

Townsend v Waldbaums, Inc.

2008 NY Slip Op 32467(U)

September 2, 2008

Supreme Court, Suffolk County

Docket Number: 0005095/2006

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 21 - SUFFOLK COUNTY

P R E S E N T :

Hon. JEFFREY ARLEN SPINNER
 Justice of the Supreme Court

MOTION DATE 2-16-08
 ADJ. DATE 7-16-08
 Mot. Seq. # 003 - MG; CASEDISP

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JACK TOWNSEND,	:		:	TONETTI & AMBROSINO
	:		:	Attorneys for Plaintiff
	:	Plaintiff,	:	548 West Jericho Turnpike
	:		:	Smithtown, New York 11787
	:	- against -	:	
	:		:	KRAL, CLERKIN, REDMOND, et al.
WALDBAUMS, INC.,	:		:	Attorneys for Defendant
	:		:	69 East Jericho Turnpike
	:	Defendant.	:	Mineola, New York 11501
-----X	:		:	

Upon the following papers numbered 1 to 14 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 12 ; Replying Affidavits and supporting papers 13 - 14 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by Waldbaums Inc., for summary judgment dismissing the complaint against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff after he was stopped and detained for shoplifting at the defendant Waldbaums Inc.'s (hereinafter "Waldbaums") store on April 14, 2004. The complaint alleges that the plaintiff was a patron of the store and that Waldbaums had a duty to maintain its premises in a reasonably safe condition, including the obligations to train and supervise its employees as to the proper manner in which to carry out security duties. The plaintiff alleges that he was restrained, taken into custody, physically assaulted, threatened and sustained serious personal injury through the acts of Waldbaums' employees, one of whom was Matthew Pepitone¹, co-manager of the store.

¹The Second and Third causes of action which were against Mr. Pepitone as well as other employees and Waldbaums, Inc., were dismissed by a decision of the Honorable Denise F. Molia dated August 16, 2006. Thus, only the First cause of action against Waldbaums remains.

Waldbaums now moves for summary judgment dismissing the complaint. It alleges that inasmuch as the plaintiff has failed to offer any proof that Waldbaums' employees had displayed propensities to use excessive force in the course of their employment or that Waldbaums knew of their employees' propensities to use excessive force in the operation of their duties, the plaintiff cannot make a prima facie case of negligence against it for its alleged failure to train and supervise its employees. In support of its motion, Waldbaums submits, *inter alia*: a copy of the pleadings; the deposition testimony of the plaintiff; the deposition testimony of Matthew Pepitone; and the affidavit of Matthew Pepitone.

Waldbaums points to the plaintiff's deposition testimony wherein he stated that he was in the Riverhead store on April 14, 2004, with a female companion, Karen Abt, who was attempting to steal beer. He stated that Ms. Abt had put a couple of cases of beer in the cart; whereupon, he walked to the front of the store, and walked out through the door that customers use to enter the store. The plaintiff testified that as he left the store, he was grabbed by a Waldbaums' co-manager, Michael² Pepitone, and dragged into the store by Mr. Pepitone and several other Waldbaums' employees. Although the plaintiff alleged that he did not resist when Waldbaums' employees were bringing him back into the store, he admitted that he bit Mr. Pepitone, claiming that Mr. Pepitone hooked his finger in his mouth. Additionally, the plaintiff testified that he was brought into an office behind the courtesy counter and was seated in a chair. He stated that Mr. Pepitone, who had been walking in and out of the room, at one point started screaming about how the plaintiff bit him, and then Mr. Pepitone started punching him. The plaintiff alleged that thereafter the police came and he was arrested.

The plaintiff also testified that earlier in the day on April 14, 2004, and prior to this incident, he had used heroin. The plaintiff further admitted that on the Saturday before April 14, 2004, he and Ms. Abt went to Waldbaums with the intent to steal beer, and that he was with Ms. Abt when she stole the beer. In addition, the plaintiff testified that on prior occasions when he was in Waldbaums, he was never in any altercation with these employees, nor did he see any of these employees involved in altercations with other individuals. He also stated that he was not aware of any complaints against these employees for involvement in similar altercations.

