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

PRESENT: HON. CAROL EDMEAD PART 32

Index Number : 118126/2006

FOFANA, DAOUDA

VS.

CHEVROLET-SATURN OF HARLEM

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

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 _____

FILED
NOV 14 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant pursuant to CPLR § 3212 for summary judgment dismissing the complaint of plaintiff is denied as to the claim of respondeat superior; and it is further

ORDERED that the motion by defendant pursuant to CPLR § 3212 for summary judgment dismissing the complaint of plaintiff is granted as to the claim based on negligent hiring; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 11/10/08

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

DAOUDA FOFANA,

Plaintiff,

-against-

CHEVROLET SATURN OF HARLEM, INC. and SEIFUDDIN SHABAZZ,

Defendant.

Index No. 118126/06

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff Daouda Fofana ("plaintiff") seeks damages for injuries he sustained when he was allegedly attacked by defendant Seifuddin Shabazz ("Mr. Shabazz"), then employee of defendant, Chevrolet Saturn of Harlem, Inc. ("defendant" or "Chevrolet Saturn"). Plaintiff is suing Chevrolet Harlem under the theories of respondeat superior and negligent hiring. Defendant now moves pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's complaint as against Chevrolet Harlem.

Background

On September 11, 2006, plaintiff was working as a salesperson for Potamkin Cadillac, which is located on the same premises as Chevrolet Saturn, where defendant, Mr. Shabazz, was working as a salesperson for Chevrolet Saturn. Plaintiff claims that, while he was speaking with a customer in the joint parking lot, Mr. Shabazz ran up to him and attacked him, resulting in physical injuries. According to Chevrolet Saturn, Mr. Shabazz was fired from his position

shortly thereafter, on the day of the incident.[1]

Defendant's Motion

In support of summary judgment, defendant asserts that the evidence on the record establishes that Mr. Shabazz's attack on plaintiff was "an obvious departure from the normal duties of a vehicle salesperson." Defendant points to the deposition testimony of its general manager, Mr. Alan Talmadge ("Mr. Talmadge"), to establish that Mr. Shabazz's actions were, in fact, in direct contravention of defendant's rules and regulations; that is, defendant has a "no tolerance" rule regarding fighting and a policy in place to deal with potential altercations, under which employees were to contact their manager and/or the police if a threat was present. Furthermore, defendant asserts that any employee involved in a fight would be terminated, as was Mr. Shabazz, regardless of who started the fight. Defendant additionally asserts that security duties were no aspect of a salesperson's responsibilities; thus, fighting was clearly *ultra vires* of Mr. Shabazz's employment. Defendant points to *Flowers v New York City Transit Auth.* (267 AD2d 132, 132 [1st Dept 1999]), which involved an assault by a token booth attendant in an attempt to prevent panhandling outside of his booth. The First Department affirmed summary judgment in the defendant's favor, holding that the token booth attendant's use of force was "such a wide departure from [the] normal method of performance as not to be reasonably anticipated by defendant." To further support its contention that Mr. Shabazz's actions were not in furtherance of defendant's interest, defendant points to the risk to its business reputation and relationships with its neighbors posed by fighting.

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[1] Defendant's documentation suggests that Mr. Shabazz may have returned to work that week. However, Mr. Alan Talmadge, one of defendant's managers, explains this discrepancy as a clerical error. Because this issue is not relevant to the resolution of this case, it will not be discussed further.

Defendant additionally contends that there was no evidence of a past history of violence or anger management difficulties in Mr. Shabazz's personnel records,[2] or as revealed by his references. Thus, defendant asserts, it was not reasonably foreseeable that Mr. Shabazz would have been involved in any altercation. Defendant also points to testimony of the plaintiff to establish that the altercation was unforeseeable; specifically, plaintiff attested that there had been no history of ill will between the two individuals or between any employees of Chevrolet Saturn and the plaintiff. Additionally, plaintiff testified that he had been professionally engaged with a customer prior to being attacked by Mr. Shabazz, and that he had done nothing to provoke the attack.

