, plaintiff put both hands on the doorman's chest and pushed him away.

Alternatively, Starwood contends that the confrontation between plaintiff and the doorman, its employee, was outside the scope of his employment and that the doorman should have immediately called security once it became apparent that the situation was escalating. Starwood relies upon the deposition testimony by Mr. Jackson that hotel staff

are required to undergo an orientation called "WOW" about how to handle hostile or aggressive behavior by a guest or third party. Mr. Jackson testified that the doorman attended the training.

The eye witness, Mr. Moffat, testified plaintiff pushed open the door to the limousine, striking the doorman on the leg, and that plaintiff was making pointing gestures in the doorman's face. Mr. Moffat also saw the driver push the doorman. He also observed the doorman hit the plaintiff.

Discussion

In deciding whether the defendants are entitled to the grant of summary judgment in their favor, the court considers whether they have tendered sufficient evidence to eliminate any material issues of fact from this case. " E.G. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); Zuckerman v. City of New York, 49 N.Y. 2d 557, 562 (1980). If met, the burden shifts to plaintiff who must then demonstrate the existence of a triable issue of fact in order to defeat these motions. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, *supra*.

An employer will be held vicariously liable for the negligent acts of its employee, to the extent the acts are within the scope of their employment. Riviello v. Waldron, 47 NY2d 297 (1979); N.X. v. Cabrini Medical Center, 97 NY2d 247 (2002). Such acts, however, must be "generally foreseeable and a natural incident of the employment." Judith M. v. Sisters of Charity Hosp., 93 NY2d 932 (1999) (citing Riviello v Waldron, 47 NY2d at 304); Bowman v. State, 10 AD3d 315, 316 (1st Dept 2004). If, however, an employee "for purposes of his own departs from the line of his duty so that for the time being his acts constitute an abandonment of his service, the master is not liable . . ."

Judith M. v. Sisters of Charity Hosp., *supra* at 933; Bowman v. State, *supra*. If there are no disputed facts, then the question of whether the employee was acting within the scope of his or her employment is a question of law. Crawford v. Wescott Steel Co., 188 AD2d 731 (3rd Dept 1992). Whether an employee acted within the scope of employment is generally one of fact for the jury. Crawford v. Wescott Steel Co., *supra*.

While at trial it will be plaintiff's burden to prove the doorman was acting within the scope of his employment when he (allegedly) struck him on the side of his head with the car door, it is defendants' burden to prove they are entitled to summary judgment because there are no disputed facts to be tried, and they have a complete defense to the claims against them. Starwood has failed to meet this burden with respect to the 2nd cause of action for the following reasons.

There are factual disputes about who was the aggressor in the admittedly heated exchange that took place on July 20, 2005. If proved, plaintiff has set forth facts that it was the doorman who began the assault, at first by being verbally abusive, following by punching the vehicle, culminating in striking plaintiff with the car door. There is no evidence that the doorman contacted security when plaintiff refused to move from the no standing area. Although Starwood contends that "at the moment" the doorman (allegedly) hit plaintiff, he was not acting within the scope of his employment, but acting in his own interest, there is no dispute that the doorman, also known as the "Welcome Ambassador" keeps the flow of traffic moving in front of the hotel." Tr Jackson p. 28. Thus, while Starwood may not have expected its doorman to engage in a physical exchange, and had trained him to call security when needed, dealing with unruly persons was foreseeable, and therefore, within the scope of the doorman's employment. Riviello

v Waldron, supra.

Having failed to prove its defense, that the doorman's acts were not in the scope of his employment, or alternatively he was acting in self defense, Starwood's motion for summary judgment dismissing the *respondeat superior* cause of action is denied. The court has considered plaintiff's other arguments about whether the documents submitted by Starwood are in admissible form, however even assuming they are or could be authenticated, defendant would not have prevailed on its motion for the reasons articulated.

Since the note of issue has been filed, this case is ready for trial. Plaintiff shall serve a copy of this order on the Office of Trial Support so that it can be scheduled.

Conclusion

Defendants' motion for summary judgment is granted to the extent that all claims against W Hotels Real Estate, LLC ("LLC") are dismissed because plaintiff does not oppose that branch of the motion. The negligent hiring cause of action (1st cause of action) is also dismissed as against defendant Starwood Hotels & Resorts Worldwide Inc. because plaintiff does not oppose that branch of the motion either. These claims are severed and dismissed. The Clerk shall enter judgment in favor of defendant W Hotels Real Estate, LLC, against plaintiff, dismissing all claims against it. The Clerk shall also enter judgment in favor of defendant Starwood Hotels & Resorts Worldwide, Inc., against plaintiff dismissing the 1st cause of action as well.

Defendant Starwood has not, however, proved it is entitled to summary judgment on the remaining 2nd cause of action against it based upon principles of *respondeat superior*.

Plaintiff shall serve a copy of this order on the Office of Trial Support so that it can be scheduled for trial on the remaining cause of action.

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

This constitutes the decision and order of the court.

Dated: New York, New York
May 21, 2008

So Ordered:



Hon. Judith J. Gische, JSC

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