Waldbaums also points to Matthew Pepitone's deposition testimony wherein he testified that on the day of the incident he was employed by Waldbaums as a co-manager, and that part of his duties and responsibilities included apprehending shoplifters. He estimated that he apprehended approximately one shoplifter a month, and if he determined that someone had shoplifted, he would stop the person and have them come back in the store to have them arrested. He also indicated that approximately a week prior to the incident on April 14, 2004, he observed the plaintiff on the store's surveillance system stealing beer from the store. Mr. Pepitone alleged, in pertinent part, that the surveillance video showed the plaintiff and his female companion loading up a shopping wagon full of beer, the plaintiff opening the "in" door for his female companion, and the female companion walking out the "in" door without paying. Mr. Pepitone testified to the effect that on April 14, 2004, he was informed by another employee that the plaintiff and his companion were once again in the store and they were stealing beer.

²Although the plaintiff refers to the co-manager throughout his testimony as Michael Pepitone, it is obvious from all of the supporting papers that the co-manager's actual name is Matthew Pepitone.

Mr. Pepitone further stated that when the plaintiff was right outside the exterior door, he approached the plaintiff and informed him that he was going to have to go back into the store, whereupon the plaintiff shoved him. Mr. Pepitone indicated that the plaintiff tried to flee, but he grabbed him. He stated that some other employees, one of whom was Al Cassidy, his assistant manager, came out to help him as the plaintiff was trying to get away. Mr. Pepitone stated that he and Al Cassidy had to drag the plaintiff into the store kicking and screaming. Mr. Pepitone alleged that while he was holding the plaintiff, the plaintiff bit his hand, and the plaintiff told Mr. Pepitone that he had AIDS virus. Mr. Pepitone explained that initially the plaintiff was placed in a chair, but once the Waldbaum employees let him go, the plaintiff threw himself on the floor. Mr. Pepitone further explained, "He banged his head on the desk with the computer on it, and was, like, banging his head on the wall. He was kind of, like, freaking." When asked if during the course of this event he ever hit the plaintiff with a closed fist, Mr. Pepitone answered "no." Mr. Pepitone also stated that he never saw anyone else hit the plaintiff with a closed fist. He testified to the effect that shortly after the plaintiff started throwing his body around and banging his head, the police arrived.

Lastly, Waldbaums points to the affidavit of Mr. Pepitone wherein he states that he has been employed by Waldbaums for the past 25 years, that he has held the position of co-manager for over 15 years, and that he has apprehended many shoplifters during his employment with Waldbaums. Mr. Pepitone alleges that in the 25 years that he has been employed by Waldbaums, he has never been involved in a prior similar altercation while apprehending a shoplifter, and that he has no knowledge of any of his co-workers being involved in a prior similar altercation while apprehending a shoplifter. He alleges that he has never received any complaints, nor is he aware of any complaints made against any of his co-employees for involvement in a prior similar altercation. He states that, specifically, he has never had any complaints made against him for use of excessive force in apprehending shoplifters. Additionally, Mr. Pepitone alleges that he is not aware of any complaints that Waldbaums has received against him or any of its employees for excessive use of force in apprehending shoplifters. Mr. Pepitone asserts that he has never been warned, written up, or reprimanded by Waldbaums for improper or inappropriate behavior actions and that he has an excellent and untarnished employment history with Waldbaums.

Waldbaums argue that based upon the aforementioned testimonies, no proof has been adduced that Waldbaums' employees had displayed propensities to use excessive force in the course of their employment with Waldbaums or that Waldbaums knew of the propensities of their employees to use excessive force in the operation of their duties. Therefore, alleges Waldbaums, no triable issues of fact exist with regard to negligence on its part and it is entitled to summary judgment as a matter of law.

The plaintiff opposes this motion, arguing that the divergence in testimony of the plaintiff and Mr. Pepitone warrants a denial of Waldbaums' motion for summary judgment. The plaintiff contends that Mr. Pepitone, as an employee of Waldbaums, had a duty to the plaintiff to carry out his job as a security officer in a reasonable fashion to avoid causing him injury. He claims that what is reasonable, is a jury question. The plaintiff asserts that the Waldbaums' employees acted negligently and that such negligence is attributable, under the theory of respondeat superior, to Waldbaums. The plaintiff also claims that Mr. Pepitone and Al Cassidy were carrying out their duties in approaching suspected shoplifters and detaining them on Waldbaums' behalf. He further points to that portion of Mr.

