[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART 10
Justice

McCann, Heather

INDEX NO. 109534/06

MOTION DATE

- v -

MOTION SEQ. NO. 01

Varrick Group

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: APR 09 2010

HON. JUDITH J. GISCHE J.S.C.

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

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

----------x

Heather McCann,

Plaintiff (s),

-against-

Varrick Group, LLC,

Defendant (s).

----------x

DECISION/ ORDER
Index No.: 109534-06
Seq. No.: 001

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

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

Papers	**Numbered**
Def's n/m (3212) w/ AMB affirm, exhs	1
Pltf's opp w/SFO affirm, exhs	2
Def's reply w/AMB affirm	3

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

GISCHE J.:

This is a personal injury action brought by plaintiff Heather McCann who claims she was injured at the restaurant that defendant owns. Issue has been joined and defendant now moves for summary judgment dismissing the complaint. Plaintiff opposes the motion in all respects. Since this motion was brought within 120 days of plaintiff filing the note of issue, the motion is timely and will be decided on the merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). The court's decision and order is as follows:

Arguments Presented

On September 12, 2005, the day of the accident, plaintiff was employed as a cocktail waitress at "Butter," a restaurant in Manhattan owned by defendant Varrick

Group, LLC. There had been a party at the restaurant and there were balloons and streamers about. At the end of the party, plaintiff went to collect her share of the tips. While she was waiting, she had a drink at the downstairs bar where other staff had congregated, including the security guards who had worked the party. One of the security guards jokingly told her that she was too skinny to pop a balloon with her derriere. The guard, Solomon Gray a/k/a "Supreme," then proceeded to grab one of the balloons by its string and pressed his hip - and the string - to the bar to hold it in place. Gray then lifted plaintiff up over the bar which was approximately 4.5 - 5 feet above ground. He did this by putting his hand under plaintiff's armpit. While he was lifting plaintiff, Gray yanked the balloon up and put it on bar. He then attempted to either seat or drop plaintiff onto the balloon. The balloon, however, slipped out and plaintiff landed on the bar striking her tail bone.

Defendant argues that Gray was not an employee, but an independent contractor who worked on a per diem or as needed basis and, therefore, defendant is not responsible for Gray's actions, not only because defendant did not control the manner in which Gray did his work, but also because the incident happened after the party was over and everyone was "off duty."

Simon Akiva, Butter's general manager, was deposed. He testified at his EBT that whenever Butter needs security it contacts John Taylor a/k/a "Spider." Taylor, according to Akiva, is an independent contractor and defendant provides him with a 1099 form for the work he does.

Tamara Reyes, Butter's event coordinator, was also deposed. She testified that various payroll records from 2005 were destroyed in a flood that occurred at the storage

facility. No employee records were salvaged either. According to Reyes, Butter does not have a contract with anyone for security and it does not have its own security personnel on staff. Reyes testified that defendant uses Taylor and other security personnel on an as needed basis. Usually Taylor provides the men who do security and Taylor pays them directly.

Gray was deposed pursuant to a subpoena as a non-party witness. At his EBT, Gray testified that he works security for different people and companies, including Butter. He described himself as a "self-employed independent contractor," and testified he gets a call if Butter needs security and that he often works with Taylor. When Gray first starting doing work for Butter, Butter paid him directly in cash at the end of the night. More recently, however, things have "changed" and sometimes he is paid through Taylor. According to Gray, plaintiff was already popping balloons on top of the bar when she lost her balance and he tried to help. He warned her about falling down. Gray testified he helped get plaintiff on top of the bar, but does not remember clearly how he did it - whether he pushed her up or gave her a hand. Gray is certified for security work; he is 6' 4" and 248 pounds.

Taylor was also served with a subpoena for his deposition. He testified at his EBT that he does security work and is self employed. He is also certified for security work. According to Taylor, Gray and he get calls from clubs, bars, etc., as needed. Taylor was "introduced" to Butter by the bar manager, Joe Stern, who he knew. In 2005, Taylor was (apparently) being paid off the books. Later, in 2008, he started receiving 1099s. Now he receives checks and 1099s. He does not get a W-2 form from Butter. Taylor testified that he and Gray met a few years ago and although they work together they are independent

of one another.

Plaintiff argues that defendant's motion for summary judgment should be denied because the issue of whether Gray is defendant's employee or an independent contractor must be decided by the trier of fact. Plaintiff contends Butter could have controlled Gray's activities, had it wanted to. Plaintiff argues further that Gray was acting within the scope of his employment when he dropped her on the bar.

Alternatively, plaintiff argues that even if Gray is an independent contractor, he was an "incompetent contractor" and defendant was negligent because it should have known about his propensity for negligent conduct. This latter argument is based upon jail time Gray did when he was a teenager into young adulthood.

Applicable Law

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 [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 v. City of New York, *supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are

insufficient to defeat the motion (Plantamura v. Penske Truck Leasing, Inc., 246 A.D.2d 347 [1st Dept 1998]).

Discussion

Employment Status

It is well established law that the employer of an independent contractor is not liable for injury caused to a third party by an act or omission by that independent contractor or the independent contractor's employees (Wright v. Esplanade Gardens 150 A.D.2d 197 [1st Dept 1989]). Typically, the determination of whether someone is independent contractor or an employee is a question of fact for the trier of fact to decide (Lazo v. Mak's Trading Co., Inc., 199 A.D.2d 165 [1st Dept 1993] *affd* 84 N.Y.2d 896 [1994]). Where, however, there is no conflicting proof on the issue of control, the matter may be determined by the court as a matter of law (Lazo v. Mak's Trading Co., Inc., *supra*).

