

**Malizia v Lulu's LLC**

2010 NY Slip Op 30110(U)

January 19, 2010

Supreme Court, New York County

Docket Number: 102599/07

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

MICHAEL MALIZIA,  
Plaintiff,

Index No.: 102599/07

Motion Date: 09/29/09

- v -

Motion Seq. No.: 04

LULU'S LLC individually and d/b/a CLUB  
LOTUS And "JOHN DOE" #1 and "JOHN DOE" #2,  
Defendants.

Motion Cal. No.: 63

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

Answering Affidavits - Exhibits

Replying Affidavits - Exhibits

**FILED**  
PAPERS NUMBERED  
1  
3  
JAN 21 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers,

Defendant Lulu's LLC individually and d/b/a Club Lotus (Lulu) moves for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint based on failure to state a cause of action, and/or pursuant to CPLR 3212, granting summary judgment.

Plaintiff seeks damages for personal injuries suffered on January 13, 2006, while on the premises owned by Lulu located at 409 West 14<sup>th</sup> Street, New York County. The complaint alleges that plaintiff was caused to be detained, assaulted, beaten, battered and was caused to sustain severe and permanent injuries.

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):

An incident report prepared by Carlos Robinson, head of security for Lulu, states that plaintiff was attempting to enter the female bathroom on the premises when he was stopped by Laurice Genung, another member of the security team. At that point, plaintiff allegedly attempted to push Genung aside and was escorted out of the area by Robinson. Plaintiff claims that he was thereafter attacked by the security team.

The complaint included claims based on assault and battery, as well as negligence and negligent hiring and retention. Lulu moved for, and was granted, an order to dismiss the assault and battery claims on statute of limitations grounds. The remaining claims are based on negligence.

Lulu seeks dismissal of the complaint on the ground of failure to state a cause of action, and, alternatively, seeks summary judgment. According to Lulu, plaintiff's claim of general negligence must be dismissed since the graveman of the complaint alleges that plaintiff was assaulted and battered. Furthermore, Lulu argues that it is entitled to summary judgment on plaintiff's claim of negligent hiring and retention of the security employees because Lulu was not on notice of any propensity to assault and batter patrons on their part prior to the incident.

Lulu submits an affidavit from Andrew Waldman. Waldman is a partner of 3 Sixty Hospitality LLC, which is the management

company in charge of overseeing the operations of Lulu. He claims not to have any knowledge of any violent propensities of Robinson or Genung. Waldman states that he knows of no incident or accident reports concerning Robinson or Genung, prior to January 13, 2006, that would reflect violent tendencies on their part

In opposition, plaintiff asserts that he has alleged a valid claim for negligence based on the doctrine of respondeat superior and on the theory of negligent hiring and supervision. Specifically, plaintiff alleges that defendants failed to provide for the adequate safety and protection of plaintiff, failed to supervise their premises and employees, and were negligent in hiring and training their employees. Plaintiff argues that Lulu is vicariously liable for all the torts committed by its employees acting within the scope of their employment. Plaintiff concludes that there is an issue of fact as to whether Lulu had known of any violent propensity of its employees and did nothing about it.

Under the doctrine of respondeat superior, an employer may be held vicariously liable for torts committed by an employee when the employee acts negligently or intentionally, as long as the conduct complained of is generally foreseeable and a natural incident of the employment. Melbourne v New York Life Ins. Co., 271 AD2d 296, 297 (1<sup>st</sup> Dept 2000).

If, based on a reading of the factual allegations, the essence of the cause of action is assault, plaintiff cannot exalt form over substance by labeling the action as one for negligence. Friedman v Gallinelli, 240 AD2d 699, 700 (2d Dept 1997). The acts alleged in the complaint and in plaintiff's affidavit sound in assault and battery, not in negligence. They are allegations of intentional conduct, rather than conduct conceived as a deviation from reasonable care. Since plaintiff is precluded from bringing claims for intentional torts in this action, due to the lapsing of the one-year statute of limitations, he cannot hold Lulu liable for the alleged intentional torts of Lulu's employees. See CPLR 215 (3).

The negligence of an employer, under the theory of negligent hiring and retention, is direct rather than vicarious, and arises from its having placed the employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee. Sheila C. v Povich, 11 AD3d 120, 129 (1<sup>st</sup> Dept 2004). The essential element of this cause of action is that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury. Id. at 129-130.

On this motion, the court finds that the defendants' evidence is sufficient to establish a prima facie defense to the

negligent hiring claim. The affidavit of Waldman in support of the motion sets forth that there was no conduct by the aforementioned responding employees that would have placed the defendants on notice of any violent propensity. See Gomez v City of New York, 304 AD2d 374, 375 (1<sup>st</sup> Dept 2003) ("moving defendants, in support of their motion, submitted sufficient proof of their lack of such notice to demonstrate their prima facie entitlement to judgment as a matter of law"). Plaintiff has failed in rebuttal to come forward with any evidence raising an issue of fact as to the negligence of defendants conduct in hiring the security staff.

Accordingly, it is

ORDERED that defendant Lulu's motion for summary judgment dismissing the complaint is GRANTED, the complaint is hereby DISMISSED, and the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: JAN 19 2010

ENTER:

Debra A. James  
**DEBRA A. JAMES** J.S.C.

**FILED**  
 JAN 21 2010  
 NEW YORK  
 COUNTY CLERKS OFFICE