Pepitone's testimony wherein Mr. Pepitone testified, that he was never given security training at any time either before or during his employment with Waldbaums, and that prior to working at Waldbaums, he had no background in the security field. The plaintiff also highlights that portion of Mr. Pepitone's testimony wherein he testified to the effect that he was not aware of any security training being offered by Waldbaums. Thus, argues the plaintiff, it is undisputed that Mr. Pepitone was not properly trained to approach shoplifters. The plaintiff concludes that any reasonable jury could find that an untrained and inexperienced employee given quasi-police type duties might cause physical injury to a suspect whether by the use of unreasonable or unnecessary force or by an intentional act which may have been precipitated by the "heat of battles."

Viewing the evidence in a light most favorable to the plaintiff, as a court must on a defendant's motion for summary judgment (*see, Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 834 NYS2d 503 [2007]), the court notes that Waldbaums' employees' initial use of force to apprehend and detain the plaintiff, up to the point of the alleged punching, was reasonable as a matter of law (*see, Watkins v Sears Roebuck & Company*, 289 AD2d 73; 735 NYS2d 75 [2001]). Furthermore, accepting as true for the purposes of this motion the plaintiff's version of events that he was punched by Mr. Pepitone, and assuming arguendo that this behavior was unreasonable, such offensive contact was an intentional assault and not negligence, as a negligent assault does not exist (*see, Panzella v Burns*, 169 AD2d 824, 565 NYS2d 194 [1991]). Moreover, "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... employment" (*Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599, 600; 815 NYS2d 107, 108 [2006]). However, there can be no vicarious liability on the part of an employer for torts committed by an employee where such torts are committed solely for personal motives unrelated to the furtherance of the employer's business (*Vega v Northland Marketing Corp.*, 289 AD2d 565, 735 NYS2d 213 [2001]). Thus, if 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 (*State Farm Insurance Company v Central Parking Systems, Inc.*, 18 AD3d 859, 796 NYS2d 665, 666 [2005]; [quoting *Jones v Weigand*, 134 AD 644, 645]). In addition, an employer is not vicariously liable for an employee's torts where the employee's tortious conduct could not have been reasonably expected by the employer (*Carnegie v J.P. Phillips, Inc.*, *supra*). In this case, as testified by the plaintiff, Mr. Pepitone's punching the plaintiff was not in furtherance of Waldbaums' business, but rather a reaction to the plaintiff's biting, motivated by personal outrage. Additionally, there is no evidence that Mr. Pepitone's alleged use of excessive force or the alleged use of excessive force by any other employee, could have been reasonably expected by Waldbaums. Therefore, Waldbaums is not liable for its employees' conduct under the doctrine of respondeat superior, since its employees acted outside the scope of their employment at the time of the alleged assault, and their conduct was not reasonably foreseeable (*see, Cherry v Tucker*, 5 AD3d 422, 773 NYS2d 405 [2004]; *Vega v Northland Marketing Corp.*, *supra*).

Similarly, as a matter of law, Waldbaums is not liable for its employees' alleged conduct under theories of negligent supervision and negligent training (*see, Carnegie v J.P. Phillips, Inc.*, *supra*). A necessary requirement of a cause of action for negligent supervision is that the employer knew or should have known of the employee's propensity for conduct which caused the injury (*State Farm Insurance Company v Central Parking Systems, Inc.*, *supra*). Here, Mr. Pepitone, a 25-year employee, had an

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unblemished record with Waldbaums, and was never before involved with this type of altercation with a shoplifter. Nor was Mr. Pepitone aware of any co-workers' involvement with any such altercation with a shoplifter. There was never any complaints filed against Mr. Pepitone or co-workers for excessive use. Further, over the course of his 25-year career with Waldbaums, Mr. Pepitone dealt with shoplifters on a monthly basis, thus establishing that he had sufficient on-the-job training prior to this incident. In response to Waldbaums' prima facie showing of entitlement to judgment as a matter of law on the claims for negligent supervision and training, the plaintiff has failed to come forward with evidence sufficient to raise a triable issue of fact as to whether Waldbaums knew or should have known that Mr. Pepitone or any employee would use excessive force or that Mr. Pepitone's training or other employees' training was deficient (*see, Doe v Rohan*, 17 AD3d 509, 793 NYS2d 170 [2005], *lv appeal denied* 6 NY3d 701; *Richardson v New York University*, 202 AD2d 295, 609 NYS2d 180 [1994]).

Accordingly, Waldbaums' motion for summary judgment dismissing the complaint against it is granted.

Dated: SEP 02 2006



 J.S.C.
HON. JEFFREY ARLEN SPINNER

 X FINAL DISPOSITION _____ NON-FINAL DISPOSITION