Defendant has established that Gray was an independent contractor, and not an employee of the defendant. Gray's own testimony is that he is self employed and he works independently. He does not have a set schedule with Butter, nor does he work a certain number of day. Gray does not work exclusively for Butter and he is free to work for any company or person he chooses. He can decide to reject an assignment if the terms do not comport with his requirements.

When needed for security work, Gray is notified by defendant's staff (sometimes Taylor) to come in. Gray works on an as needed basis. He is often paid cash, sometimes checks and, according to Gray, he receives a 1099, not a W2, for the work he does.

Sometimes Taylor pays Gray directly.

Although the defendant has not included any of Gray's work record in its motion papers (i.e copies of 1099s, checks, etc.), not only had defendant established that those records were destroyed in a flood, plaintiff makes no claim that anything she demanded of defendant was withheld. This motion is brought after plaintiff filed her note of issue certifying that discovery was complete.

In any event, whether a person is an employee or an independent contractor involves more than just an analysis of how they are paid or what they are called. Thus the absence of documentary evidence is not fatal to defendant's motion nor does this raise a triable issue of fact. A proper analysis of whether someone is an employee or an independent contractors requires a determination of who controls the methods and means that person uses to do his or her work (Lazo v. Mak's Trading Co., Inc., *supra*).

Assuming Butter's staff can and does give Gray instructions about how to handle security at the restaurant when he is there, or he is assigned a particular task, there is no evidence that Gray has ever been closely supervised by any of defendant's employees or that any of them control the details of his work. Aside from asking him to dress neatly (black suit), Gray works independently. The defendant's general supervision of its contractor (Gray) does not make defendant liable for Gray's acts (Lazo v. Mak's Trading Co., Inc., *supra*).

Respondeat Superior

Plaintiff's respondent superior claims would fail, even if she can prove at trial that Gray is not an independent contractor, but defendant's employee.

Under the doctrine of respondeat superior, an employer can be held vicariously

liable for the torts committed by an employee acting within the scope of the employment (Fernandez v. Rustic Inn, Inc., 60 AD3d 893, 896 [2nd Dept 2009]; Judith M. v. Sisters of Charity Hosp., 93 N.Y.2d 932, 933 [1999]). However, the acts Gray is alleged to have undertake were not a part of his job to provide security and would not have served his employer's interests, were it proved he is an employee (White v. Hampton Management Co. L.L.C., 35 A.D.3d 243 [1st Dept 2006]). The actions (if committed, as described) were done for purely personal motives and were an obvious departure from his normal duties as a security guard (White v. Hampton Management Co. L.L.C., supra). None of the tasks described by Gray, Akiva or Reyes required Gray to "socialize" or provide entertainment at the restaurant, or mingle with the guests, but to silently monitor events to make sure they were secure. The after hours horseplay occurred when all the party goers had left and the restaurant was preparing to close down for the night.

Negligent Hiring/ Training

An employer has a duty to use reasonable care and refrain from knowingly retaining in its employ a person with known dangerous propensities in a position that would present a foreseeable risk of harm to others (Haddock v. City of New York, 106 A.D.2d 359 [1st dept 1984] *after remand* 140 A.D.2d 91 [1st Dept 1988] *appeal granted* 74 N.Y.2d 611 [1989] *aff'd* 75 N.Y.2d 478 [1990]). Although plaintiff raises Gray's criminal record as proof that "[people] found guilty of such a crime would have the propensity to carry out their job in a cavalier and unprofessional manner, which might result in bodily injuries to others . . ." a criminal past is not a reason to deny someone employment and runs counter to our societal belief that people can be rehabilitated (Haddock v. City of

New York, supra).

While an employer will be liable for his or her own negligence in hiring or retaining an employee whom the employer knew or, in the exercise of reasonable care, should have known was potentially dangerous, plaintiff has raised no triable issues of fact. In the years preceding her accident, no other incidents of this type involving Gray were reported. Recovery on a negligent hiring and retention theory requires a showing that the employer had notice of the employee's relevant tortious propensities (Gomez v. City of New York, 304 A.D.2d 374 [1st Dept 2003]). The crime that Gray committed as a teenager (and served jail time for) is completely different than what is alleged to have happened at the restaurant.

Plaintiff's negligent training claim also fails. Gray is certified to do security work and he received training for that job (Shubert v. Bennett Mfg. Co., Inc., 201 A.D.2d 285 [1st Dept. 1994]). He was not trained by defendant to do his job, but undertook the training on his own before he starting doing security work at the restaurant.

Defendants have established that Gray is an independent contractor and, therefore, defendant is not liable for injury caused to a third party by an act or omission by that independent contractor.

Even if plaintiff can prove at trial that Gray was defendant's employee and that he injured her, she has not raised triable issues of fact that his actions in furtherance of his employment. Gray's actions, as described by plaintiff herself, were done for purely personal motives and were an obvious departure from his normal duties. Gray was hired to provide security for the party. The party was over and the party goers had already left

when this happened. The only people at the bar the (and the restaurant) were the workers. Thus, not only did Gray act for purely personal motives, he was no longer providing security at the restaurant (i.e. serving his employer) when the accident happened. Defendant has met its burden of proving it is entitled to summary judgment. Plaintiff has failed to raise material disputed issues of fact that require a trial of this action. Therefore, defendant's motion is granted and the complaint is dismissed.

Conclusion

In accordance with the foregoing,

IT IS HEREBY

ORDERED that defendant's motion for summary judgment is granted in all respects; and it is further

ORDERED that the clerk shall enter judgment in favor of defendant Varrick Group, LLC against plaintiff Heather McCann dismissing the complaint; and it is further

ORDERED that any relief requested that has not been expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
April 9, 2010

So Ordered:

Hon. Judith J. Gische, J.S.C.