Plaintiff's Opposition

Plaintiff contends that defendant is vicariously liable for the acts of its employee, Mr. Shabazz, and asserts that defendant has not addressed plaintiff's claim that defendant was negligent in hiring Mr. Shabazz. Plaintiff additionally asserts that two co-workers of plaintiff will attest that defendant actually encouraged the actions of Mr. Shabazz, which led to plaintiff's injury. Plaintiff points to the affidavit supplied by John Johnson ("Mr. Johnson"), one of plaintiff's witnesses, to establish that defendant "encouraged the actions of their employees which ultimately is the underlying cause of the above entitled action." In his affidavit, Mr. Johnson states that "Chevrolet-Saturn of Harlem would constantly send their employees over to Potamkin Cadillac of Harlem to solicit our clients to their showroom" and that "it was common knowledge that the management of Chevrolet-Saturn of Harlem would encourage whatever

[2] Copies of Mr. Shabazz's personnel records and defendant's "employee's handbook" were authenticated by Mr. Talmadge in his affidavit.

means necessary to solicit[] our clients."

Defendant's Reply

In reply, defendant points out that plaintiff failed to cite any cases to support plaintiff's contentions. Defendant additionally points out that plaintiff, as the opponent to the summary judgment motion, failed to provide evidence in admissible form sufficient to raise a triable issue of fact to counter the motion. Defendant asserts that the affirmation of plaintiff's lawyer, which largely contained conclusory statements, is "without evidentiary value," and that the affidavit of Mr. Johnson is insufficient for three reasons: first, it does not state that the affiant is over 18 years of age; second it does not provide the foundation necessary to establish knowledge attested to therein; and third, defendant's conduct as alleged, even if true, is not enough to establish that the attack was approved by defendant.

Defendant additionally points out that the affidavit of its own general manager, Mr. Talmadge, establishes that Mr. Shabazz's conduct was, in contrast to being encouraged or directed by defendant, expressly forbidden.

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) [Sup Ct New York County, Oct. 21, 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] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). 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]).

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]).

An employer may be held liable for the intentional torts of its employee, such as the assault herein, under the theory of respondeat superior when the employee is acting within the "scope of employment" at the time of the commission of the tort (*Riviello v Waldron*, 47 NY2d 297, 302 [1979], *quoting Mott v Consumers' Ice Co.*, 73 NY 543 [1874]). To determine this scope, the Court of Appeals has applied the following test: "whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions" (*Riviello*, 44 NY2d at 302, internal quotations omitted, *see also Stavitz v City of New York*, 98 AD2d 529, 531 [1st Dept 1984] ["[When] done with a view to the furtherance of that business and the master's interest, the master will be held responsible, whether the act be done negligently, wantonly, or even willfully," quoting *Mott*]). "[T]he employer need not have foreseen the precise act or manner of the injury as long as the general type of conduct may have been reasonably expected" (*Riviello, supra* at 304). The determination of whether the doctrine applies depends upon, "The connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one the employer could reasonably have anticipated." (*Riviello*, 47 N.Y.2d at 303). "The doctrine is premised upon a notion that the employer 'is justly held responsible when the servant through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another'" (*Ramos v Jake Realty Co.*, 21 AD3d 744, 801 NYS2d 566 [1st Dept 2005] *citing*

De Wald v Seidenberg, 297 NY 335, 338 [1948]).

Questions regarding whether an act was performed within the scope of employment are normally left for the jury (*Riviello*, 47 NY2d at 303, *Schilt*, 304 AD2d at 193), with courts deciding such issue as a matter of law only when "the *undisputed facts* provide *no basis* for the application of the doctrine" (*Schilt*, 304 AD at 193, emphasis added). However, the actual authorization or condonation by the employer, of employee's actions, clearly places the actions within the scope of employment (*see Yeboah v Snapple*, 286 AD2d 204, 205 [1st Dept 2001]; *Kwak v Wolfenson*, 258 AD2d 418, 418 [1st Dept 1999]).

Yet, an employer is relieved from liability for its employee's acts only "where an employee's conduct is brought on by a matter wholly personal in nature, the source of which is not job related . . ." (*Stavitz*, 98 AD2d at 531, *cf. Ramos v Jake Realty*, 21 AD3d 744, 746 [1st Dept 2005] ["There is no evidence that the [perpetrator] had any personal motivation for the assault. His animus, shared by management, was about the rent strike"]).

In the case at bar, the plaintiff testified that, before being attacked, he was speaking with a customer in front of the Potamkin-Cadillac dealership. As plaintiff was talking with the customer, Mr. Shabazz ran towards them, and told the customer "whatever Potamkin's offering you, I can offer the best here at Saturn. We can offer you the best here, so come with me." The customer declined and plaintiff continued to talk to the customer. Next there was an exchange between plaintiff and Mr. Shabazz as to whether plaintiff's continued comments were directed at Mr. Shabazz or to the customer. Mr. Shabazz then took out a pen and started cursing at the plaintiff. Mr. Shabazz struck plaintiff with a pen several times, struck plaintiff's jaw, punched plaintiff, and twisted plaintiff's arm, causing plaintiff to fall to the ground. Plaintiff further

testified that Mr. Shabazz's manager said to Mr. Shabazz, immediately after the attack, "Way to go, this is how you handle this business." Plaintiff also stated that ". . . the people at the Chevrolet dealership [would] always come in front of our lot here and inside of our building, of the Potamkin building, sometimes with their customers to show them our cars and they have no right to, and they'll take their sign and bring their sign to our place, and they had no right doing that . . . ." The above testimony is sufficient to raise an issue of fact as to whether the dispute and resulting altercation were committed while Mr. Shabazz was acting within the scope of his employment when he committed the assault, and whether his actions were performed in the furtherance of his employer's interest (*see Ramos v Jake Realty Co.*, 21 AD3d 744, 801 NYS2d 566 [1st Dept 2005]). Although defendant's witness, Mr. Alan Talmadge, asserted that he did not hear of any manager making such statements to Mr. Shabazz, there was no evidence from a witness with personal knowledge or who observed the incident establishing that plaintiff's version of the events did not occur. Thus, this Court cannot state that the "undisputed facts provide no basis for the application" of the respondeat superior doctrine.

Flowers was cited by defendant for the proposition that, even when the perpetrator's goal overlaps with the employer's, a method of performance that is a "wide departure" from normal methods will not be attributable to the employer. *Flowers*, however, is distinguishable in that there was no evidence on the record that the New York City Transit Authority condoned or encouraged the tollbooth attendant's behavior. Accepting plaintiff's testimony as true, as this Court must, an issue of fact exists as to whether Chevrolet Saturn, through the actions of Mr. Shabazz's manager, explicitly encouraged and condoned Mr. Shabazz's actions. Therefore, defendant's motion for summary judgment must be denied.

Plaintiff also claims that the defendant is liable under the theory of negligent hiring. An employer can be held liable for its employee's torts even when a defendant-employee is not found to be acting within the scope of employment if the employer was negligent in hiring the employee. However, "[r]ecovery on negligent hiring and retention theory requires a showing that the employer was on notice of a propensity to commit the alleged acts" (*White v Hampton Mgt. Co., LLC*, 35 AD3d 243, 244 [1st Dept 2006]). To avoid liability, the defendant must submit evidence to demonstrate a *prima facie* showing of lack of notice. It is then incumbent for the plaintiff to provide evidence sufficient to raise a triable issue of fact to counter such a showing (*id., see also Gomez v City of New York*, 304 AD2d 374, 374-75 [1st Dept 2003]; *Detone v Bullit Courier Service*, 140 AD2d 278, 280 [1st Dept 1988] ["Negligence, however, is not presumed. It must be proved by the plaintiff, and it must be proved by a preponderance of the evidence"]).

In this case, defendant made a *prima facie* showing that it had no notice of any violent tendencies of Mr. Shabazz *via* testimony of its witness, Mr. Talmadge, and *via* Mr. Shabazz's personnel records. Plaintiff has provided no evidence to suggest that defendant was on notice of Mr. Shabazz's violent tendencies, or even that a more thorough investigation of Mr. Shabazz's background would have revealed such tendencies. Plaintiff, in fact, provided no evidence of Mr. Shabazz's past history of violence whatsoever. Thus, plaintiff's claim based on negligent hiring must fail.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant pursuant to CPLR § 3212 for summary judgment dismissing the complaint of plaintiff is denied as to the claim of respondeat superior; and it is further

ORDERED that the motion by defendant pursuant to CPLR § 3212 for summary judgment dismissing the complaint of plaintiff is granted as to the claim based on negligent hiring; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 10, 2008

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